Fifth Edition

Halsbury's Laws of England

49

Financial Services and Institutions

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HALSBURY'S
Laws of England

FIFTH EDITION
2008

Volume 49

This is volume 49 of the Fifth Edition of Halsbury's Laws of England, containing the second part of the title FINANCIAL SERVICES AND INSTITUTIONS.

Volume 49 (5th Edn), together with volume 48 (5th Edn) and volume 50 (5th Edn), replace the Fourth Edition volume 18(1) (Reissue), which may now be archived. Customers should retain the Fourth Edition volumes 49(1) (2005 Reissue), 49(2) (2004 Reissue) and 49(3) (2004 Reissue) until advised to archive them.

FINANCIAL SERVICES AND INSTITUTIONS is a new title which replaces material from the following superseded Fourth Edition titles: BANKING vol 3(1) (2005 Reissue); BILLS OF EXCHANGE AND OTHER NEGOTIABLE INSTRUMENTS vol 4(1) (2002 Reissue); BILLS OF SALE vol 4(1) (2002 Reissue); BUILDING SOCIETIES vol 4(3) (Reissue); FRIENDLY SOCIETIES vol 19(1) (2007 Reissue); GUARANTEE AND INDEMNITY vol 20(1) (Reissue); INDUSTRIAL AND PROVIDENT SOCIETIES vol 24 (Reissue); MONEY vol 32 (2005 Reissue). **The volumes containing these superseded titles should be retained** as they contain other titles not replaced by volumes 48 (5th Edn), 49 (5th Edn), and 50 (5th Edn).

For a full list of volumes comprised in a current set of Halsbury's Laws of England please see overleaf.

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1 (2008), 48 (2008), 49 (2008), 50 (2008)

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1(1) (2001 Reissue), **1(2)** (2007 Reissue), **2(1)**, **2(2)**, **2(3)**, **3(1)** (2005 Reissue), **3(2)** (2002 Reissue), **4(1)** (2002 Reissue), **4(2)** (2002 Reissue), **4(3)**, **5(1)** (2004 Reissue), **5(2)** (2001 Reissue), **5(3)** (2008 Reissue), **5(4)** (2008 Reissue), **6** (2003 Reissue), **7(1)** (2004 Reissue), **7(2)** (2004 Reissue), **7(3)** (2004 Reissue), **7(4)** (2004 Reissue), **8(1)** (2003 Reissue), **8(2)**, **8(3)**, **9(1)**, **9(2)** (2006 Reissue), **10**, **11(1)** (2006 Reissue), **11(2)** (2006 Reissue), **11(3)** (2006 Reissue), **11(4)** (2006 Reissue), **12(1)**, **12(2)** (2007 Reissue), **12(3)** (2007 Reissue), **13** (2007 Reissue), **14**, **15(1)** (2006 Reissue), **15(2)** (2006 Reissue), **15(3)** (2007 Reissue), **15(4)** (2007 Reissue), **16(1A)**, **16(1B)**, **16(2)**, **17(1)**, **17(2)**, **18(2)**, **19(1)** (2007 Reissue), **19(2)** (2007 Reissue), **19(3)** (2007 Reissue), **20(1)**, **20(2)**, **21** (2004 Reissue), **22** (2006 Reissue), **23(1)**, **23(2)**, **24**, **25** (2003 Reissue), **26** (2004 Reissue), **27(1)** (2006 Reissue), **27(2)** (2006 Reissue), **27(3)** (2006 Reissue), **28**, **29(1)**, **29(2)**, **29(3)**, **30(1)**, **30(2)**, **31** (2003 Reissue), **32** (2005 Reissue), **33**, **34**, **35**, **36(1)** (2007 Reissue), **36(2)**, **37**, **38** (2006 Reissue), **39(1A)**, **39(1B)**, **39(2)**, **40(1)** (2007 Reissue), **40(2)** (2007 Reissue), **40(3)** (2007 Reissue), **41** (2005 Reissue), **42**, **43(1)**, **43(2)**, **44(1)**, **44(2)**, **45(1)** (2005 Reissue), **45(2)**, **46(1)**, **46(2)**, **46(3)**, **47** (2001 Reissue), **48** (2007 Reissue), **49(1)** (2005 Reissue), **49(2)** (2004 Reissue), **49(3)** (2004 Reissue), **50** (2005 Reissue), **51**, **52**, **53(1)** (2008 Consolidated Table of Statutes), **53(2)** (2008 Consolidated Table of Statutory Instruments, etc), **54(1)** (2008 Consolidated Table of Cases A–L), **54(2)** (2008 Consolidated Table of Cases M–Z, ECJ Cases), **55** (2007 Consolidated Index A–E), **56** (2007 Consolidated Index F–O), **57** (2007 Consolidated Index P–Z).

May 2008

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FIFTH EDITION

LORD MACKAY OF CLASHFERN
Lord High Chancellor of Great Britain
1987–97

Volume 49

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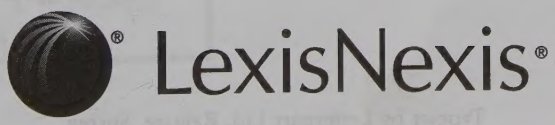

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The law stated in this volume is in general that in force on 1 April 2008, although subsequent changes have been included wherever possible.

Any future updating material will be found in the Current Service and annual Cumulative Supplement to Halsbury's Laws of England.

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HOW TO USE HALSBURY'S LAWS OF ENGLAND

Volumes

Each text volume of Halsbury's Laws of England contains the law on the titles contained in it as at a date stated at the front of the volume (the operative date).

Information contained in Halsbury's Laws of England may be accessed in several ways.

First, by using the tables of contents.

Each volume contains both a general Table of Contents, and a specific Table of Contents for each title contained in it. From these tables you will be directed to the relevant part of the work.

Readers should note that the current arrangement of titles can be found in the Current Service.

Secondly, by using tables of statutes, statutory instruments, cases or other materials.

If you know the name of the Act, statutory instrument or case with which your research is concerned, you should consult the Consolidated Tables of statutes, cases and so on (published as separate volumes) which will direct you to the relevant volume and paragraph. The Consolidated Tables will indicate if the volume referred to is a Fifth Edition volume.

(Each individual text volume also includes tables of those materials used as authority in that volume.)

Thirdly, by using the indexes.

If you are uncertain of the general subject area of your research, you should go to the Consolidated Index (published as separate volumes) for reference to the relevant volume(s) and paragraph(s). The Consolidated Index will indicate if the volume referred to is a Fifth Edition volume.

(Each individual text volume also includes an index to the material contained therein.)

Updating publications

The text volumes of Halsbury's Laws should be used in conjunction with the annual Cumulative Supplement and the monthly Noter-Up.

The annual Cumulative Supplement

The Supplement gives details of all changes between the operative date of the text volume and the operative date of the Supplement. It is arranged in the same

volume, title and paragraph order as the text volumes. Developments affecting particular points of law are noted to the relevant paragraph(s) of the text volumes. As from the commencement of the Fifth Edition, the Supplement will clearly distinguish between Fourth and Fifth Edition titles.

For narrative treatment of material noted in the Cumulative Supplement, go to the Annual Abridgment volume for the relevant year.

The Noter-Up

The Noter-Up is contained in the Current Service Noter-Up booklet, issued monthly and noting changes since the publication of the annual Cumulative Supplement. Also arranged in the same volume, title and paragraph order as the text volumes, the Noter-Up follows the style of the Cumulative Supplement. As from the commencement of the Fifth Edition, the Noter-Up will clearly distinguish between Fourth and Fifth Edition titles.

For narrative treatment of material noted in the Noter-Up, go to the relevant Monthly Review.

REFERENCES AND ABBREVIATIONS

ACT	Australian Capital Territory
A-G	Attorney General
Admin	Administrative Court
Admlty	Admiralty Court
Adv-Gen	Advocate General
affd	affirmed
affg	affirming
Alta	Alberta
App	Appendix
art	article
Aust	Australia
B	Baron
BC	British Columbia
C	Command Paper (of a series published before 1900)
c	chapter number of an Act
CA	Court of Appeal
CAC	Central Arbitration Committee
CA in Ch	Court of Appeal in Chancery
CB	Chief Baron
CCA	Court of Criminal Appeal
CCR	County Court Rules 1981 (SI 1981/1687) as subsequently amended
CCR	Court for Crown Cases Reserved
C-MAC	Courts-Martial Appeal Court
CO	Crown Office
COD	Crown Office Digest
CPR	Civil Procedure Rules 1998 (SI 1998/3132) as subsequently amended (see the Civil Court Practice)
Can	Canada
Cd	Command Paper (of the series published 1900–18)
Cf	compare
Ch	Chancery Division
ch	chapter
cl	clause

Cm	Command Paper (of the series published 1986 to date)
Cmd	Command Paper (of the series published 1919–56)
Cmnd	Command Paper (of the series published 1956–86)
Comm	Commercial Court
Comr	Commissioner
Court Forms (2nd Edn)	Atkin's Encyclopaedia of Court Forms in Civil Proceedings, 2nd Edn. See note 2 post.
Court Funds Rules 1987	Court Funds Rules 1987 (SI 1987/821) as subsequently amended
DC	Divisional Court
DPP	Director of Public Prosecutions
EAT	Employment Appeal Tribunal
EC	European Community
ECJ	Court of Justice of the European Community
EComHR	European Commission of Human Rights
ECSC	European Coal and Steel Community
ECtHR Rules of Court	Rules of Court of the European Court of Human Rights
EEC	European Economic Community
EFTA	European Free Trade Association
EWCA Civ	Official neutral citation for judgments of the Court of Appeal (Civil Division)
EWCA Crim	Official neutral citation for judgments of the Court of Appeal (Criminal Division)
EWHC	Official neutral citation for judgments of the High Court
Edn	Edition
Euratom	European Atomic Energy Community
Ex Ch	Court of Exchequer Chamber
ex p	ex parte
Fam	Family Division
Fed	Federal
Forms & Precedents (5th Edn)	Encyclopaedia of Forms and Precedents other than Court Forms, 5th Edn. See note 2 post.
GLC	Greater London Council
HC	High Court
HC	House of Commons
HK	Hong Kong
HL	House of Lords
IAT	Immigration Appeal Tribunal
ILM	International Legal Materials

INLR	Immigration and Nationality Law Reports
IRC	Inland Revenue Commissioners
Ind	India
Int Rels	International Relations
Ir	Ireland
J	Justice
JA	Judge of Appeal
Kan	Kansas
LA	Lord Advocate
LC	Lord Chancellor
LCC	London County Council
LCJ	Lord Chief Justice
LJ	Lord Justice of Appeal
LoN	League of Nations
MR	Master of the Rolls
Man	Manitoba
n	note
NB	New Brunswick
NI	Northern Ireland
NS	Nova Scotia
NSW	New South Wales
NY	New York
NZ	New Zealand
OHIM	Office for Harmonisation in the Internal Market
OJ	The Official Journal of the European Community published by the Office for Official Publications of the European Community
Ont	Ontario
P	President
PC	Judicial Committee of the Privy Council
PEI	Prince Edward Island
Pat	Patents Court
q	question
QB	Queen's Bench Division
QBD	Queen's Bench Division of the High Court
Qld	Queensland
Que	Quebec
r	rule
RDC	Rural District Council
RPC	Restrictive Practices Court
RSC	Rules of the Supreme Court 1965 (SI 1965/1776) as subsequently amended

reg	regulation
Res	Resolution
revsd	reversed
Rly	Railway
s	section
SA	South Africa
S Aust	South Australia
SC	Supreme Court
SI	Statutory Instruments published by authority
SR & O	Statutory Rules and Orders published by authority
SR & O Rev 1904	Revised Edition comprising all Public and General Statutory Rules and Orders in force on 31 December 1903
SR & O Rev 1948	Revised Edition comprising all Public and General Statutory Rules and Orders and Statutory Instruments in force on 31 December 1948
SRNI	Statutory Rules of Northern Ireland
STI	Simon's Tax Intelligence (1973–1995); Simon's Weekly Tax Intelligence (1996-current)
Sask	Saskatchewan
Sch	Schedule
Sess	Session
Sing	Singapore
TCC	Technology and Construction Court
TS	Treaty Series
Tanz	Tanzania
Tas	Tasmania
UDC	Urban District Council
UKHL	Official neutral citation for judgments of the House of Lords
UKPC	Official neutral citation for judgments of the Privy Council
UN	United Nations
V-C	Vice-Chancellor
Vict	Victoria
W Aust	Western Australia
Zimb	Zimbabwe

NOTE 1. A general list of the abbreviations of law reports and other sources used in this work can be found at the beginning of vol 54(1) (Reissue) Consolidated Table of Cases.

NOTE 2. Where references are made to other publications, the volume number precedes and the page number follows the name of the publication; eg the reference '12 Forms & Precedents (5th Edn) 44' refers to volume 12 of the Encyclopaedia of Forms and Precedents, page 44.

NOTE 3. An English statute is cited by short title or, where there is no short title, by regnal year and chapter number together with the name by which it is commonly known or a description of its subject matter and date. In the case of a foreign statute, the mode of citation generally follows the style of citation in use in the country concerned with the addition, where necessary, of the name of the country in parentheses.

NOTE 4. A statutory instrument is cited by short title, if any, followed by the year and number, or, if unnumbered, the date.

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2. FINANCIAL SERVICES REGULATION

(9) SPECIALIST AREAS

(i) Control of Business Transfers

590. Control of business transfers. The Financial Services and Markets Act 2000 provides that no insurance business transfer scheme[1] or banking business transfer scheme[2] is to have effect unless an order sanctioning the scheme[3] has been made in relation to it[4]. At the date at which this volume states the law, this provision had been brought into force in relation to insurance business transfer schemes only[5].

1 As to insurance business transfer schemes see PARA 591. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 18. As to the Handbook generally see PARA 22.

2 As to banking business transfer schemes see PARA 592.

3 Ie under the Financial Services and Markets Act 2000 s 111(1): see PARA 594.

4 Financial Services and Markets Act 2000 s 104. Section 104 has been brought into force for the purpose of insurance business transfer schemes only: Financial Services and Markets Act 2000 (Commencement No 7) Order 2001, SI 2001/3538, art 2(1), (2).

The Treasury may by regulations: (1) provide for prescribed provisions of the Financial Services and Markets Act 2000 Pt VII (ss 104–117) to have effect in relation to prescribed cases with such modifications as may be prescribed; (2) make such amendments to any of those statutory provisions as it considers appropriate for the more effective operation of that or any other provision relating to the control of business transfers: s 117. 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). The Financial Services and Markets Act 2000 (Motor Insurance) Regulations 2007, SI 2007/2403, have been made under the Financial Services and Markets Act 2000 s 117 which, among other things, amended Sch 12 para 6 (see PARA 595). As to regulations made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

5 See note 4.

591. Insurance business transfer schemes. A scheme is an insurance business transfer scheme if it: (1) satisfies one of the conditions described below[1]; (2) results in the business transferred being carried on from an establishment[2] of the transferee in an EEA state[3]; and (3) is not an excluded scheme[4]. The conditions are that:

(a) the whole or part of the business carried on in one or more member states by a UK authorised person[5] who has permission to effect or carry out contracts of insurance[6] (the 'authorised person concerned') is to be transferred to another body (the 'transferee')[7];

(b) the whole or part of the business, so far as it consists of reinsurance[8], carried on in the United Kingdom through an establishment there by an EEA firm which is an insurance undertaking qualifying for authorisation[9] (the 'authorised person concerned') is to be transferred to another body (the 'transferee')[10];

(c) the whole or part of the business carried on in the United Kingdom by an authorised person who is neither a UK authorised person nor an EEA firm but who has permission to effect or carry out contracts of insurance (the 'authorised person concerned') is to be transferred to another body (the 'transferee')[11].

A scheme is an excluded scheme for these purposes if it falls within any of the following cases:

(i) Case 1 is where the authorised person concerned is a friendly society[12];

(ii) Case 2 is where: (A) the authorised person concerned is a UK authorised person; (B) the authorised person is not a reinsurance undertaking[13]; (C) the business to be transferred under the scheme is business which consists of the effecting or carrying out of contracts of reinsurance in one or more EEA states other than the United Kingdom; and (D) the scheme has been approved by a court in an EEA state other than the United Kingdom or by the host state regulator[14];

(iii) Case 3 is where: (A) the authorised person concerned is a UK authorised person; (B) the business to be transferred under the scheme is carried on in one or more countries or territories (none of which is an EEA state) and does not include policies of insurance against risks arising in an EEA state; and (C) the scheme has been approved by a court in a country or territory other than an EEA state or by the authority responsible for the supervision of that business in a country or territory in which it is carried on;

(iv) Case 4 is where (A) the business to be transferred under the scheme is the whole of the business of the authorised person concerned; (B) all the policyholders[15] are controllers[16] of the firm or of firms within the same group[17] as the firm which is the transferee; and (C) all of the policyholders who will be affected by the transfer have consented to it;

(v) Case 5 is where (A) the business of the authorised person concerned consists solely of the effecting or carrying out of contracts of reinsurance; (B) the business to be transferred is the whole or part of that business; (C) the scheme does not fall within Case 4; (D) all of the policyholders who will be affected by the transfer have consented to it; and (E) a certificate has been obtained[18] in relation to the proposed transfer[19].

1 Ie the conditions set out in the Financial Services and Markets Act 2000 s 105(2): see the text and notes 4–10.

The expression 'scheme' has a broad meaning and includes any arrangement the predominant purpose of which is to transfer an insurance business transfer: see *Re the Standard Life Assurance Company* [2007] SCLR 581.

2 'Establishment' means, in relation to a person, his head office or a branch of his: Financial Services and Markets Act 2000 s 105(9).

3 As to the meaning of 'EEA state' see PARA 315 note 1.

4 Financial Services and Markets Act 2000 s 105(1). As to excluded schemes see the text and notes 12–19. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 18. As to the Handbook generally see PARA 22.

5 'UK authorised person' means a body which is an authorised person and which: (1) is incorporated in the United Kingdom; or (2) is an unincorporated association formed under the law of any part of the United Kingdom: Financial Services and Markets Act 2000 s 105(8). As to authorised persons see PARA 314. As to the meaning of 'United Kingdom' see PARA 2 note 3.

6 As to the meaning of 'contracts of insurance' see PARA 351 note 13.

7 Financial Services and Markets Act 2000 s 105(2)(a).

8 In the Financial Services and Markets Act 2000, references to 'reinsurance' are to be read with s 22 and Sch 2 (see PARA 84 et seq): s 424(1)(b).

9 Ie an EEA firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(d) (see PARA 315 note 1) and qualifying for authorisation under Sch 3 (see PARA 314 et seq).

10 Financial Services and Markets Act 2000 s 105(2)(b) (amended by SI 2007/3253).

11 Financial Services and Markets Act 2000 s 105(2)(c).

12 'Friendly society' means an incorporated or registered friendly society: Financial Services and Markets Act 2000 s 417(1).

13 Ie a reinsurance undertaking within the meaning of the Reinsurance Directive (ie European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.2005, p 1) on reinsurance and amending EEC Council Directives 73/239, 92/49 as well as EC Directives 98/78 and 2002/83) art 2.1(c).

14 As to the meaning of 'host state regulator' see PARA 323 note 10.

15 For the purposes of the Financial Services and Markets Act 2000, 'policyholder', in relation to a contract of insurance, has such meaning as the Treasury may by order specify: s 424(2). The Treasury has ordered that, for the purposes of the Financial Services and Markets Act 2000 s 424(2), 'policyholder' means the person who for the time being is the legal holder of the policy, and includes any person to whom, under the policy, a sum is due, a periodic payment is payable or any other benefit is to be provided or to whom such a sum, payment or benefit is contingently due, payable or to be provided: Financial Services and Markets Act 2000 (Meaning of 'Policy' and 'Policyholder') Order 2001, SI 2001/2362, art 3. As to the meaning of 'policy' see PARA 595 note 13. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

16 In the Financial Services and Markets Act 2000 (except Pt XVIII Ch IA (ss 301A–301G): see PARA 725 et seq), 'controller', in relation to an undertaking ('A'), means a person who falls within any of the following cases, namely where the person: (1) holds 10% or more of the shares in A; (2) is able to exercise significant influence over the management of A by virtue of his shareholding in A; (3) holds 10% or more of the shares in a parent undertaking ('P') of A; (4) is able to exercise significant influence over the management of P by virtue of his shareholding in P; (5) is entitled to exercise, or control the exercise of, 10% or more of the voting power in A; (6) is able to exercise significant influence over the management of A by virtue of his voting power in A; (7) is entitled to exercise, or control the exercise of, 10% or more of the voting power in P; or (8) is able to exercise significant influence over the management of P by virtue of his voting power in P: s 422(1), (2) (s 422(1) amended by SI 2007/126). For the purposes of the Financial Services and Markets Act 2000 s 422(2), the 'person' means: (a) the person; (b) any of the person's associates; or (c) the person and any of his associates: s 422(3). 'Associate', in relation to a person ('H') holding shares in an undertaking ('C') or entitled to exercise or control the exercise of voting power in relation to another undertaking ('D'), means: (i) the spouse or civil partner of H; (ii) a child or stepchild of H (if under 18); (iii) the trustee of any settlement under which H has a life interest in possession; (iv) an undertaking of which H is a director; (v) a person who is an employee or partner of H; (vi) if H is an undertaking: (A) a director of H; (B) a subsidiary undertaking of H; (C) a director or employee of such a subsidiary undertaking; and (vii) if H has with any other person an agreement or arrangement with respect to the acquisition, holding or disposal of shares or other interests in C or D or under which they undertake to act together in exercising their voting power in relation to C or D, that other person: s 422(4) (amended by the Civil Partnership Act 2004 Sch 27 para 165). As to the meanings of 'parent undertaking' and 'subsidiary undertaking' see PARA 351 note 32. For the purposes of head (iii) above, 'settlement' includes any disposition or arrangement under which property is held on trust (or subject to a comparable obligation): Financial Services and Markets Act 2000 s 422(5). 'Shares', in relation to an undertaking with a share capital, means allotted shares; in relation to an undertaking with capital but no share capital, means rights to share in the capital of the undertaking; in relation to an undertaking without capital, means interests conferring any right to share in the profits, or liability to contribute to the losses, of the undertaking; or giving rise to an obligation to contribute to the debts or expenses of the undertaking in the event of a winding up: s 422(6). 'Voting power', in relation to an undertaking which does not have general meetings at which matters are decided by the exercise of voting rights, means the right under the constitution of the undertaking to direct the overall policy of the undertaking or alter the terms of its constitution: s 422(7). The Treasury may by order amend s 422 by varying, or removing, any of the cases in which a person is treated as being a controller of a person or by adding a case: s 192(e). No order is to be made under s 192(e) unless a draft of the order has been laid before Parliament and approved by a resolution of each House: s 429(1)(a).

17 As to the meaning of 'group' see PARA 351 note 37.

18 Ie under the Financial Services and Markets Act 2000 Sch 12 para 2: see PARA 595.

19 Financial Services and Markets Act 2000 s 105(3) (amended by SI 2007/3253). The parties to a scheme which falls within Case 2, 3, 4 or 5 may apply to the court for an order sanctioning the scheme as if it were an insurance business transfer scheme: s 105(4) (amended by SI 2007/3253).

If the scheme involves a compromise or arrangement falling within the Companies Act 2006 Pt 27 (ss 902–941) (mergers and divisions of public companies), the provisions of Pt 27 (and

Pt 26 (ss 895–901)) (see COMPANIES) apply accordingly but this does not affect the operation of the Financial Services and Markets Act 2000 Pt VII (ss 104–117) in relation to the scheme: s 105(5) (substituted by SI 2008/948).

592. Banking business transfer schemes. A scheme is a banking business transfer scheme if it: (1) satisfies one of the conditions described below[1]; (2) is one under which the whole or part of the business to be transferred includes the accepting of deposits; and (3) is not an excluded scheme[2]. The conditions are that:

(a) the whole or part of the business carried on by a UK authorised person[3] who has permission to accept deposits (the 'authorised person concerned') is to be transferred to another body (the 'transferee')[4];

(b) the whole or part of the business carried on in the United Kingdom by an authorised person who is not a UK authorised person but who has permission to accept deposits (the 'authorised person concerned') is to be transferred to another body which will carry it on in the United Kingdom (the 'transferee')[5].

A scheme is an excluded scheme for these purposes if: (i) the authorised person concerned is a building society[6] or a credit union[7]; or (ii) the scheme is a compromise or arrangement to which the statutory provisions relating to mergers and divisions of public companies[8] applies[9].

1 Ie the conditions set out in the Financial Services and Markets Act 2000 s 106(2): see the text and notes 3–5.

2 Financial Services and Markets Act 2000 s 106(1). As to excluded schemes see the text and notes 6–9.

3 As to the meaning of 'UK authorised person' see PARA 591 note 5; definition applied by the Financial Services and Markets Act 2000 s 106(5).

4 Financial Services and Markets Act 2000 s 106(2)(a). For the purposes of s 106(2)(a) (see head (a) in the text), it is immaterial whether or not the business to be transferred is carried on in the United Kingdom: s 106(4). As to the meaning of 'United Kingdom' see PARA 2 note 3.

5 Financial Services and Markets Act 2000 s 106(2)(b).

6 'Building society' has the meaning given in the Building Societies Act 1986 (see PARA 1856): Financial Services and Markets Act 2000 s 106(6).

7 'Credit union' means a credit union within the meaning of: (1) the Credit Unions Act 1979 (see PARA 2402); (2) the Credit Unions (Northern Ireland) Order 1985, SI 1985/1205 (NI 12): Financial Services and Markets Act 2000 s 106(7).

8 Ie the Companies Act 2006 Pt 27 (ss 902–941): see COMPANIES.

9 Financial Services and Markets Act 2000 s 106(3) (amended by SI 2008/948).

593. Application for an order sanctioning a business transfer scheme. An application may be made to the High Court for an order sanctioning an insurance business transfer scheme[1] or a banking business transfer scheme[2]. An application may be made by: (1) the authorised person[3] concerned; (2) the transferee; or (3) both[4]. The application must be made: (a) if the authorised person concerned and the transferee are registered or have their head offices in the same jurisdiction, to the court in that jurisdiction; (b) if the authorised person concerned and the transferee are registered or have their head offices in different jurisdictions, to the court in either jurisdiction; (c) if the transferee is not registered in the United Kingdom[5] and does not have his head office there, to the court which has jurisdiction in relation to the authorised person concerned[6].

The Treasury[7] may by regulations impose requirements on applicants under the provisions described above[8], and the court may not determine an application[9] if the applicant has failed to comply with prescribed[10] requirements[11]. The regulations may, in particular, include provision: (i) as to the

persons to whom, and periods within which, notice of an application must be given; (ii) enabling the court to waive a requirement of the regulations in prescribed circumstances[12].

On an application[13], the following are also entitled to be heard: (A) the Financial Services Authority; and (B) any person (including an employee of the authorised person concerned or of the transferee) who alleges that he would be adversely affected by the carrying out of the scheme[14].

1 As to insurance business transfer schemes see PARA 591. An application under the Financial Services and Markets Act 2000 s 107 in respect of an insurance business transfer scheme must be accompanied by a report on the terms of the scheme (a 'scheme report'): s 109(1). A scheme report may be made only by a person: (1) appearing to the Financial Services Authority to have the skills necessary to enable him to make a proper report; and (2) nominated or approved for the purpose by the Authority: s 109(2). A scheme report must be made in a form approved by the Authority: s 109(3). As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 18. As to the Handbook generally see PARA 22.

2 Financial Services and Markets Act 2000 s 107(1), (4). As to banking business transfer schemes see PARA 592. An objector to such an application, which generally involves a change in the legal rights of members and/or creditors of the applicant, has no right to his costs, the right order being no order as to costs: *Re Alliance Assurance Co Ltd; Re British Engine Insurance Ltd* [2006] EWHC 2947 (Ch), [2006] All ER (D) 196 (Oct).

3 As to authorised persons see PARA 314.

4 Financial Services and Markets Act 2000 s 107(2).

5 As to the meaning of 'United Kingdom' see PARA 2 note 3.

6 Financial Services and Markets Act 2000 s 107(3).

7 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

8 Financial Services and Markets Act 2000 s 108(1). As to regulations made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

An applicant under s 107 (see the text and notes 1–6) for an order sanctioning an insurance business transfer scheme (the 'scheme') must comply with the following requirements (Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625, reg 3(1)):

(1) a notice stating that the application has been made must be: (a) published (i) in the London, Edinburgh and Belfast Gazettes; (ii) in two national newspapers in the United Kingdom; and (iii) where, as regards any policy (other than a contract of reinsurance) included in the proposed transfer, an EEA state other than the United Kingdom is the state of the commitment or the state in which the risk is situated, in two national newspapers in that EEA state; and (iv) where, as regards any policy included in the proposed transfer which evidences a contract of reinsurance, an EEA state other than the United Kingdom is the state in which the establishment of the policyholder to which the policy relates is situated at the date when the contract was entered into, in one business newspaper which is published or circulated in that EEA State; and (b) sent to every policyholder of the parties (reg 3(2) (amended by SI 2007/3255));

(2) the notices mentioned in head (1) above must be approved by the Authority prior to publication (or, as the case may be, being sent), and must contain the address from which the documents mentioned in head (3) below may be obtained (Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625, reg 3(3));

(3) a copy of the report and a statement setting out the terms of the scheme and containing a summary of the report must be given free of charge to any person who requests them (reg 3(4));

(4) a copy of the application, the report and the statement mentioned in head (3) above must be given free of charge to the Authority (reg 3(5));

(5) in the case of any such scheme as is mentioned in the Financial Services and Markets Act 2000 s 105(5) (see PARA 591), copies of the documents listed in the Companies Act 2006 ss 910(1), 911(3), 925(1), 926(3) (formerly the Companies Act 1985 Sch 15B para 6(1)) (see COMPANIES) or in the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), Sch 15B para 6(1) (application of provisions about compromises and arrangements to mergers and divisions of public companies) must be given to the

Authority by the beginning of the period referred to in the Companies Act 2006 ss 908, 909, 911, 912, 923–927 (formerly the Companies Act 1985 Sch 15B para 3(e)) (see COMPANIES) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), Sch 15B para 3(e) (see the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625, reg 3(6)).

'State of the commitment' and 'state in which the risk is situated' have the meanings given by the Financial Services and Markets Act 2000 Sch 12 para 6 (see PARA 595): Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625, reg 1(2). As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'reinsurance' see PARA 591 note 8.

An applicant under the Financial Services and Markets Act 2000 s 107 for an order sanctioning a banking business transfer scheme (the 'scheme') must comply with the following requirements (Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625, reg 5(1)):

(A) a notice stating that the application has been made must be published in the London, Edinburgh and Belfast Gazettes, and in two national newspapers in the United Kingdom (reg 5(2));

(B) the notice mentioned in head (A) above must be approved by the Authority prior to its publication, and must contain the address from which the statement mentioned in head (C) below may be obtained (reg 5(3));

(C) a statement setting out the terms of the scheme must be given free of charge to any person who requests it (reg 5(4));

(D) copies of the application and the statement mentioned in head (iii) above must be given free of charge to the Authority (reg 5(5)).

9 Ie under the Financial Services and Markets Act 2000 s 107: see the text and notes 1–6.

10 'Prescribed' means prescribed in regulations made by the Treasury: Financial Services and Markets Act 2000 s 417(1). See notes 8, 11.

11 Financial Services and Markets Act 2000 s 108(2). The court may not determine an application under s 107 (see the text and notes 1–6) for an order sanctioning an insurance business transfer scheme: (1) where the applicant has failed to comply with the requirements in the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625, reg 3(2), (3), (6) (see note 8); and (2) until a period of not less than 21 days has elapsed since the Authority was given the documents mentioned in reg 3(5) (see note 8): reg 4(1). The court may not determine an application under the Financial Services and Markets Act 2000 s 107 for an order sanctioning a banking business transfer scheme: (a) where the applicant has failed to comply with the requirements in the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625, reg 5(2), (3) (see note 8); and (b) until a period of not less than 21 days has elapsed since the Authority was given the documents mentioned in reg 5(5) (see note 8): reg 6(1).

12 Financial Services and Markets Act 2000 s 108(3). Certain of the requirements as to publication in the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625, regs 3, 5 (see note 8) may be waived by the court in such circumstances and subject to such conditions as the court considers appropriate: see regs 4(2), 6(2) (reg 4(2) amended by SI 2007/3255). However the requirement in the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625, reg 3(2)(a)(iv) (see note 8 head (1)(a)(iv)) must be waived where an applicant demonstrates that he has notified all policyholders of contracts of reinsurance: reg 4(3) (added by SI 2007/3255).

13 Ie under the Financial Services and Markets Act 2000 s 107: see the text and notes 1–6.

14 Financial Services and Markets Act 2000 s 110.

594. Conditions to be met before business transfer schemes are sanctioned. The following conditions must be satisfied before the court may make an order[1] sanctioning an insurance business transfer scheme[2] or a banking business transfer scheme[3]. The court must be satisfied that: (1) the appropriate certificates have been obtained[4]; (2) the transferee has the authorisation required (if any) to enable the business, or part, which is to be transferred to be carried on in the place to which it is to be transferred (or will have it before the scheme takes effect)[5]. The court must consider that, in all the circumstances of the case, it is appropriate to sanction the scheme[6].

1 Ie an order under the Financial Services and Markets Act 2000 s 111.
2 As to insurance business transfer schemes see PARA 591. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 18. As to the Handbook generally see PARA 22.
3 Financial Services and Markets Act 2000 s 111(1). As to banking business transfer schemes see PARA 592.
4 Financial Services and Markets Act 2000 s 111(2)(a). Certificates are obtained in accordance with Sch 12 Pts I, II: see PARAS 595–596.
5 Financial Services and Markets Act 2000 s 111(2)(b).
6 Financial Services and Markets Act 2000 s 111(3). A scheme can be sanctioned even though it varies the contractual rights of customers or policyholders: see *Re the Standard Life Assurance Company* [2007] SCLR 581.

595. Certificates for insurance business transfer schemes. The appropriate certificates which must be obtained[1] before the court sanctions an insurance business transfer scheme[2] are:

(1) a certificate as to margin of solvency[3] (that is to say, the excess of the value of the assets of the transferee over the amount of its liabilities[4]), given by the relevant authority[5], or in a case where there is no relevant authority, by the Financial Services Authority[6];

(2) if the authorised person concerned is a UK authorised person[7] which has received authorisation[8] from the Authority, and the establishment from which the business is to be transferred under the proposed insurance business transfer scheme is in an EEA state other than the United Kingdom[9], a certificate as to consent[10];

(3) if (a) the authorised person concerned has received authorisation[11] from the Authority; (b) the proposed transfer relates to business which consists of the effecting or carrying out of contracts of long-term insurance[12]; and (c) as regards any policy[13] which is included in the proposed transfer and which evidences a contract of insurance[14] (other than reinsurance[15]), an EEA state other than the United Kingdom is the state of the commitment[16], a certificate as to long-term business[17];

(4) if (a) the authorised person concerned has received authorisation[18] from the Authority; (b) the business to which the proposed insurance business transfer scheme relates is business which consists of the effecting or carrying out of contracts of general insurance[19]; and (c) as regards any policy which is included in the proposed transfer and which evidences a contract of insurance (other than reinsurance), the risk is situated in an EEA state[20] other than the United Kingdom, a certificate as to general business[21];

(5) if (a) the authorised person concerned has received authorisation[22] from the Authority; and (b) the proposed transfer is to a branch or agency, in an EEA state other than the United Kingdom, authorised under the same provision[23], certificates as to legality and as to consent[24].

1 Ie for the purposes of the Financial Services and Markets Act 2000 s 111(2): see PARA 594.
2 As to insurance business transfer schemes see PARA 591. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 18. As to the Handbook generally see PARA 22.
3 Financial Services and Markets Act 2000 Sch 12 paras 1(1)(a), 2.
4 Financial Services and Markets Act 2000 Sch 12 para 2(5).
5 A certificate given under the Financial Services and Markets Act 2000 Sch 12 para 1(a) by the relevant authority is one certifying that, taking the proposed transfer into account: (1) the transferee possesses, or will possess before the scheme takes effect, the necessary margin of solvency; or (2) there is no necessary margin of solvency applicable to the transferee: Sch 12 para 2(2). 'Relevant authority' means: (a) if the transferee is an EEA firm falling within Sch 3

para 5(d) or (da) (see PARA 315 note 1), its home state regulator; (b) if the transferee is a non-EEA branch, the competent authorities of the EEA state in which the transferee is situated or, where appropriate, the competent authorities of an EEA state which supervise the state of solvency of the entire business of the transferee's agencies and branches within the EEA in accordance with the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance) art 26 or the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) art 56; (c) if the transferee is a Swiss general insurer, the authority responsible in Switzerland for supervising persons who effect or carry out contracts of insurance; (d) if the transferee is an authorised person not falling within head (a), (b) or (c) above, the Financial Services Authority: Sch 12 para 2(6) (amended by SI 2007/3253). As to the meanings of 'EEA firm', 'EEA state' and 'home state regulator' see PARA 315 note 1. As to authorised persons see PARA 314. As to the Financial Services Authority see PARAS 4, 6 et seq. 'Competent authorities' has the same meaning as in the Insurance Directives: Financial Services and Markets Act 2000 Sch 12 para 2(7A) (added by SI 2007/3253). As to the meaning of 'Insurance Directives' see PARA 86 note 6. 'Non-EEA branch means' a branch or agency which has received authorisation under the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3)) art 23 or the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1)) art 51: Financial Services and Markets Act 2000 Sch 12 para 2(9) (added by SI 2007/3253). 'Swiss general insurer' means a body whose head office is in Switzerland, which has permission to carry on regulated activities consisting of the effecting and carrying out of contracts of general insurance, and whose permission is not restricted to the effecting or carrying out of contracts of reinsurance: Financial Services and Markets Act 2000 Sch 12 para 2(8). As to regulated activities see PARA 84 et seq. For the purposes of Sch 12 para 2(6), any reference to a transferee of a particular description includes a reference to a transferee who will be of that description if the proposed scheme takes effect: Sch 12 para 2(7). 'Necessary margin of solvency' means the margin of solvency required in relation to the transferee, taking the proposed transfer into account, under the law which it is the responsibility of the relevant authority to apply: Sch 12 para 2(4).

6 Financial Services and Markets Act 2000 Sch 12 para 2(1). A certificate given by the Financial Services Authority is one certifying that the Authority has received from the authority which it considers to be the authority responsible for supervising persons who effect or carry out contracts of insurance in the place to which the business is to be transferred that, taking the proposed transfer into account: (1) the transferee possesses or will possess before the scheme takes effect the margin of solvency required under the law applicable in that place; or (2) there is no such margin of solvency applicable to the transferee: Sch 12 para 2(3).

7 As to the meaning of 'UK authorised person' see PARA 358 note 3.

8 Ie under the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1)) art 4 or the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3)) art 6.

9 As to the meaning of 'United Kingdom' see PARA 2 note 3.

10 Financial Services and Markets Act 2000 Sch 12 paras 1(1)(b), (2), 3 (Sch 12 para 1(2) amended by SI 2004/3379). A certificate as to consent is one given by the Authority and certifying that the host state regulator has been notified of the proposed scheme and that: (1) that regulator has responded to the notification; or (2) it has not responded but the period of three months beginning with the notification has elapsed: Financial Services and Markets Act 2000 Sch 12 para 3. As to the meaning of 'host state regulator' see PARA 323 note 10.

11 Ie under the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1)) art 4 or art 51.

12 For the purposes of the Financial Services and Markets Act 2000, references to 'contracts of long-term insurance' are to be read with s 22 and Sch 2 (see PARA 84 et seq): s 424(1)(c).

13 For the purposes of the Financial Services and Markets Act 2000, 'policy', in relation to a contract of insurance, has such meaning as the Treasury may by order specify: s 424(2). The Treasury has ordered that, for the purposes of the Financial Services and Markets Act 2000 s 424(2), 'policy' means, as the context requires, a contract of insurance, including one under which an existing liability has already accrued, or any instrument evidencing such a contract: Financial Services and Markets Act 2000 (Meaning of 'Policy' and 'Policyholder') Order 2001, SI 2001/2362, art 2. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

14 As to the meaning of 'contracts of insurance' see PARA 351 note 13.

15 As to references to 'contracts of reinsurance' see PARA 591 note 8.

16 'State of the commitment', in relation to a commitment entered into at any date, means: (1) if the policyholder is an individual, the state in which he had his habitual residence at that date; (2) if the policyholder is not an individual, the state in which the establishment of the policyholder to which the commitment relates was situated at that date: Financial Services and Markets Act 2000 Sch 12 para 6(1). As to the meaning of 'policyholder' see PARA 591 note 15. 'Commitment' means a commitment represented by contracts of insurance of a prescribed class: Sch 12 para 6(2). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). See the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625; and PARA 593. As to regulations made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

17 Financial Services and Markets Act 2000 Sch 12 paras 1(1)(c), (3), 4 (Sch 12 para 1(3) amended by SI 2004/3379; SI 2007/3253). A certificate as to long-term business is one given by the Authority and certifying that the authority responsible for supervising persons who effect or carry out contracts of insurance in the state of the commitment has been notified of the proposed scheme and that: (1) that authority has consented to the proposed scheme; or (2) the period of three months beginning with the notification has elapsed and that authority has not refused its consent: Financial Services and Markets Act 2000 Sch 12 para 4.

18 Ie under the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3)) art 6 or art 23.

19 For the purposes of the Financial Services and Markets Act 2000, references to 'contracts of general insurance' are to be read with s 22 and Sch 2 (see PARA 84 et seq): s 424(1)(d).

20 References to the EEA state in which a risk is situated are: (1) if the insurance relates to a building or to a building and its contents (so far as the contents are covered by the same policy), to the EEA state in which the building is situated; (2) if the insurance relates to a vehicle of any type, to the EEA state of registration; (3) in the case of policies of a duration of four months or less covering travel or holiday risks (whatever the class concerned), to the EEA state in which the policyholder took out the policy; (4) in a case not covered by heads (1)–(3) above: (a) if the policyholder is an individual, to the EEA state in which he has his habitual residence at the date when the contract is entered into; and (b) otherwise, to the EEA state in which the establishment of the policyholder to which the policy relates is situated at that date: Financial Services and Markets Act 2000 Sch 12 para 6(3). If the insurance relates to a vehicle dispatched from one EEA state to another, in respect of the period of 30 days beginning with the day on which the purchaser accepts delivery a reference to the EEA state in which a risk is situated is a reference to the state of destination (and not, as provided by head (2) above, to the state of registration): Sch 12 para 6(4) (added by SI 2007/2403).

21 Financial Services and Markets Act 2000 Sch 12 paras 1(1)(d), (4), 5 (Sch 12 para 1(4) amended by SI 2007/3253). A certificate as to general business is one given by the Authority and certifying that the authority responsible for supervising persons who effect or carry out contracts of insurance in the EEA state in which the risk is situated has been notified of the proposed scheme and that: (1) that authority has consented to the proposed scheme; or (2) the period of three months beginning with the notification has elapsed and that authority has not refused its consent: Financial Services and Markets Act 2000 Sch 12 para 5.

22 Ie under the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3)) art 23 or the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1)) art 51.

23 Ie under the same article of the relevant directive: see note 22.

24 Financial Services and Markets Act 2000 Sch 12 paras 1(1)(e), (5), 5A (added by SI 2007/3253). The relevant certificates are to be given, in the case of the certificate as to consent, by the Authority; and, in the case of the certificate as to legality, by the relevant authority: Financial Services and Markets Act 2000 Sch 12 para 5A(1) (as so added). A certificate as to consent is one certifying that the relevant authority has been notified of the proposed scheme and that (1) the relevant authority has consented to the proposed scheme; or (2) the period of three months beginning with the notification has elapsed and that relevant authority has not refused its consent: Sch 12 para 5A(2) (as so added). A certificate as to legality is one certifying that the law of the EEA state in which the transferee is set up permits such a transfer: Sch 12 para 5A(3) (as so added). For these purposes, 'relevant authority' means the competent authorities (within the meaning of the Insurance Directives) of the EEA state in which the transferee is set up: Sch 12 para 5A(4) (as so added).

596. Certificates for banking business transfer schemes. The appropriate certificates which must be obtained[1] before the court sanctions a banking business transfer scheme[2] are: (1) a certificate as to financial resources[3]; and (2)

if the authorised person[4] concerned or the transferee is an EEA firm[5], a certificate as to consent of the home state regulator[6].

1 Ie for the purposes of the Financial Services and Markets Act 2000 s 111(2): see PARA 594.
2 As to banking business transfer schemes see PARA 592.
3 Financial Services and Markets Act 2000 Sch 12 paras 7(1)(a), 8. A certificate as to financial resources is one given by the relevant authority and certifying that, taking the proposed transfer into account, the transferee possesses, or will possess before the scheme takes effect, adequate financial resources: Sch 12 para 8(1). 'Relevant authority' means: (1) if the transferee is a person with a Part IV permission (see PARA 348) or with permission under Sch 4 (see PARAS 314, 319), the Financial Services Authority; (2) if the transferee is an EEA firm falling within Sch 3 para 5(b) (see PARA 315 note 1), its home state regulator; (3) if the transferee does not fall within head (1) or head (2) above, the authority responsible for the supervision of the transferee's business in the place in which the transferee has its head office: Sch 12 para 8(2). As to the Financial Services Authority see PARAS 4, 6 et seq. As to the meaning of 'EEA firm' see PARA 315 note 1. As to the meaning of 'home state regulator' see PARA 315 note 1. For the purposes of Sch 12 para 8(2), any reference to a transferee of a particular description of person includes a reference to a transferee who will be of that description if the proposed banking business transfer scheme takes effect: Sch 12 para 8(3).
4 As to authorised persons see PARA 314.
5 Ie falling within the Financial Services and Markets Act 2000 Sch 3 para 5(b): see PARA 315 note 1.
6 Financial Services and Markets Act 2000 Sch 12 paras 7(1), (2), 9. A certificate as to consent of the home state regulator is one given by the Authority and certifying that the home state regulator of the authorised person concerned or of the transferee has been notified of the proposed scheme and that: (1) the home state regulator has responded to the notification; or (2) the period of three months beginning with the notification has elapsed: Sch 12 para 9.

597. Effect of order sanctioning business transfer scheme. If the court makes an order[1], it may by that or any subsequent order make such provision (if any) as it thinks fit[2]:

(1) for the transfer to the transferee of the whole or any part of the undertaking concerned and of any property[3] or liabilities[4] of the authorised person[5] concerned[6];
(2) for the allotment or appropriation by the transferee of any shares[7], debentures[8], policies or other similar interests in the transferee which under the scheme are to be allotted or appropriated to or for any other person[9];
(3) for the continuation by (or against) the transferee of any pending legal proceedings by (or against) the authorised person concerned[10];
(4) with respect to such incidental, consequential and supplementary matters as are, in its opinion, necessary to secure that the scheme is fully and effectively carried out[11].

If an order[12] makes provision for the transfer of property or liabilities, the property is transferred to and vests in, and the liabilities are transferred to and become liabilities of, the transferee as a result of the order[13]. However, if any property or liability included in the order is governed by the law of any country or territory outside the United Kingdom[14], the order may require the authorised person concerned, if the transferee so requires, to take all necessary steps for securing that the transfer to the transferee of the property or liability is fully effective under the law of that country or territory[15]. Property transferred[16] may, if the court so directs, vest in the transferee free from any charge[17] which is (as a result of the scheme) to cease to have effect[18]. An order[19] which makes provision for the transfer of property is to be treated as an instrument of transfer[20].

If the court makes an order[21] in relation to an insurance business transfer scheme[22], it may by that or any subsequent order make such provision (if any) as

it thinks fit: (a) for dealing with the interests of any person who, within such time and in such manner as the court may direct, objects to the scheme; (b) for the dissolution, without winding up, of the authorised person concerned; (c) for the reduction, on such terms and subject to such conditions (if any) as it thinks fit, of the benefits payable under any description of policy[23], or policies generally, entered into by the authorised person concerned and transferred as a result of the scheme[24]. If, in the case of an insurance business transfer scheme, the authorised person concerned is not an EEA firm[25], it is, for certain purposes[26], immaterial that the law applicable to any of the contracts of insurance[27] included in the transfer is the law of an EEA state[28] other than the United Kingdom[29].

The transferee must, if an insurance or banking business transfer scheme[30] is sanctioned by the court, deposit two office copies of the order with the Financial Services Authority[31] within ten days of the making of the order[32].

1 Ie under the Financial Services and Markets Act 2000 s 111(1): see PARA 594.

2 Financial Services and Markets Act 2000 s 112(1). See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 18. As to the Handbook generally see PARA 22.

3 'Property' includes property, rights and powers of any description: Financial Services and Markets Act 2000 s 112(12). It appears that the benefit of contracts may be transferred by the order, notwithstanding contractual restrictions on assignment: see *Co-operative Group (CWS) Ltd v Stansell Ltd* [2006] EWCA Civ 538; [2006] 1 WLR 1704, [2006] 2 BCLC 599 (a decision on 'transfer of engagements' under the Industrial and Provident Societies Act 1965 s 51(1): see PARAS 2560, 2562).

4 'Liabilities' includes duties: Financial Services and Markets Act 2000 s 112(13).

5 As to authorised persons see PARA 314.

6 Financial Services and Markets Act 2000 s 112(1)(a). An order under s 112(1)(a) may: (1) transfer property or liabilities whether or not the authorised person concerned otherwise has the capacity to effect the transfer in question; (2) make provision in relation to property which was held by the authorised person concerned as trustee; (3) make provision as to future or contingent rights or liabilities of the authorised person concerned, including provision as to the construction of instruments (including wills) under which such rights or liabilities may arise; (4) make provision as to the consequences of the transfer in relation to any occupational pension scheme (within the meaning of the Finance Act 2004 s 150(5) (see SOCIAL SECURITY AND PENSIONS)) operated by or on behalf of the authorised person concerned: Financial Services and Markets Act 2000 s 112(2) (amended by SI 2006/745). See *WASA International (UK) Insurance Co v WASA International Insurance Co Ltd (a Swedish Company)* [2002] EWHC 2698 (Ch), [2003] 1 All ER (Comm) 696 (where it was held that rights could be transferred by virtue of the Financial Services and Markets Act 2000 s 112(1)(a) whether or not the company was capable of effecting assignment of those rights at common law).

7 'Shares' and 'debentures' have the same meaning as in the Companies Acts (see the Companies Act 2006 ss 540, 738; and COMPANIES): Financial Services and Markets Act 2000 s 112(14) (amended by SI 2008/948).

8 See note 7.

9 Financial Services and Markets Act 2000 s 112(1)(b).

10 Financial Services and Markets Act 2000 s 112(1)(c).

11 Financial Services and Markets Act 2000 s 112(1)(d).

12 Ie an order under the Financial Services and Markets Act 2000 s 112(1): see the text and notes 1–11.

13 Financial Services and Markets Act 2000 s 112(3).

14 As to the meaning of 'United Kingdom' see PARA 2 note 3.

15 Financial Services and Markets Act 2000 s 112(4).

16 Ie as the result of an order under the Financial Services and Markets Act 2000 s 112(1): see the text and notes 1–11.

17 'Charge' includes a mortgage: Financial Services and Markets Act 2000 s 112(15).

18 Financial Services and Markets Act 2000 s 112(5).

19 Ie under the Financial Services and Markets Act 2000 s 112(1): see the text and notes 1–11.

20 Financial Services and Markets Act 2000 s 112(6) (amended by SI 2008/948). The order is to be treated as an instrument of transfer for the purposes of the Companies Act 2006 s 770(1) (registration of transfer of shares or debentures) (see COMPANIES): Financial Services and Markets Act 2000 s 112(6) (as so amended).
21 Ie under the Financial Services and Markets Act 2000 s 111(1): see PARA 594.
22 As to insurance business transfer schemes see PARA 591.
23 As to the meaning of 'policy' see PARA 595 note 13.
24 Financial Services and Markets Act 2000 s 112(8).
25 As to the meaning of 'EEA firm' see PARA 315 note 1.
26 Ie for the purposes of the Financial Services and Markets Act 2000 s 112(1)(a), (c) or (d) (see heads (1), (3), (4) in the text; and notes 6, 10–11) or s 112(2), (3) or (4) (see the text and notes 6, 12–15).
27 As to the meaning of 'contracts of insurance' see PARA 351 note 13.
28 As to the meaning of 'EEA state' see PARA 315 note 1.
29 Financial Services and Markets Act 2000 s 112(9).
30 As to banking business transfer schemes see PARA 592.
31 As to the Financial Services Authority see PARAS 4, 6 et seq.
32 Financial Services and Markets Act 2000 s 112(10). The Authority may extend that period: s 112(11). For the purposes of any provision of the Financial Services and Markets Act 2000 (other than a provision of Pt VI (ss 72–103) (see PARA 385 et seq)) authorising or requiring a person to do anything within a specified number of days, no account is to be taken of any day which is a public holiday in any part of the United Kingdom: s 417(3) (amended by SI 2005/1433). As to public holidays see TIME vol 45(2) (Reissue) PARA 219 et seq.

598. Appointment of an actuary in relation to the reduction of benefits. If an order[1] has been made sanctioning an insurance business transfer scheme[2] or a banking business transfer scheme[3], the court making the order may, on the application of the Financial Services Authority[4], appoint an independent actuary: (1) to investigate the business transferred under the scheme; and (2) to report to the Authority on any reduction in the benefits payable under policies entered into by the authorised person[5] concerned that, in the opinion of the actuary, ought to be made[6].

1 Ie under the Financial Services and Markets Act 2000 s 111(1): see PARA 594.
2 As to insurance business transfer schemes see PARA 591. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 18. As to the Handbook generally see PARA 22.
3 As to banking business transfer schemes see PARA 592.
4 As to the Financial Services Authority see PARAS 4, 6 et seq.
5 As to authorised persons see PARA 314.
6 Financial Services and Markets Act 2000 s 113(1), (2).

599. Rights of certain policyholders in insurance business transfer scheme. The provisions described below[1] apply in relation to an insurance business transfer scheme[2] if: (1) the authorised person[3] concerned is an authorised person other than an EEA firm[4] qualifying for authorisation[5]; (2) the court has made an order[6] sanctioning the scheme; and (3) an EEA state[7] other than the United Kingdom[8] is, as regards any policy[9] included in the transfer which evidences a contract of insurance (other than a contract of reinsurance)[10], the state of the commitment[11] or the EEA state in which the risk is situated[12] (the 'EEA state concerned')[13].

The court must direct that notice of the making of the order, or the execution of any instrument, giving effect to the transfer must be published by the transferee in the EEA state concerned[14]. Such a notice must specify such period as the court may direct as the period during which the policyholder[15] may exercise any right which he has to cancel the policy[16]. The order or instrument[17] does not bind the policyholder if: (a) the notice required is not published; or (b)

the policyholder cancels the policy during the period specified in the notice[18]. The law of the EEA state concerned governs: (i) whether the policyholder has a right to cancel the policy; and (ii) the conditions, if any, subject to which any such right may be exercised[19].

1 Ie the Financial Services and Markets Act 2000 s 114.
2 As to insurance business transfer schemes see PARA 591. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 18. As to the Handbook generally see PARA 22.
3 As to authorised persons see PARA 314.
4 As to the meaning of 'EEA firm' see PARA 315 note 1.
5 Ie under the Financial Services and Markets Act 2000 Sch 3: see PARA 315.
6 Ie under the Financial Services and Markets Act 2000 s 111: see PARA 594.
7 As to the meaning of 'EEA state' see PARA 315 note 1.
8 As to the meaning of 'United Kingdom' see PARA 2 note 3.
9 As to the meaning of 'policy' see PARA 595 note 13.
10 As to the meaning of 'contracts of insurance' see PARA 351 note 13. As to references to 'contracts of reinsurance' see PARA 591 note 8. As to notice of transfer of reinsurance contracts see PARA 600.
11 As to the meanings of 'state of the commitment' and 'commitment' see PARA 595 note 16; definitions applied by the Financial Services and Markets Act 2000 s 114(6).
12 As to references to the EEA state in which the risk is situated see PARA 595 note 20; definition applied by the Financial Services and Markets Act 2000 s 114(6).
13 Financial Services and Markets Act 2000 s 114(1) (amended by SI 2007/3253).
14 Financial Services and Markets Act 2000 s 114(2).
15 As to the meaning of 'policyholder' see PARA 591 note 15.
16 Financial Services and Markets Act 2000 s 114(3).
17 Ie the order or instrument mentioned in the Financial Services and Markets Act 2000 s 114(2): see the text to note 14.
18 Financial Services and Markets Act 2000 s 114(4).
19 Financial Services and Markets Act 2000 s 114(5).

600. Notice of transfer of reinsurance contracts. The provisions described below[1] apply in relation to an insurance business transfer scheme[2] if: (1) the authorised person[3] concerned is an authorised person other than an EEA firm[4] qualifying for authorisation[5]; (2) the court has made an order[6] in relation to the scheme; and (3) an EEA state[7] other than the United Kingdom[8] is, as regards any policy[9] included in the transfer which evidences a contract of reinsurance[10], the state in which the establishment of the policyholder to which the policy relates is situated at the date when the contract was entered into (the 'EEA state concerned')[11].

The court may direct that notice of the making of the order, or the execution of any instrument, giving effect to the transfer must be published by the transferee in the EEA state concerned[12].

1 Ie the Financial Services and Markets Act 2000 s 114A.
2 As to insurance business transfer schemes see PARA 591. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP). As to the Handbook generally see PARA 22.
3 As to authorised persons see PARA 314.
4 As to the meaning of 'EEA firm' see PARA 315 note 1.
5 Ie under the Financial Services and Markets Act 2000 Sch 3: see PARA 315.
6 Ie under the Financial Services and Markets Act 2000 s 111: see PARA 594.
7 As to the meaning of 'EEA state' see PARA 315 note 1.
8 As to the meaning of 'United Kingdom' see PARA 2 note 3.
9 As to the meaning of 'policy' see PARA 595 note 13.
10 As to references to 'contracts of reinsurance' see PARA 591 note 8.
11 Financial Services and Markets Act 2000 s 114A(1) (s 114A added by SI 2007/3253).
12 Financial Services and Markets Act 2000 s 114A(2) (as added: see note 11).

601. Insurance business transfers outside the United Kingdom. Provision is made with respect to certificates which the Financial Services Authority[1] may issue in relation to insurance business transfers[2] taking place outside the United Kingdom[3].

The provisions described below[4] apply to a proposal to execute under provisions corresponding to Part VII of the Financial Services and Markets Act 2000[5] in a country or territory other than the United Kingdom an instrument transferring all the rights and obligations of the transferor under general or long-term insurance policies[6], or under such descriptions of such policies as may be specified in the instrument, to the transferee if any of the following conditions[7] is met in relation to it[8]. The conditions are:

(1) the transferor is an EEA firm[9] and the transferee is an authorised person[10] whose margin of solvency[11] is supervised by the Authority[12];

(2) the transferor is a company authorised in an EEA state[13] other than the United Kingdom[14] and the transferee is a UK authorised person[15] which has received authorisation[16];

(3) the transferor is a Swiss general insurer[17] and the transferee is a UK authorised person which has received authorisation[18].

In relation to such a proposed transfer, the Authority may, if it is satisfied that the transferee possesses the necessary margin of solvency[19], issue a certificate to that effect[20].

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 As to insurance business transfer schemes see PARA 591. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 18. As to the Handbook generally see PARA 22.

3 See the Financial Services and Markets Act 2000 s 115, Sch 12 Pt III. As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 Ie the Financial Services and Markets Act 2000 Sch 12 para 10.

5 Ie the Financial Services and Markets Act 2000 ss 104–117 (control of business transfers).

6 'General policy' means a policy evidencing a contract which, if it had been effected by the transferee, would have constituted the carrying on of a regulated activity consisting of the effecting of contracts of general insurance: Financial Services and Markets Act 2000 Sch 12 para 10(8). As to the meaning of 'policy' see PARA 595 note 13. As to regulated activities see PARA 84 et seq. As to the meaning of 'contracts of general insurance' see PARA 595 note 19. 'Long-term policy' means a policy evidencing a contract which, if it had been effected by the transferee, would have constituted the carrying on of a regulated activity consisting of the effecting of contracts of long-term insurance: Sch 12 para 10(9). As to the meaning of 'contracts of long-term insurance' see PARA 595 note 12.

7 Ie the conditions set out in the Financial Services and Markets Act 2000 Sch 12 para 10(2), (3) or (4): see the text and notes 9–18.

8 Financial Services and Markets Act 2000 Sch 12 para 10(1).

9 Ie falling within the Financial Services and Markets Act 2000 Sch 3 para 5(d) or Sch 3 para 5(da): see PARA 315 note 1. As to the meaning of 'EEA firm' see PARA 315 note 1.

10 As to authorised persons see PARA 314.

11 As to the margin of solvency see PARA 595.

12 Financial Services and Markets Act 2000 Sch 12 para 10(2) (amended by SI 2007/3253).

13 As to the meaning of 'EEA state' see PARA 315 note 1.

14 Ie under the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) art 51 or the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance) art 23: see PARA 86 note 6.

15 As to the meaning of 'UK authorised person' see PARA 358 note 3.

16 Financial Services and Markets Act 2000 Sch 12 para 10(3) (amended by SI 2004/3379). Authorisation is given under the Life Assurance Consolidation Directive (ie European

Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1)) art 4 or the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3)) art 6: see PARA 86 note 6.

17 As to the meaning of 'Swiss general insurer' see PARA 595 note 5; definition applied by the Financial Services and Markets Act 2000 Sch 12 para 10(7).

18 Financial Services and Markets Act 2000 Sch 12 para 10(4) (amended by SI 2004/3379). Authorisation is given under the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1)) art 4 or the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3)) art 6: see PARA 86 note 6.

19 'Necessary margin of solvency' means the margin of solvency which the transferee, taking the proposed transfer into account, is required by the Authority to maintain: Financial Services and Markets Act 2000 Sch 12 para 10(6).

20 Financial Services and Markets Act 2000 Sch 12 para 10(5).

602. Effect of insurance business transfers authorised in other EEA states. The provisions described below[1] apply if, as a result of an authorised transfer[2], an EEA firm[3] transfers to another body all its rights and obligations under any UK policies[4] and if, as a result of an authorised transfer[5], a company authorised in an EEA state other than the United Kingdom[6] transfers to another body all its rights and obligations under any UK policies[7].

If appropriate notice[8] of the execution of an instrument giving effect to the transfer is published, the instrument has the effect in law: (1) of transferring to the transferee all the transferor's rights and obligations under the UK policies to which the instrument applies; and (2) if the instrument so provides, of securing the continuation by or against the transferee of any legal proceedings by or against the transferor which relate to those rights and obligations[9].

1 Ie the Financial Services and Markets Act 2000 s 116.

2 For these purposes, 'authorised transfer' means a transfer authorised in the home state of the EEA firm in accordance with: (1) the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) art 14; (2) the Third Non-Life Insurance Directive (ie EC Council Directive 92/49 (OJ L228, 11.8.92, p 1) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance, and amending EC Directives 73/239 and 88/357) art 12; or (3) the Reinsurance Directive (ie European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.2005, p 1) on reinsurance and amending EEC Council Directives 73/239, 92/49 as well as EC Directives 98/78 and 2002/83) art 18: Financial Services and Markets Act 2000 s 116(5)(a) (amended by SI 2004/3379; SI 2007/3253). As to the meaning of 'EEA firm' see PARA 315 note 1.

3 Ie falling within the Financial Services and Markets Act 2000 Sch 3 para 5(d) or Sch 3 para 5(da): see PARA 315 note 1.

4 Financial Services and Markets Act 2000 s 116(1) (amended by SI 2007/3253). 'UK policy' means (1) in the case of an authorised transfer within the meaning of the Financial Services and Markets Act 2000 s 116(5)(a)(i) or (ii) (see note 2 heads (1), (2)) or s 116(5)(b)(i) or (ii) (see note 5 heads (1), (2)), a policy evidencing a contract of insurance (other than a contract of reinsurance) for which the applicable law is the law of a part of the United Kingdom; (2) in the case of an authorised transfer within the meaning of s 116(5)(a))(iii) (see note 2 head (3)) or s 116(5)(b)(iii) (see note 5 head (3)), a policy evidencing a contract of reinsurance to which the applicable law is the law of a part of the United Kingdom: s 116(6) (substituted by SI 2007/3253). As to the meaning of 'policy' see PARA 595 note 13. As to the meaning of 'contracts of insurance' see PARA 351 note 13. As to the meaning of 'contract of reinsurance' see PARA 591 note 8. As to the meaning of 'United Kingdom' see PARA 2 note 3.

5 For these purposes, 'authorised transfer' means a transfer authorised in an EEA state other than the United Kingdom in accordance with: (1) the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1)) art 53; (2) the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance) art 28a; or (3) the provisions in the law of that EEA state which provide for the authorisation of transfers of all or

part of a portfolio of contracts of an undertaking authorised to carry out reinsurance activities in its territory (as mentioned in the Reinsurance Directive (ie European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.2005, p 1)) art 49): Financial Services and Markets Act 2000 s 116(5)(b) (amended by SI 2004/3379; SI 2007/3253). As to the meaning of 'EEA state' see PARA 315 note 1.

6 Ie (1) an undertaking authorised in an EEA state other than the United Kingdom under the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1)) art 51; (2) an undertaking authorised in an EEA state other than the United Kingdom under the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3)) art 23; (3) an undertaking, whose head office is not within the EEA, authorised under the law of an EEA state other than the United Kingdom to carry out reinsurance activities in its territory (as mentioned in the Reinsurance Directive (ie European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.2005, p 1)) art 49).

7 Financial Services and Markets Act 2000 s 116(2) (substituted by SI 2007/3253).

8 'Appropriate notice' means: (1) if the UK policy evidences a contract of insurance in relation to which an EEA state other than the United Kingdom is the state of the commitment, notice given in accordance with the law of that state; (2) if the UK policy evidences a contract of insurance where the risk is situated in an EEA state other than the United Kingdom, notice given in accordance with the law of that EEA state; (3) in any other case, notice given in accordance with the applicable law: Financial Services and Markets Act 2000 s 116(7). As to the meanings of 'state of the commitment' and 'commitment', and as to references to the EEA state in which the risk is situated, see PARA 595 notes 17, 21; definitions applied by s 116(8).

9 Financial Services and Markets Act 2000 s 116(3). No agreement or consent is required before s 116(3) has the effects mentioned: s 116(4).

(ii) Collective Investment Schemes

A. INTRODUCTION

603. Definitions. 'Collective investment scheme' means any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income[1]. The arrangements must be such that the persons who are to participate ('participants') do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions[2]. The arrangements must also have either or both of the following characteristics: (1) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled; (2) the property is managed as a whole by or on behalf of the operator of the scheme[3]. If arrangements provide for such pooling as is mentioned in head (1) above in relation to separate parts of the property, the arrangements are not to be regarded as constituting a single collective investment scheme unless the participants are entitled to exchange rights in one part for rights in another[4]. The Treasury may by order provide that arrangements do not amount to a collective investment scheme in specified circumstances or if the arrangements fall within a specified category of arrangement[5].

'Open-ended investment company' means a collective investment scheme which satisfies both the property condition and the investment condition[6]. The property condition is that the property belongs beneficially to, and is managed by or on behalf of, a body corporate[7] ('BC') having as its purpose the investment of its funds with the aim of spreading investment risk and giving its members the benefit of the results of the management of those funds by or on behalf of that body[8]. The investment condition is that, in relation to BC, a reasonable investor

would, if he were to participate in the scheme: (a) expect that he would be able to realise, within a period appearing to him to be reasonable, his investment in the scheme (represented, at any given time, by the value of shares in, or securities of, BC held by him as a participant in the scheme); and (b) be satisfied that his investment would be realised on a basis calculated wholly or mainly by reference to the value of property in respect of which the scheme makes arrangements[9]. The Treasury may by order amend the definition of an open-ended investment company[10].

'Authorised open-ended investment company' means a body incorporated by virtue of regulations[11] in respect of which an authorisation order is in force under any provision made in such regulations[12].

'Unit trust scheme' means a collective investment scheme under which the property is held on trust for the participants[13]. 'Units' means the rights or interests (however described) of the participants in a collective investment scheme[14]. 'Authorised unit trust scheme' means a unit trust scheme which is authorised for the purposes of the Financial Services and Markets Act 2000 by an authorisation order[15].

'Recognised scheme' means a scheme recognised as a scheme constituted in another EEA state[16], a scheme authorised in a designated country or territory[17] or an individually recognised overseas scheme[18].

1 Financial Services and Markets Act 2000 ss 235(1), 417(1). See also the Financial Services Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Financial Services Authority see PARAS 4, 6 et seq. As to the Handbook generally see PARA 22.

A membership fee paid to a firm running a betting scheme can be 'property of any description' for these purposes even though those amounts were not in fact invested: see *Financial Services Authority v Fradley* [2005] EWCA Civ 1183, [2006] 2 BCLC 616.

2 Financial Services and Markets Act 2000 s 235(2). See *Financial Services Authority v Fradley* [2005] EWCA Civ 1183, [2006] 2 BCLC 616. For cases involving joint investments in real estate which were held to be collective investment schemes see *Russell-Cooke Trust Co v Elliott* [2001] All ER (D) 197 (Jul); *Russell-Cooke Trust Co v Prentis* [2002] EWHC 2227 (Ch), [2003] 2 All ER 478.

3 Financial Services and Markets Act 2000 s 235(3). See *Financial Services Authority v Fradley* [2005] EWCA Civ 1183, [2006] 2 BCLC 616.

4 Financial Services and Markets Act 2000 s 235(4).

5 Financial Services and Markets Act 2000 s 235(5). As to the order that has been made see the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062; and PARA 604. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

6 Financial Services and Markets Act 2000 ss 236(1), 417(1).

7 As to the meaning of 'body corporate' see PARA 86 note 11.

8 Financial Services and Markets Act 2000 s 236(2).

9 Financial Services and Markets Act 2000 s 236(3). In determining whether the investment condition is satisfied, no account is to be taken of any actual or potential redemption or repurchase of shares or securities under: (1) the Companies Act 1985 Pt V Ch VII (ss 159–181) (prospectively repealed) (see COMPANIES vol 7(1) (2004 Reissue) PARA 613 et seq) (as to replacement provisions see the Companies Act 2006 Pt 18 Ch 3–6 (ss 684–736)); (2) the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), Pt VI Ch VII (arts 169–191); (3) corresponding provisions in force in another EEA state; or (4) provisions in force in a country or territory other than an EEA state which the Treasury has, by order, designated as corresponding provisions: Financial Services and Markets Act 2000 s 236(4). At the date at which this volume states the law no such order had been made. As to the meaning of 'EEA state' see PARA 315 note 1.

10 Financial Services and Markets Act 2000 s 236(5). No order is to be made under s 236(5) unless a draft of the order has been laid before Parliament and approved by a resolution of each House: s 429(1)(a).

11 Ie under the Financial Services and Markets Act 2000 s 262: see PARA 621.
12 Financial Services and Markets Act 2000 ss 237(3), 417(1).
13 Financial Services and Markets Act 2000 ss 237(1), 417(1).
14 Financial Services and Markets Act 2000 s 237(2).
15 Financial Services and Markets Act 2000 s 237(3). An authorisation order is made under s 243: see PARA 608.
16 Ie under the Financial Services and Markets Act 2000 s 264: see PARA 672.
17 Ie under the Financial Services and Markets Act 2000 s 270: see PARA 675.
18 Financial Services and Markets Act 2000 s 237(3). Such a scheme is recognised under s 272: see PARA 676.

604. Arrangements not amounting to a collective investment scheme. The following arrangements do not amount to a collective investment scheme[1]:

(1) individual investment management arrangements[2];
(2) enterprise initiative schemes[3];
(3) pure deposit based schemes[4];
(4) schemes not operated by way of business[5];
(5) debt issues[6];
(6) common accounts[7];
(7) certain funds relating to leasehold property[8];
(8) certain employee share schemes[9];
(9) schemes entered into for commercial purposes related to existing business[10];
(10) group schemes[11];
(11) franchise arrangements[12];
(12) trading schemes[13];
(13) timeshare schemes[14];
(14) other schemes relating to use or enjoyment of property[15];
(15) schemes involving the issue of certificates representing investments[16];
(16) clearing services[17];
(17) contracts of insurance[18];
(18) funeral plan contracts[19];
(19) individual pension accounts[20];
(20) occupational and personal pension schemes[21];
(21) bodies corporate etc[22].

1 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, art 3. As to the meaning of 'collective investment scheme' see PARA 603.
2 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 1. Arrangements do not amount to a collective investment scheme if:
(1) the property to which the arrangements relate (other than cash awaiting investment) consists of investments of one or more of the following kinds: (a) an investment of the kind specified by any of the provisions of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 76–80 (see PARA 224); (b) an investment of the kind specified by art 81 (units in a collective investment scheme) (see PARA 224) so far as relating to authorised unit trust schemes, recognised schemes or shares in an open-ended investment company; or (c) a contract of long term insurance (Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 1(a));
(2) each participant is entitled to a part of that property and to withdraw that part at any time (Schedule para 1(b)); and
(3) the arrangements do not have the characteristics mentioned in the Financial Services and Markets Act 2000 s 235(3)(a) (see PARA 603 head (1)) and have those mentioned in s 235(3)(b) (see PARA 603 head (2)) only because the parts of the property to which different participants are entitled are not bought and sold separately except where a

person becomes or ceases to be a participant (Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 1(c)).

As to the meanings of 'authorised unit trust scheme' and 'recognised scheme' see PARA 603; both definitions applied by art 2. As to the meaning of 'contract of long term insurance' see PARA 90 note 3; definition applied by art 2.

3 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 2. Arrangements do not amount to a collective investment scheme if:

(1) the property to which the arrangements relate (other than cash awaiting investment) consists of shares (Schedule para 2(1)(a));

(2) the arrangements constitute a complying fund (Schedule para 2(1)(b));

(3) each participant is entitled to a part of the property to which the arrangements relate and:

(a) to the extent that the property to which he is entitled comprises relevant shares of a class which are admitted to official listing in an EEA state or to dealings on a recognised investment exchange, he is entitled to withdraw it at any time after the end of the period of five years beginning with the date on which the shares in question were issued;

(b) to the extent that the property to which he is entitled comprises other relevant shares, he is entitled to withdraw it at any time after the end of the period of seven years beginning with the date on which the shares in question were issued;

(c) to the extent that the property to which he is entitled comprises shares other than relevant shares, he is entitled to withdraw it at any time after the end of the period of six months beginning with the date on which the shares in question ceased to be relevant shares; and

(d) to the extent that the property comprises cash which the operator has agreed (conditionally or unconditionally) to apply in subscribing for shares,

he is entitled to withdraw it at any time (Schedule para 2(1)(c)); and

(4) the arrangements would meet the conditions described in Schedule para 1(c) (see note 2 head (3)) were it not for the fact that the operator is entitled to exercise all or any of the rights conferred by shares included in the property to which the arrangements relate (Schedule para 2(1)(d)).

'Shares' means investments of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 76 (see PARA 224) and shares are to be regarded as relevant shares if and so long as they are shares in respect of which neither: (i) a claim for relief made in accordance with the Income and Corporation Taxes Act 1988 s 306 (repealed with respect to 2007–08 and subsequent income tax years) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1149) has been disallowed; nor (ii) an assessment has been made pursuant to s 307 (repealed with respect to 2007–08 and subsequent income tax years) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1150) withdrawing or refusing relief by reason of the body corporate in which the shares are held having ceased to be a body corporate which is a qualifying company for the purposes of that Act: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 2(2)(a). 'Complying fund' means arrangements which provide that: (A) the operator will, so far as is practicable, make investments each of which, subject to each participant's individual circumstances, qualify for relief by virtue of the Income and Corporation Taxes Act 1988 Pt VII Ch III (ss 289–312) (repealed with respect to 2007–08 and subsequent income tax years) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1137 et seq); and (B) the minimum contribution to the arrangements which each participant must make is not less than £2,000: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 2(2)(b).

4 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 3. Arrangements do not amount to a collective investment scheme if the whole amount of each participant's contribution is a deposit which is accepted by an authorised person with permission to carry on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 5 (accepting deposits) (see PARA 89) or a person who is an exempt person in relation to such an activity: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 3.

5 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 4. Arrangements do not amount to a collective investment scheme if they are operated otherwise than by way of business: Schedule para 4.

6 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 5. Arrangements do not amount to a collective investment scheme

if they are arrangements under which the rights or interests of participants are, except as provided in Schedule para 5(2) (see below), represented by investments of one, and only one, of the following descriptions:

(1) investments of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 77 (instruments creating or acknowledging indebtedness) (see PARA 224) which are:
   (a) issued by a single body corporate other than an open-ended investment company; or
   (b) issued by a single issuer who is not a body corporate and which are guaranteed by the government of the United Kingdom, the Scottish Administration, the Executive Committee of the Northern Ireland Assembly, the National Assembly for Wales or the government of any country or territory outside the United Kingdom,

   and which are not convertible into or exchangeable for investments of any other description (Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 5(1)(a));

(2) investments falling within head (1)(a) or head (1)(b) above (the 'former investments') which are convertible into or exchangeable for investments of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 76 (see PARA 224) (the 'latter investments') provided that the latter investments are issued by the same person who issued the former investments or are issued by a single other issuer (Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 5(1)(b));

(3) investments of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 78 (government and public securities) (see PARA 224) which are issued by a single issuer (Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 5(1)(c)); or

(4) investments of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 79 (instruments giving entitlement to investments) (see PARA 224) which are issued otherwise than by an open-ended investment company and which confer rights in respect of investments, issued by the same issuer, of the kind specified by art 76 or within any of heads (1)–(3) above (Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 5(1)(d)).

As to the meaning of 'United Kingdom' see PARA 2 note 3. Arrangements which would otherwise not amount to a collective investment scheme by virtue of the provisions of heads (1)–(4) above are not to be regarded as amounting to such a scheme by reason only that one or more of the participants (the 'counterparty') is a person: (i) whose ordinary business involves him in carrying on activities of the kind specified by any of the provisions of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (dealing in investments as principal) (see PARA 112), art 21 (dealing in investments as agent) (see PARA 126), art 25 (arranging deals in investments) (see PARA 139), art 25D (operating a multilateral trading facility) (see PARA 139); art 37 (managing investments) (see PARA 152), art 40 (safeguarding and administering investments) (see PARA 160), art 45 (sending dematerialised instructions) (see PARA 190), art 51 (establishing etc a collective investment scheme) (see PARA 171), art 52 (establishing etc a stakeholder pension scheme) (see PARA 187) and art 53 (advising on investments) (see PARA 174) or, so far as relevant to any of those articles, art 64 (agreeing to carry on specified kinds of activities) (see PARA 221), or would do so apart from any exclusion from any of those articles made by that order; and (ii) whose rights or interests in the arrangements are or include rights or interests under a swap arrangement: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 5(2) (amended by SI 2006/3384). 'Swap arrangement' means an arrangement the purpose of which is to facilitate the making of payments to participants whether in a particular amount or currency or at a particular time or rate of interest or all or any combination of those things, being an arrangement under which the counterparty: (A) is entitled to receive amounts, whether representing principal or interest, payable in respect of any property subject to the arrangements or sums determined by reference to such amounts; and (B) makes payments, whether or not of the same amount or in the same currency as the amounts or sums referred to in head (A) above, which are calculated in accordance with an agreed formula by reference to those amounts or sums: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 5(3).

7 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 6. Arrangements do not amount to a collective investment scheme if: (1) they are arrangements under which the rights or interests of participants are rights to or interests in money held in a common account; and (2) that money is held in the account on the understanding that an amount representing the contribution of each participant is to be applied: (a) in making payments to him; (b) in satisfaction of sums owed by him; or (c) in the acquisition of property for him or the provision of services to him: Schedule para 6.

8 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 7 (substituted by SI 2007/800). Arrangements do not amount to a collective investment scheme if the rights or interests of the participants are rights or interests (1) in a fund which is a trust fund within the meaning of the Landlord and Tenant Act 1987 s 42(1) (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 352) or which would be such a fund if the landlord were not an exempt landlord within the meaning of s 58(1) (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 354); or (2) in money held in a designated account by the scheme administrator under a tenancy deposit scheme within the meaning of the Housing Act 2004 s 212(2) (see HOUSING): Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 7 (as so substituted).

9 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 8. Arrangements do not amount to a collective investment scheme if they are operated by a person ('A'), a member of the same group as A, or a relevant trustee for the purpose of enabling or facilitating: (1) transactions in shares in, or debentures issued by, A between, or for the benefit of, any of the persons mentioned in Schedule para 8(2); or (2) the holding of such shares or debentures by, or for the benefit of, any such persons: Schedule para 8(1). The persons referred to in Schedule para 8(1) are: (a) the bona fide employees or former employees of A or of another member of the same group; or (b) the wives, husbands, widows, widowers, civil partners, surviving civil partners, or children or step-children under the age of 18 of such employees or former employees: Schedule para 8(2) (amended by SI 2005/2114). 'Shares' and 'debentures' have the meaning given by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 71(6)(a) (see PARA 123); and 'relevant trustee' means a person who, in pursuance of the arrangements, holds shares in or debentures issued by A: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 8(3).

10 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 9 (amended by SI 2001/3650; SI 2006/3384). Arrangements do not amount to a collective investment scheme if each of the participants: (1) carries on a business other than the business of engaging in any regulated activity of the kind specified by any of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112), art 21 (see PARA 126), art 25 (see PARA 139), art 25D (see PARA 139), art 37 (see PARA 152), art 40 (see PARA 160), art 45 (see PARA 190), arts 51–53 (see PARAS 171, 174, 187) or, so far as relevant to any of those articles, art 64 (see PARA 221); and (2) enters into the arrangements for commercial purposes related to that business: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 9(1) (as so amended). Schedule para 9(1) does not apply where the person will carry on the business in question by virtue of being a participant in the arrangements: Schedule para 9(2).

11 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 10. Arrangements do not amount to a collective investment scheme if each of the participants is a body corporate in the same group as the operator: Schedule para 10. As to the meaning of the 'operator' see PARA 606 note 16; definition applied by art 2.

12 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 11. Franchise arrangements do not amount to a collective investment scheme: Schedule para 11. 'Franchise arrangements' means arrangements under which a person earns profits or income by exploiting a right conferred by the arrangements to use a trade mark or design or other intellectual property or the goodwill attached to it: art 2.

13 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 12. Arrangements do not amount to a collective investment scheme if: (1) the purpose of the arrangements is that participants should receive, by way of reward, payments or other benefits in respect of the introduction by any person of other persons who become participants; (2) the arrangements are such that the payments or other benefits referred to in head (1) above are to be wholly or mainly funded out of the contributions of other participants; and (3) the only reason why the arrangements have either or both of the characteristics mentioned in the Financial Services and Markets Act 2000 s 235(3) (see PARA 603 heads (1), (2)) is because, pending their being used to fund those payments or other benefits,

contributions of participants are managed as a whole by or on behalf of the operator of the scheme: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 12.

14 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 13. Arrangements do not amount to a collective investment scheme if the rights or interests of the participants are timeshare rights: Schedule para 13. 'Timeshare rights' has the meaning given by the Timeshare Act 1992 s 1 (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 868): Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, art 2.

15 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 14. Arrangements do not amount to a collective investment scheme if: (1) the predominant purpose of the arrangements is to enable the participants to share in the use or enjoyment of property or to make its use or enjoyment available gratuitously to others; and (2) the property to which the arrangements relate does not consist of the currency of any country or territory and does not consist of or include any investment of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt III (arts 73–89) (see PARA 224) or which would be of such a kind apart from any exclusion made by Pt III: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 14.

16 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 15. Arrangements do not amount to a collective investment scheme if the rights or interests of the participants are investments of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 80 (certificates representing certain securities) (see PARA 224): Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 15.

17 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 16. Arrangements do not amount to a collective investment scheme if their purpose is the provision of clearing services and they are operated by an authorised person, a recognised clearing house or a recognised investment exchange: Schedule para 16.

18 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 17. A contract of insurance does not amount to a collective investment scheme: Schedule para 17. As to the meaning of 'contract of insurance' see PARA 90 note 3; definition applied by art 2.

19 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 18 (substituted by SI 2001/3650). Arrangements do not amount to a collective investment scheme if they consist of, or are made pursuant to: (1) a funeral plan contract; or (2) a contract which would be a funeral plan contract but for the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 59(2) proviso, or the exclusion in art 60 (see PARA 201): Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 18 (as so substituted). As to the meaning of 'funeral plan contract' see PARA 200 note 1; definition applied by art 2.

20 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 19. An individual pension account does not amount to a collective investment scheme: Schedule para 19. 'Individual pension account' has the meaning given by the Personal Pension Schemes (Restriction on Discretion to Approve) (Permitted Investments) Regulations 2001, SI 2001/117, reg 4 (see SOCIAL SECURITY AND PENSIONS); definition applied by the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, art 2.

21 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 20. An occupational pension scheme does not amount to a collective investment scheme: Schedule para 20(1). A personal pension scheme does not amount to a collective investment scheme: Schedule para 20(2). Schedule para 20(2) does not extend to a personal pension unit trust which is constituted as a feeder fund or comprises feeder funds: Schedule para 20(3). 'Occupational pension scheme' has the meaning given by the Pension Schemes Act 1993 s 1 but with para (b) of the definition omitted (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARAS 710, 741): Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, art 2 (definition substituted by SI 2006/1969). 'Personal pension scheme' means a scheme or arrangement which is not an occupational pension scheme and which is comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of people (1) on retirement; (2) on having reached a particular age; or (3) on termination of service in an employment: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, art 2 (definition substituted by SI 2006/1969). 'Personal pension

unit trust' means a personal pension scheme which is an authorised unit trust scheme of a kind mentioned in the Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, Sch 1 Pt I (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 886): Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, art 2. 'Feeder fund' means an authorised unit trust scheme the sole object of which is investment in units of a single authorised unit trust scheme or shares in a single open-ended investment company: art 2.

22 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 21 (substituted by SI 2001/3650). No body incorporated under the law of, or any part of, the United Kingdom relating to building societies or industrial and provident societies or registered under any such law relating to friendly societies, and no other body corporate other than an open-ended investment company, amounts to a collective investment scheme: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 21(1) (as so substituted). This does not apply to any body incorporated as a limited liability partnership: Schedule para 21(2) (as so substituted). As to building societies see PARA 1856 et seq; as to industrial and provident societies see PARA 2394 et seq; as to friendly societies see PARA 2081 et seq; and as to limited liability partnerships see PARTNERSHIP.

B. RESTRICTION ON PROMOTION

605. Main restriction. An authorised person[1] must not communicate[2] an invitation or inducement to participate[3] in a collective investment scheme[4].

1 As to authorised persons see PARA 314.

2 'Communicate' includes causing a communication to be made: Financial Services and Markets Act 2000 s 238(9).

3 'Participate', in relation to a collective investment scheme, means become a participant (within the meaning given by the Financial Services and Markets Act 2000 s 235(2) (see PARA 603)) in the scheme: s 238(11). As to the meaning of 'collective investment scheme' see PARA 603.

4 Financial Services and Markets Act 2000 s 238(1). This provision is subject to ss 238(3)–(8), 239 (see PARA 606): s 238(2). An unauthorised person cannot communicate such an invitation or inducement by virtue of s 21: see PARA 225.

606. Qualifications to main restriction. The main restriction on promotion[1] is subject to the provisions described below[2].

The main restriction applies in the case of a communication[3] originating outside the United Kingdom[4] only if the communication is capable of having an effect in the United Kingdom[5]. It does not apply in relation to: (1) an authorised unit trust scheme[6]; (2) a scheme constituted by an authorised open-ended investment company[7]; or (3) a recognised scheme[8], nor does it apply to anything done in accordance with rules[9] made by the Financial Services Authority[10] for the purpose of exempting[11] the promotion otherwise than to the general public[12] of schemes of specified descriptions[13].

The Treasury may by order specify circumstances in which the main restriction does not apply[14]. Such an order may, in particular, provide that the main restriction does not apply in relation to communications: (a) of a specified description; (b) originating in a specified country or territory outside the United Kingdom; (c) originating in a country or territory which falls within a specified description of country or territory outside the United Kingdom; or (d) originating outside the United Kingdom[15].

The Treasury may by regulations make provision for exempting single property schemes[16] from the main restriction[17]. If such regulations are made, the Authority may make rules imposing duties or liabilities on the operator and (if any) the trustee or depositary[18] of a scheme exempted by the regulations[19].

An authorised person may not approve[20] the content of a communication relating to a collective investment scheme if he would be prohibited[21] from effecting the communication himself or from causing it to be communicated[22].

1 As to the main restriction see PARA 605.
2 Financial Services and Markets Act 2000 s 238(2).
3 As to the meaning of 'communicate' see PARA 605 note 2.
4 As to the meaning of 'United Kingdom' see PARA 2 note 3.
5 Financial Services and Markets Act 2000 s 238(3). The Treasury may by order repeal s 238(3): s 238(8). At the date at which this volume states the law no such order had been made. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

If an authorised person contravenes a requirement imposed on him by s 238, then s 150 (action for damages) (see PARA 33) applies to the contravention as it applies to a contravention mentioned in s 150: s 241.

6 As to the meaning of 'authorised unit trust scheme' see PARA 603.
7 As to the meaning of 'authorised open-ended investment company' see PARA 603.
8 Financial Services and Markets Act 2000 s 238(4). See note 5. As to the meaning of 'recognised scheme' see PARA 603.
9 As to the meaning of 'rule' see PARA 23 note 2.
10 As to the Financial Services Authority see PARAS 4, 6 et seq.
11 Ie from the Financial Services and Markets Act 2000 s 238(1): see PARA 605.
12 'Promotion otherwise than to the general public' includes promotion in a way designed to reduce, so far as possible, the risk of participation by persons for whom participation would be unsuitable: Financial Services and Markets Act 2000 s 238(10). As to the meaning of 'participate' see PARA 603.
13 Financial Services and Markets Act 2000 s 238(5). See note 5.
14 Financial Services and Markets Act 2000 s 238(6). As to the order that has been made see the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060; and PARA 607. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1.
15 Financial Services and Markets Act 2000 s 238(7). See note 14.
16 For these purposes, a single property scheme is a scheme which has the characteristics mentioned below and satisfies such other requirements as are prescribed by the regulations conferring the exemption: Financial Services and Markets Act 2000 s 239(2). The characteristics are: (1) that the property subject to the scheme (apart from cash or other assets held for management purposes) consists of: (a) a single building (or a single building with ancillary buildings) managed by or on behalf of the operator of the scheme; or (b) a group of adjacent or contiguous buildings managed by him or on his behalf as a single enterprise, with or without ancillary land and with or without furniture, fittings or other contents of the building or buildings in question; and (2) that the units of the participants in the scheme are either dealt in on a recognised investment exchange or offered on terms such that any agreement for their acquisition is conditional on their admission to dealings on such an exchange: s 239(3). 'Operator', in relation to a unit trust scheme with a separate trustee, means the manager; and, in relation to an open-ended investment company, means that company: s 237(2). 'Trustee', in relation to a unit trust scheme, means the person holding the property in question on trust for the participants: s 237(2). As to the meanings of 'units', 'unit trust scheme' and 'open-ended investment company' see PARA 603. As to the meaning of 'recognised investment exchange' see PARA 684 note 1.
17 Financial Services and Markets Act 2000 s 239(1). At the date at which this volume states the law no such regulations had been made.
18 'Depositary', in relation to: (1) a collective investment scheme which is constituted by a body incorporated by virtue of regulations under the Financial Services and Markets Act 2000 s 262 (see PARA 621); or (2) any other collective investment scheme which is not a unit trust scheme, means any person to whom the property subject to the scheme is entrusted for safekeeping: s 237(2).
19 Financial Services and Markets Act 2000 s 239(4). The rules may include, to such extent as the Authority thinks appropriate, provision for purposes corresponding to those for which provision can be made under s 248 (see PARA 615) in relation to authorised unit trust schemes: s 239(5).
20 Ie for the purposes of the Financial Services and Markets Act 2000 s 21: see PARA 225.
21 Ie by the Financial Services and Markets Act 2000 s 238(1): see PARA 605.

22 Financial Services and Markets Act 2000 s 240(1). For the purposes of determining in any case whether there has been a contravention of s 21(1) (see PARA 225), an approval given in contravention of s 240(1) is to be regarded as not having been given: s 240(2). If an authorised person contravenes a requirement imposed on him by s 240, then s 150 (action for damages) (see PARA 33) applies to the contravention as it applies to a contravention mentioned in s 150: s 241.

607. Exemptions from restriction. The scheme promotion restriction[1] does not apply to any communication[2]: (1) which is made (whether from inside or outside the United Kingdom) to a person who receives the communication outside the United Kingdom; or (2) which is directed (whether from inside or outside the United Kingdom) only at persons outside the United Kingdom[3]. This exemption does not apply to an unsolicited real time communication unless it is made from a place outside the United Kingdom, and it relates to an overseas scheme[4].

The scheme promotion restriction does not apply to any solicited real time communication[5] which is made from outside the United Kingdom and which relates to units in an overseas scheme[6].

The scheme promotion restriction does not apply to a non-real time or unsolicited real time communication which is made from outside the United Kingdom by an authorised person to a previously overseas customer[7] of his, and which relates to units in an overseas scheme[8].

The scheme promotion restriction does not apply to an incoming electronic commerce communication[9].

The following are also exempted from the scheme promotion restriction:

(a) follow up non-real time communications and solicited real time communications[10];

(b) introductions[11];

(c) generic promotions[12];

(d) communications made only to investment professionals[13];

(e) one off non-real time communications and solicited real time communications[14];

(f) one off unsolicited real time communications[15];

(g) communications required or authorised by enactments other than the Financial Services and Markets Act 2000[16];

(h) communications to persons in the business of placing promotional material[17];

(i) communications to existing participants in an unregulated scheme[18];

(j) communications made by one body corporate in a group to another body corporate in the same group[19];

(k) communications to persons in the business of disseminating information[20];

(l) communications to certified high net worth individuals[21];

(m) communications to high net worth companies, unincorporated associations or partnerships or trustees of high value trusts[22];

(n) communications to certified sophisticated investors[23];

(o) non-real time communications or solicited real time communications to associations of high net worth or sophisticated investors[24];

(p) communications to settlors, trustees and personal representatives if the communication is made for the purposes of the trust or estate[25];

(q) communications to beneficiaries of trusts, wills or intestacy if the communication relates to the management or distribution of the trust fund or estate[26];

(r) communications made or directed by a person for the purpose of enabling any injustice[27] to be remedied[28];

(s) any communication received by a person who receives the publication in which the communication is contained because he has himself placed an advertisement in that publication[29];

(t) a scheme constituted by an authorised Northern Ireland open-ended investment company[30];

(u) any communication which is made by an EEA management company[31].

Nothing in the provisions relating to exemptions from the scheme promotion restriction[32] is to be construed as preventing a person from relying on more than one exemption in respect of the same communication[33].

1 'Scheme promotion restriction' means the restriction imposed by the Financial Services and Markets Act 2000 s 238(1) (see PARA 605): Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 2(2).

2 For the purposes of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060: (1) any reference to a communication is a reference to the communication, by an authorised person in the course of business, of an invitation or inducement to participate in an unregulated scheme; (2) any reference to a communication being made to another person is a reference to a communication being addressed, whether verbally or in legible form, to a particular person or persons (e g where it is contained in a telephone call or letter); (3) any reference to a communication being directed at persons is a reference to a communication being addressed to persons generally (e g where it is contained in a television broadcast or website); (4) 'communicate' includes causing a communication to be made; (5) a 'recipient' of a communication is a person to whom the communication is made or, in the case of a non-real time communication which is directed at persons generally, any person who reads or hears the communication; (6) 'electronic commerce communication' means a communication the making of which constitutes the provision of an information society service; (7) 'incoming electronic commerce communication' means an electronic commerce communication made from an establishment in an EEA state other than the United Kingdom; (8) 'outgoing electronic commerce communication' means an electronic commerce communication made from an establishment in the United Kingdom to a person in an EEA state other than the United Kingdom: art 3 (amended by SI 2002/2157). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the meaning of 'EEA state' see PARA 315 note 1. As to outgoing electronic commerce communications see also the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 5A (added by SI 2002/2157).

References to a 'real time communication' are references to any communication made in the course of a personal visit, telephone conversation or other interactive dialogue: Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 4(1). A 'non-real time communication' is a communication not falling within art 4(1): art 4(2). Non-real time communications include communications made by letter or e-mail or contained in a publication: art 4(3). 'Publication' means: (a) a newspaper, journal, magazine or other periodical publication; (b) a website or similar system for the electronic display of information; (c) any programme forming part of a service consisting of the broadcast or transmission of television or radio programmes; and (d) any teletext service, that is to say a service consisting of television transmissions consisting of a succession of visual displays (with or without accompanying sound) capable of being selected and held for separate viewing or other use: art 2(1) (definition amended by SI 2002/1310). The following factors are to be treated as indications that a communication is a non-real time communication: (i) the communication is made to or directed at more than one recipient in identical terms (save for details of the recipient's identity); (ii) the communication is made or directed by way of a system which in the normal course constitutes or creates a record of the communication which is available to the recipient to refer to at a later time; (iii) the communication is made or directed by way of a system which in the normal course does not enable or require the recipient to

respond immediately to it: Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 4(4), (5).

3 Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 8(1) (amended by SI 2002/2157). The Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 8(1) does not apply to an outgoing electronic commerce communication: art 8(7) (added by SI 2002/2157).

For the purposes of head (1) in the text: (1) if the conditions set out in heads (a), (b), (c) and (d) below are met, a communication directed from a place inside the United Kingdom is to be regarded as directed only at persons outside the United Kingdom; (2) if the conditions set out in heads (c) and (d) below are met, a communication directed from a place outside the United Kingdom is to be regarded as directed only at persons outside the United Kingdom; (3) in any other case where one or more of the conditions in heads (a)–(e) below are met, that fact must be taken into account in determining whether the communication is to be regarded as directed only at persons outside the United Kingdom (but a communication may still be regarded as directed only at persons outside the United Kingdom even if none of the conditions in heads (a)–(e) below is met): Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 8(3). The conditions are that: (a) the communication is accompanied by an indication that it is directed only at persons outside the United Kingdom; (b) the communication is accompanied by an indication that it must not be acted upon by persons in the United Kingdom; (c) the communication is not referred to in, or directly accessible from, any other communication which is made to a person or directed at persons in the United Kingdom by or on behalf of the same person; (d) there are in place proper systems and procedures to prevent recipients in the United Kingdom (other than those to whom the communication might otherwise lawfully have been made or directed) acquiring from the person directing the communication, a close relative of his or a company in the same group, units in the scheme to which the communication relates; (e) the communication is included in: (i) a website, newspaper, journal, magazine or periodical publication which is principally accessed in or intended for a market outside the United Kingdom; (ii) a radio or television broadcast or teletext service transmitted principally for reception outside the United Kingdom: art 8(4). As to the meaning of 'units' see PARA 603; definition applied by art 2(1). A communication may be treated as directed only at persons outside the United Kingdom even if it is also directed at investment professionals or at high net worth persons: see art 8(5). Where a communication falls within art 8(5), the condition in head (a) above is to be construed as requiring an indication that the communication is directed only at persons outside the United Kingdom or persons having professional experience in matters relating to investments or high net worth persons (as the case may be); the condition in head (b) above is to be construed as requiring an indication that the communication must not be acted upon by persons in the United Kingdom or by persons who do not have professional experience in matters relating to investments or who are not high net worth persons (as the case may be): art 8(6). 'Close relative', in relation to a person, means: (A) his spouse or civil partner; (B) his children and step-children, his parents and step-parents, his brothers and sisters and his step-brothers and step-sisters; and (C) the spouse or civil partner of any person within head (B) above: art 2(1) (definition amended by SI 2005/2114). As to the degree of prominence to be given to the required indications see the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 6.

4 Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 8(2). 'Overseas scheme' means an unregulated scheme which is operated and managed in a country or territory outside the United Kingdom: art 2(1). 'Unregulated scheme' means a collective investment scheme which is not an authorised unit trust scheme nor a scheme constituted by an authorised open-ended investment company nor a recognised scheme for the purposes of the Financial Services and Markets Act 2000 Pt XVII (ss 235–284) (see PARA 603): Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 2(1).

5 A real time communication is solicited where it is made in the course of a personal visit, telephone call or other interactive dialogue if that call, visit or dialogue: (1) was initiated by the recipient of the communication; or (2) takes place in response to an express request from the recipient of the communication: Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 5(1). A real time communication is unsolicited where it is made otherwise than as described in art 5(1): art 5(2). A person is not to be treated as expressly requesting a call, visit or dialogue: (a) because he omits to indicate that he does not wish to receive any or any further visits or calls or to engage in any or any further dialogue; (b) because he agrees to standard terms that state that such visits, calls

or dialogue will take place, unless he has signified clearly that, in addition to agreeing to the terms, he is willing for them to take place: art 5(3)(a). A communication is solicited only if it is clear from all the circumstances when the call, visit or dialogue is initiated or requested that during the course of the visit, call or dialogue communications will be made concerning the kind of activities or investments to which the communications in fact made relate: art 5(3)(b). It is immaterial whether the express request is made before or after the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060 came into force (ie 1 December 2001): art 5(3)(c). Where a real time communication is solicited by a recipient ('R'), it is treated as having also been solicited by any other person to whom it is made at the same time as it is made to R if that other recipient is a close relative of R, or expected to participate in the unregulated scheme jointly with R: art 5(4).

6 Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 9.

7 'Previously overseas customer' means a person with whom the authorised person has done business within the period of 12 months ending with the day on which the communication was made (the 'earlier business'), where: (1) at the time that the earlier business was done, the customer was neither resident in the United Kingdom nor had a place of business there; or (2) at the time the earlier business was done, the authorised person had on a former occasion done business with the customer, being business of the same description as the business to which the communication relates, and on that former occasion the customer was neither resident in the United Kingdom nor had a place of business there: Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 10(2). An authorised person has done business with a customer if, in the course of his overseas business, he has: (a) effected a transaction, or arranged for a transaction to be effected, with the customer in respect of units in an overseas scheme; or (b) given, outside the United Kingdom, any advice on the merits of the customer buying or selling units in an overseas scheme: art 10(3).

8 Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 10(1).

9 Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 10A(1) (art 10A added by SI 2002/2157). This provision does not apply to certain advertisements or unsolicited communications made by electronic mail: see the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 10A(2)–(4) (as so added; art 10A(3) amended by SI 2003/2067).

10 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 11.

11 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 12.

12 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 13.

13 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 14.

14 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 15.

15 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 15A (added by SI 2001/2633).

16 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 16.

17 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 17.

18 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 18.

19 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 19.

20 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 20.

21 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 21 (substituted by SI 2005/270). As to statements for certified high net worth individuals see the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, Schedule Pt I (Schedule added by SI 2005/270).

22 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 22 (amended by SI 2002/1310).
23 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 23 (amended by SI 2005/270). As to self-certified sophisticated investors see the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 23A (added by SI 2005/270; and amended by SI 2005/1532). As to statements for self-certified sophisticated investors see the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, Schedule Pt II (as added: see note 21).
24 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 24 (amended by SI 2005/1532).
25 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 25.
26 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 26.
27 Ie any injustice stated to have occurred by the Parliamentary Commissioner for Administration in a report under the Parliamentary Commissioner Act 1967 s 10: see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 44. As to the Parliamentary Commissioner for Administration see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 41 et seq.
28 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 27.
29 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 28.
30 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 29 (added by SI 2003/2067).
31 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 30 (added by SI 2003/2067). The reference is to an EEA firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(f) and qualifying for authorisation under Sch 3 para 12 unless a notice under Sch 3 para 15A(2) has been given and not withdrawn: see PARA 315.
32 Ie the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060.
33 Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 7.

C. AUTHORISED UNIT TRUSTS

(A) Authorisation

608. Applications for authorisation. Any application for an order declaring a unit trust scheme[1] to be an authorised unit trust scheme[2] must be made to the Financial Services Authority[3] by the manager and trustee[4], or proposed manager and trustee, of the scheme[5]. The manager and trustee (or proposed manager and trustee) must be different persons[6]. The application must be made in such manner as the Authority may direct, and must contain or be accompanied by such information as the Authority may reasonably require for the purpose of determining the application[7]. At any time after receiving an application and before determining it, the Authority may require the applicants to provide it with such further information as it reasonably considers necessary to enable it to determine the application[8]. Different directions may be given, and different requirements imposed, in relation to different applications[9]. The Authority may require applicants to present information which they are required to give in such form, or to verify it in such a way, as the Authority may direct[10].

If, on an application[11] in respect of a unit trust scheme, the Authority: (1) is satisfied that the scheme complies with the following requirements[12]; (2) is satisfied that the scheme complies with the requirements of the trust scheme rules[13]; and (3) has been provided with a copy of the trust deed and a certificate signed by a solicitor to the effect that it complies with such of the requirements

mentioned in head (1) or head (2) above as relate to its contents, the Authority may make an order declaring the scheme to be an authorised unit trust scheme[14]. If the Authority makes such an order, it must give written notice of the order to the applicant[15]. The requirements are:

(a) the manager and the trustee must be persons who are independent of each other[16];

(b) the manager and the trustee must each be a body corporate[17] incorporated in the United Kingdom[18] or another EEA state[19] and must have a place of business in the United Kingdom, and the affairs of each must be administered in the country in which it is incorporated[20];

(c) the manager and the trustee must each be an authorised person[21] and the manager must have permission to act as manager and the trustee must have permission to act as trustee[22];

(d) the name of the scheme must not be undesirable or misleading[23];

(e) the purposes of the scheme must be reasonably capable of being successfully carried into effect[24];

(f) the participants[25] must be entitled to have their units[26] redeemed in accordance with the scheme at a price: (i) related to the net value of the property to which the units relate; and (ii) determined in accordance with the scheme[27].

An application[28] must be determined by the Authority before the end of the period of six months beginning with the date on which it receives the completed application[29]. The Authority may determine an incomplete application if it considers it appropriate to do so; and it must in any event determine such an application within 12 months beginning with the date on which it first receives the application[30]. The applicant may withdraw his application, by giving the Authority written notice, at any time before the Authority determines it[31].

1 As to the meaning of 'unit trust scheme' see PARA 603.
2 As to the meaning of 'authorised unit trust scheme' see PARA 603.
3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
4 As to the meaning of 'trustee' see PARA 606 note 16.
5 Financial Services and Markets Act 2000 s 242(1).
6 Financial Services and Markets Act 2000 s 242(2).
7 Financial Services and Markets Act 2000 s 242(3).
8 Financial Services and Markets Act 2000 s 242(4).
9 Financial Services and Markets Act 2000 s 242(5).
10 Financial Services and Markets Act 2000 s 242(6).
11 Ie under the Financial Services and Markets Act 2000 s 242: see the text to notes 1–10.
12 Ie set out in the Financial Services and Markets Act 2000 s 243: see heads (a)–(f) in the text.
13 As to the trust scheme rules see PARA 614.
14 Financial Services and Markets Act 2000 s 243(1). For the purposes of Pt XVII Ch III (ss 242–261), 'authorisation order' means an order under s 243(1): s 243(3).
15 Financial Services and Markets Act 2000 s 243(2).
16 Financial Services and Markets Act 2000 s 243(4).
17 As to the meaning of 'body corporate' see PARA 86 note 11.
18 As to the meaning of 'United Kingdom' see PARA 2 note 3.
19 As to the meaning of 'EEA state' see PARA 315 note 1.
20 Financial Services and Markets Act 2000 s 243(5). If the manager is incorporated in another EEA state, the scheme must not be one which satisfies the requirements prescribed for the purposes of s 264 (see PARA 672): s 243(6). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). As to regulations made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
21 As to authorised persons see PARA 314.

22 Financial Services and Markets Act 2000 s 243(7).
23 Financial Services and Markets Act 2000 s 243(8).
24 Financial Services and Markets Act 2000 s 243(9).
25 As to the meaning of 'participants' see PARA 603.
26 As to the meaning of 'units' see PARA 603.
27 Financial Services and Markets Act 2000 s 243(10). However, a scheme is to be treated as complying with s 243(10) if it requires the manager to ensure that a participant is able to sell his units on an investment exchange at a price not significantly different from that mentioned in s 243(10): s 243(11). As to investment exchanges see PARA 684 et seq.
28 Ie under the Financial Services and Markets Act 2000 s 242: see the text to notes 1–10.
29 Financial Services and Markets Act 2000 s 244(1).
30 Financial Services and Markets Act 2000 s 244(2).
31 Financial Services and Markets Act 2000 s 244(3).

609. Refusal of applications. If the Financial Services Authority[1] proposes to refuse an application[2], it must give each of the applicants a warning notice[3]. If the Authority decides to refuse the application: (1) it must give each of the applicants a decision notice[4]; and (2) either applicant may refer the matter to the Financial Services and Markets Tribunal[5].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Financial Services Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
2 Ie an application made under the Financial Services and Markets Act 2000 s 242: see PARA 608.
3 Financial Services and Markets Act 2000 s 245(1). As to warning notices see PARA 769.
4 Financial Services and Markets Act 2000 s 245(2)(a). As to decision notices see PARA 770.
5 Financial Services and Markets Act 2000 s 245(2)(b). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

610. Certificates. If the manager or trustee[1] of a unit trust scheme[2] which complies with the conditions necessary for it to enjoy the rights conferred by any relevant Community instrument so requests, the Financial Services Authority[3] may issue a certificate to the effect that the scheme complies with those conditions[4]. Such a certificate may be issued on the making of an authorisation order[5] in respect of the scheme or at any subsequent time[6].

1 As to the meaning of 'trustee' see PARA 606 note 16.
2 As to the meaning of 'unit trust scheme' see PARA 603.
3 As to the Financial Services Authority see PARAS 4, 6 et seq.
4 Financial Services and Markets Act 2000 s 246(1).
5 As to the meaning of 'authorisation order' see PARA 608 note 14.
6 Financial Services and Markets Act 2000 s 246(2).

611. Exclusion clauses. Any provision of the trust deed of an authorised unit trust scheme[1] is void in so far as it would have the effect of exempting the manager or trustee[2] from liability for any failure to exercise due care and diligence in the discharge of his functions in respect of the scheme[3].

1 As to the meaning of 'authorised unit trust scheme' see PARA 603.
2 As to the meaning of 'trustee' see PARA 606 note 16.
3 Financial Services and Markets Act 2000 s 253.

612. Alterations of schemes and changes of manager or trustee. The manager of an authorised unit trust scheme[1] must give written notice to the Financial Services Authority[2] of any proposal to alter the scheme or to replace its trustee[3]. Any notice given in respect of a proposal to alter the scheme involving a change in the trust deed must be accompanied by a certificate signed by a solicitor to the effect that the change will not affect the compliance of the deed with the trust

scheme rules[4]. The trustee of an authorised unit trust scheme must give written notice to the Authority of any proposal to replace the manager of the scheme[5].

Effect is not to be given to any proposal of which notice has been given[6] unless: (1) the Authority, by written notice, has given its approval to the proposal; or (2) one month, beginning with the date on which the notice was given, has expired without the manager or trustee having received from the Authority a warning notice[7] in respect of the proposal[8]. The Authority must not approve a proposal to replace the manager or the trustee of an authorised unit trust scheme unless it is satisfied that, if the proposed replacement is made, the scheme will continue to comply with the statutory requirements[9].

If the Authority proposes to refuse approval of a proposal to replace the trustee or manager of an authorised unit trust scheme, it must give a warning notice to the person by whom notice of the proposal was given[10]. If the Authority proposes to refuse approval of a proposal to alter an authorised unit trust scheme, it must give separate warning notices to the manager and the trustee of the scheme[11]. To be valid the warning notice must be received by that person before the end of one month beginning with the date on which notice of the proposal was given[12]. If, having given a warning notice to a person, the Authority decides to refuse approval: (a) it must give him a decision notice; and (b) he may refer the matter to the Financial Services and Markets Tribunal[13].

1 As to the meaning of 'authorised unit trust scheme' see PARA 603.
2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Financial Services Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
3 Financial Services and Markets Act 2000 s 251(1). As to the meaning of 'trustee' see PARA 606 note 16.
4 Financial Services and Markets Act 2000 s 251(2). As to the meaning of 'trust scheme rules' see PARA 614.
5 Financial Services and Markets Act 2000 s 251(3).
6 Ie under the Financial Services and Markets Act 2000 s 251(1) (see the text to notes 1–3) or s 251(3) (see the text to note 5).
7 Ie under the Financial Services and Markets Act 2000 s 252: see the text to notes 10–13. As to warning notices see PARA 769.
8 Financial Services and Markets Act 2000 s 251(4).
9 Financial Services and Markets Act 2000 s 251(5). The statutory requirements referred to in the text are the requirements of s 243(4)–(7): see PARA 608.
10 Financial Services and Markets Act 2000 s 252(1). Notice is given under s 251(1) (see the text to notes 1–3) or s 251(3) (see the text to note 5).
11 Financial Services and Markets Act 2000 s 252(2).
12 Financial Services and Markets Act 2000 s 252(3).
13 Financial Services and Markets Act 2000 s 252(4). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

613. Revocation of authorisation. An authorisation order[1] may be revoked by an order made by the Financial Services Authority[2] if it appears to the Authority that[3]:

(1) one or more of the requirements for the making of the order are no longer satisfied[4];

(2) the manager or trustee[5] of the scheme concerned has contravened a requirement imposed on him by or under the Financial Services and Markets Act 2000[6];

(3) the manager or trustee of the scheme has, in purported compliance with any such requirement, knowingly or recklessly given the Authority information which is false or misleading in a material particular[7];

(4) no regulated activity[8] is being carried on in relation to the scheme and the period of that inactivity began at least 12 months earlier[9]; or

(5) none of heads (1) to (4) above applies, but it is desirable to revoke the authorisation order in order to protect the interests of participants[10] or potential participants in the scheme[11].

If the Authority proposes to make an order[12] revoking an authorisation order (a 'revoking order'), it must give separate warning notices[13] to the manager and the trustee of the scheme[14]. If the Authority decides to make a revoking order, it must without delay give each of them a decision notice[15]; and either of them may refer the matter to the Financial Services and Markets Tribunal[16].

An authorisation order may be revoked by an order made by the Authority at the request of the manager or trustee of the scheme concerned[17]. If the Authority makes such an order, it must give written notice of the order to the manager and trustee of the scheme concerned[18]. The Authority may refuse a request to make such an order if it considers that: (a) the public interest requires that any matter concerning the scheme should be investigated before a decision is taken as to whether the authorisation order should be revoked; or (b) revocation would not be in the interests of the participants or would be incompatible with a European Community obligation[19]. If the Authority proposes to refuse a request, it must give separate warning notices to the manager and the trustee of the scheme[20]. If the Authority decides to refuse the request, it must without delay give each of them a decision notice; and either of them may refer the matter to the Tribunal[21].

1 As to the meaning of 'authorisation order' see PARA 608 note 14.
2 As to the Financial Services Authority see PARAS 4, 6 et seq.
3 Financial Services and Markets Act 2000 s 254(1).
4 Financial Services and Markets Act 2000 s 254(1)(a).
5 As to the meaning of 'trustee' see PARA 606 note 16.
6 Financial Services and Markets Act 2000 s 254(1)(b).
7 Financial Services and Markets Act 2000 s 254(1)(c).
8 As to regulated activities see PARA 84 et seq.
9 Financial Services and Markets Act 2000 s 254(1)(d).
10 As to the meaning of 'participants' see PARA 603.
11 Financial Services and Markets Act 2000 s 254(1)(e). For the purposes of s 254(1)(e), the Authority may take into account any matter relating to: (1) the scheme; (2) the manager or trustee; (3) any person employed by or associated with the manager or trustee in connection with the scheme; (4) any director of the manager or trustee; (5) any person exercising influence over the manager or trustee; (6) any body corporate in the same group as the manager or trustee; (7) any director of any such body corporate; (8) any person exercising influence over any such body corporate: s 254(2). As to the meaning of 'body corporate' see PARA 86 note 11; as to the meaning of 'group' see PARA 351 note 37; and as to the meaning of 'director' see PARA 86 note 11.
12 Ie under the Financial Services and Markets Act 2000 s 254: see the text and notes 1–11.
13 As to warning notices see PARA 769.
14 Financial Services and Markets Act 2000 s 255(1).
15 As to decision notices see PARA 770.
16 Financial Services and Markets Act 2000 s 255(2). As to the Financial Services and Markets Tribunal see PARA 43 et seq.
17 Financial Services and Markets Act 2000 s 256(1).
18 Financial Services and Markets Act 2000 s 256(2).
19 Financial Services and Markets Act 2000 s 256(3).
20 Financial Services and Markets Act 2000 s 256(4).
21 Financial Services and Markets Act 2000 s 256(5).

(B) Trust Scheme Rules

614. Trust scheme rules. The Financial Services Authority[1] may make rules ('trust scheme rules') as to: (1) the constitution, management and operation of

authorised unit trust schemes[2]; (2) the powers, duties, rights and liabilities of the manager and trustee[3] of any such scheme; (3) the rights and duties of the participants[4] in any such scheme; and (4) the winding up of any such scheme[5]. Trust scheme rules may, in particular, make provision:

(a) as to the issue and redemption of the units[6] under the scheme[7];
(b) as to the expenses of the scheme and the means of meeting them[8];
(c) for the appointment, removal, powers and duties of an auditor for the scheme[9];
(d) for restricting or regulating the investment and borrowing powers exercisable in relation to the scheme[10];
(e) requiring the keeping of records with respect to the transactions and financial position of the scheme and for the inspection of those records[11];
(f) requiring the preparation of periodical reports with respect to the scheme and the provision of those reports to the participants and to the Authority[12]; and
(g) with respect to the amendment of the scheme[13].

Trust scheme rules may make provision as to the contents of the trust deed, including provision requiring any of the matters mentioned in heads (a) to (g) above to be dealt with in the deed[14]. However, trust scheme rules are binding on the manager, trustee and participants independently of the contents of the trust deed and, in the case of the participants, have effect as if contained in it[15].

If (i) a modification is made of the statutory provisions in force in Great Britain or Northern Ireland relating to companies[16]; (ii) the modification relates to the rights and duties of persons who hold the beneficial title to any shares in a company without also holding the legal title; and (iii) it appears to the Treasury[17] that, for the purpose of assimilating the law relating to authorised unit trust schemes to the law relating to companies as so modified, it is expedient to modify the rule-making powers conferred on the Authority[18], then the Treasury may by order make such modifications of those powers as it considers appropriate[19].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
2 As to the meaning of 'authorised unit trust scheme' see PARA 603.
3 As to the meaning of 'trustee' see PARA 606 note 16.
4 As to the meaning of 'participants' see PARA 603.
5 Financial Services and Markets Act 2000 ss 247(1), 417(1).
6 As to the meaning of 'units' see PARA 603.
7 Financial Services and Markets Act 2000 s 247(2)(a).
8 Financial Services and Markets Act 2000 s 247(2)(b).
9 Financial Services and Markets Act 2000 s 247(2)(c).
10 Financial Services and Markets Act 2000 s 247(2)(d).
11 Financial Services and Markets Act 2000 s 247(2)(e).
12 Financial Services and Markets Act 2000 s 247(2)(f).
13 Financial Services and Markets Act 2000 s 247(2)(g).
14 Financial Services and Markets Act 2000 s 247(3).
15 Financial Services and Markets Act 2000 s 247(4).
16 As to the statutory provisions relating to companies see generally COMPANIES.
17 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
18 Ie the powers conferred by the Financial Services and Markets Act 2000 s 247.
19 Financial Services and Markets Act 2000 s 247(5). As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1. See also the Financial Services Authority's Handbook of Rules and Guidance. As to the Handbook generally see PARA 22.

615. Scheme particulars rules. The Financial Services Authority[1] may make rules ('scheme particulars rules') requiring the manager of an authorised unit trust scheme[2]: (1) to submit scheme particulars[3] to the Authority; and (2) to publish scheme particulars or make them available to the public on request[4].

Scheme particulars rules may require the manager of an authorised unit trust scheme to submit, and to publish or make available, revised or further scheme particulars if there is a significant change affecting any matter which is contained in scheme particulars previously published or made available, and whose inclusion in those particulars was required by the rules[5]. Scheme particulars rules may require the manager of an authorised unit trust scheme to submit, and to publish or make available, revised or further scheme particulars if a significant new matter arises, and the inclusion of information in respect of that matter would have been required in previous particulars if it had arisen when those particulars were prepared[6].

Scheme particulars rules may provide for the payment, by the person or persons who in accordance with the rules are treated as responsible for any scheme particulars, of compensation to any qualifying person[7] who has suffered loss as a result of any untrue or misleading statement in the particulars, or the omission from them of any matter required by the rules to be included[8].

Scheme particulars rules do not affect any liability which any person may incur apart from the rules[9].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
2 As to the meaning of 'authorised unit trust scheme' see PARA 603.
3 'Scheme particulars' means particulars in such form, containing such information about the scheme and complying with such requirements, as are specified in scheme particulars rules: Financial Services and Markets Act 2000 s 248(2).
4 Financial Services and Markets Act 2000 ss 248(1), 417(1).
5 Financial Services and Markets Act 2000 s 248(3).
6 Financial Services and Markets Act 2000 s 248(4).
7 'Qualifying person' means a person who: (1) has become or agreed to become a participant in the scheme; or (2) although not being a participant, has a beneficial interest in units in the scheme: Financial Services and Markets Act 2000 s 248(6). As to the meaning of 'participants' see PARA 603. As to the meaning of 'units' see PARA 603.
8 Financial Services and Markets Act 2000 s 248(5).
9 Financial Services and Markets Act 2000 s 248(7).

616. Disqualification of auditor for breach of trust scheme rules. If it appears to the Financial Services Authority[1] that an auditor has failed to comply with a duty imposed on him by trust scheme rules[2], it may disqualify him from being the auditor for any authorised unit trust scheme[3] or authorised open-ended investment company[4].

1 As to the Financial Services Authority see PARAS 4, 6 et seq.
2 As to the trust scheme rules see PARA 614.
3 As to the meaning of 'authorised unit trust scheme' see PARA 603.
4 Financial Services and Markets Act 2000 s 249(1). As to the meaning of 'authorised open-ended investment company' see PARA 603. The provisions of s 345(2)–(5) (see PARA 767) have effect in relation to disqualification under s 249(1) as they have effect in relation to disqualification under s 345(1): s 249(2).

617. Modification or waiver of rules. The Financial Services Authority[1] may, on the application or with the consent of any person to whom any rules[2] apply, direct that all or any of the rules: (1) are not to apply to him as respects a

particular scheme; or (2) are to apply to him, as respects a particular scheme, with such modifications as may be specified in the direction[3]. The Authority may, on the application or with the consent of the manager and trustee[4] of a particular scheme acting jointly, direct that all or any of the rules: (a) are not to apply to the scheme; or (b) are to apply to the scheme with such modifications as may be specified in the direction[5].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebook, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
2 For these purposes, 'rules' means: (1) trust scheme rules (see PARA 614); or (2) scheme particulars rules (see PARA 615): Financial Services and Markets Act 2000 s 250(1).
3 Financial Services and Markets Act 2000 s 250(2). The provisions of s 148(3)–(9), (11) (modification or waiver of rules) (see PARA 23) have effect in relation to a direction under s 250(2) as they have effect in relation to a direction under s 148(2) but with modifications: see s 250(4) (amended by SI 2007/1973).
4 As to the meaning of 'trustee' see PARA 606 note 16.
5 Financial Services and Markets Act 2000 s 250(3). The provisions of s 148(3)–(9), (11) (see PARA 23) have effect in relation to a direction under s 250(3) as they have effect in relation to a direction under s 148(2) but with modifications: see s 250(5) (amended by SI 2007/1973).

(C) Powers of Intervention

618. Directions. The Financial Services Authority[1] may give a direction[2] if it appears to the Authority that[3]:

(1) one or more of the requirements for the making of an authorisation order[4] are no longer satisfied[5];
(2) the manager or trustee[6] of an authorised unit trust scheme[7] has contravened, or is likely to contravene, a requirement imposed on him by or under the Financial Services and Markets Act 2000[8];
(3) the manager or trustee of such a scheme has, in purported compliance with any such requirement, knowingly or recklessly given the Authority information which is false or misleading in a material particular[9]; or
(4) none of heads (1) to (3) above applies, but it is desirable to give a direction in order to protect the interests of participants[10] or potential participants in such a scheme[11].

A direction may: (a) require the manager of the scheme to cease the issue or redemption, or both the issue and redemption, of units[12] under the scheme; (b) require the manager and trustee of the scheme to wind it up[13].

If the authorisation order is revoked, the revocation does not affect any direction[14] which is then in force[15]. A direction may be given in relation to a scheme in the case of which the authorisation order has been revoked if a direction was already in force at the time of revocation[16].

The Authority may, either on its own initiative or on the application of the manager or trustee of the scheme concerned, revoke or vary a direction given under the above provisions if it appears to the Authority: (i) in the case of revocation, that it is no longer necessary for the direction to take effect or continue in force; (ii) in the case of variation, that the direction should take effect or continue in force in a different form[17].

If a person contravenes a direction, the statutory provisions relating to actions for damages[18] apply[19].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

2 Ie under the Financial Services and Markets Act 2000 s 257.
3 Financial Services and Markets Act 2000 s 257(1).
4 As to the meaning of 'authorisation order' see PARA 608 note 14.
5 Financial Services and Markets Act 2000 s 257(1)(a).
6 As to the meaning of 'trustee' see PARA 606 note 16.
7 As to the meaning of 'authorised unit trust scheme' see PARA 603.
8 Financial Services and Markets Act 2000 s 257(1)(b).
9 Financial Services and Markets Act 2000 s 257(1)(c).
10 As to the meaning of 'participants' see PARA 603.
11 Financial Services and Markets Act 2000 s 257(1)(d).
12 As to the meaning of 'units' see PARA 603.
13 Financial Services and Markets Act 2000 s 257(2).
14 Ie under the Financial Services and Markets Act 2000 s 257.
15 Financial Services and Markets Act 2000 s 257(3).
16 Financial Services and Markets Act 2000 s 257(4).
17 Financial Services and Markets Act 2000 s 257(6).
18 Ie the provisions of the Financial Services and Markets Act 2000 s 150: see PARA 33.
19 Financial Services and Markets Act 2000 s 257(5).

619. Procedure in relation to directions. A direction[1] takes effect: (1) immediately, if the notice given[2] states that that is the case; (2) on such date as may be specified in the notice; or (3) if no date is specified in the notice, when the matter to which it relates is no longer open to review[3]. A direction may be expressed to take effect immediately (or on a specified date) only if the Financial Services Authority[4], having regard to the ground on which it is exercising its power[5], considers that it is necessary for the direction to take effect immediately (or on that date)[6]. If the Authority proposes to give a direction[7], or gives such a direction with immediate effect, it must give separate written notice to the manager and the trustee[8] of the scheme concerned[9]. The notice must:

(a) give details of the direction[10];
(b) inform the person to whom it is given of when the direction takes effect[11];
(c) state the Authority's reasons for giving the direction and for its determination as to when the direction takes effect[12];
(d) inform the person to whom it is given that he may make representations to the Authority within such period as may be specified in it (whether or not he has referred the matter to the Financial Services and Markets Tribunal)[13]; and
(e) inform him of his right to refer the matter to the Tribunal[14].

If the direction imposes a requirement on the manager to cease the issue or redemption of units under the scheme[15], the notice must state that the requirement has effect until a specified date, or a further direction[16]. If the direction imposes a requirement to wind the scheme up[17], the scheme must be wound up by a date specified in the notice, or if no date is specified, as soon as practicable[18].

If, having considered any representations made by a person to whom the notice was given, the Authority decides to give the direction in the way proposed, or if it decides, where a direction has been given, not to revoke the direction, it must give separate written notice to the manager and the trustee of the scheme concerned[19]. If, having considered any representations made by a person to whom the notice was given, the Authority decides: (i) not to give the direction in the way proposed; (ii) to give the direction in a way other than that proposed; or (iii) to revoke a direction which has effect, it must give separate written notice to the manager and the trustee of the scheme concerned[20].

If a notice informs a person of his right to refer a matter to the Tribunal, it must give an indication of the procedure on such a reference[21].

The provisions described above apply to the variation of a direction on the Authority's own initiative as they apply to the giving of a direction[22].

If on an application for a direction to be revoked[23] or varied the Authority proposes to vary the direction otherwise than in accordance with the application, or to refuse to revoke or vary the direction, it must give the applicant a warning notice[24]. If the Authority decides to refuse to revoke or vary the direction, it must give the applicant a decision notice[25]; and the applicant may refer the matter to the Tribunal[26].

If the Authority decides on its own initiative to revoke a direction[27], it must give separate written notices of its decision to the manager and trustee of the scheme[28]. If on an application for a direction to be revoked or varied[29] the Authority decides to revoke the direction or vary it in accordance with the application, it must give the applicant written notice of its decision[30]. The notice[31] must specify the date on which the decision takes effect[32]. The Authority may publish such information about the revocation or variation in such way as it considers appropriate[33].

1 Ie a direction under the Financial Services and Markets Act 2000 s 257: see PARA 618.
2 Ie the notice given under the Financial Services and Markets Act 2000 s 259(3): see the text to notes 7–9.
3 Financial Services and Markets Act 2000 s 259(1). For the purposes of head (3) in the text, whether a matter is open to review is to be determined in accordance with s 391(8) (see PARA 774): s 259(14).
4 As to the Financial Services Authority see PARAS 4, 6 et seq.
5 Ie under the Financial Services and Markets Act 2000 s 257: see PARA 618.
6 Financial Services and Markets Act 2000 s 259(2).
7 Ie under the Financial Services and Markets Act 2000 s 257: see PARA 618.
8 As to the meaning of 'trustee' see PARA 606 note 16.
9 Financial Services and Markets Act 2000 s 259(3).
10 Financial Services and Markets Act 2000 s 259(4)(a).
11 Financial Services and Markets Act 2000 s 259(4)(b).
12 Financial Services and Markets Act 2000 s 259(4)(c).
13 Financial Services and Markets Act 2000 s 259(4)(d). The Authority may extend the period allowed under the notice for making representations: s 259(7). As to the Financial Services and Markets Tribunal see PARA 43 et seq.
14 Financial Services and Markets Act 2000 s 259(4)(e).
15 Ie a requirement under the Financial Services and Markets Act 2000 s 257(2)(a): see PARA 618 head (a).
16 Financial Services and Markets Act 2000 s 259(5).
17 Ie a requirement under the Financial Services and Markets Act 2000 s 257(2)(b): see PARA 618 head (b).
18 Financial Services and Markets Act 2000 s 259(6).
19 Financial Services and Markets Act 2000 s 259(8). A notice given under s 259(8) must inform the person to whom it is given of his right to refer the matter to the Tribunal: s 259(10).
20 Financial Services and Markets Act 2000 s 259(9). A notice under head (ii) in the text must comply with s 259(4) (see heads (a)–(e) in the text): s 259(11).
21 Financial Services and Markets Act 2000 s 259(12).
22 Financial Services and Markets Act 2000 s 259(13).
23 Ie under the Financial Services and Markets Act 2000 s 257(6): see PARA 618.
24 Financial Services and Markets Act 2000 s 260(1). As to warning notices see PARA 769.
25 As to decision notices see PARA 770.
26 Financial Services and Markets Act 2000 s 260(2).
27 Ie under the Financial Services and Markets Act 2000 s 257: see PARA 618.
28 Financial Services and Markets Act 2000 s 261(1).
29 Ie under the Financial Services and Markets Act 2000 s 257(6): see PARA 618.
30 Financial Services and Markets Act 2000 s 261(2).
31 Ie under the Financial Services and Markets Act 2000 s 261.

32 Financial Services and Markets Act 2000 s 261(3).
33 Financial Services and Markets Act 2000 s 261(4).

620. Applications to the court. Where the Financial Services Authority[1] is empowered to give a direction[2], it may also apply to the High Court for an order: (1) removing the manager or the trustee[3], or both the manager and the trustee, of the scheme; and (2) replacing the person or persons removed with a suitable person or persons nominated by the Authority[4]. If it appears to the Authority that there is no person it can nominate for the purposes of head (2) above, it may apply to the court for an order: (a) removing the manager or the trustee, or both the manager and the trustee, of the scheme; and (b) appointing an authorised person[5] to wind up the scheme[6]. On such an application the court may make such order as it thinks fit[7]. The Authority must give written notice of the making of an application to the manager and trustee of the scheme concerned[8].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
2 Ie under the Financial Services and Markets Act 2000 s 257: see PARA 618.
3 As to the meaning of 'trustee' see PARA 606 note 16.
4 Financial Services and Markets Act 2000 s 258(1), (7). The Authority may nominate a person for the purposes of head (2) in the text only if it is satisfied that, if the order was made, the requirements of s 243(4)–(7) (see PARA 608) would be complied with: s 258(2). See further note 6.
5 As to authorised persons see PARA 314.
6 Financial Services and Markets Act 2000 s 258(3). The court may, on the application of the Authority, rescind any such order as is mentioned in s 258(3) and substitute such an order as is mentioned in s 258(1): s 258(5).
7 Financial Services and Markets Act 2000 s 258(4).
8 Financial Services and Markets Act 2000 s 258(6).

D. OPEN-ENDED INVESTMENT COMPANIES

(A) Introduction

621. Treasury power. Part XVIII Chapter IV of the Financial Services and Markets Act 2000 relates to open-ended investment companies[1].

The Treasury[2] may by regulations make provision for: (1) facilitating the carrying on of collective investment by means of open-ended investment companies[3]; (2) regulating such companies[4].

The regulations may in particular make provision:

(a) for the incorporation and registration in Great Britain of bodies corporate[5];
(b) for a body incorporated by virtue of the regulations to take such form as may be determined in accordance with the regulations[6];
(c) as to the purposes for which such a body may exist, the investments which it may issue and otherwise as to its constitution[7];
(d) as to the management and operation of such a body and the management of its property[8];
(e) as to the powers, duties, rights and liabilities of such a body and of other persons, including the directors or sole director of such a body[9], its depositary (if any)[10], its shareholders and persons who hold the beneficial title to shares in it without holding the legal title[11], its auditor[12], and any persons who act or purport to act on its behalf[13];

(f) as to the merger of one or more such bodies and the division of such a body[14];
(g) for the appointment and removal of an auditor for such a body[15];
(h) as to the winding up and dissolution of such a body[16];
(i) for such a body, or any director or depositary of such a body, to be required to comply with directions by the Financial Services Authority[17];
(j) enabling the Authority to apply to a court for an order removing and replacing any director or depositary of such a body[18];
(k) for the carrying out of investigations by persons appointed by the Authority or the Secretary of State[19];
(l) corresponding to any provision made in relation to unit trust schemes[20].

Regulations may also:
(i) impose criminal liability[21];
(ii) confer functions on the Authority[22];
(iii) in the case of a provision made by virtue of head (l) above, authorise the making of rules[23] by the Authority[24];
(iv) confer jurisdiction on any court or on the Financial Services and Markets Tribunal[25];
(v) provide for fees to be charged by the Authority in connection with the carrying out of any of its functions under the regulations (including fees payable on a periodical basis)[26];
(vi) modify, exclude or apply (with or without modifications) any primary or subordinate legislation (including any provision of, or made under the Financial Services and Markets Act 2000)[27];
(vii) make consequential amendments, repeals and revocations of any such legislation[28];
(viii) modify or exclude any rule of law[29].

No regulations are to be made under the provisions described above unless a draft of the regulations has been laid before Parliament and approved by a resolution of each House[30].

In exercise of the power to make regulations the Treasury has made the Open-Ended Investment Companies Regulations 2001[31].

1 As to the meaning of 'open-ended investment company' see PARA 603. See also PARA 623 note 3.
2 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
3 Financial Services and Markets Act 2000 s 262(1)(a). In exercise of the power under s 262(1), the Treasury has made the Open-Ended Investment Companies Regulations 2001, SI 2001/1228: see the text and note 31; and PARA 623 et seq. As to regulations made under the Financial Services and Markets Act 2000 see PARA 67 note 1.
4 Financial Services and Markets Act 2000 s 262(1)(b). See note 3.
5 Financial Services and Markets Act 2000 s 262(2)(a). As to the meaning of 'body corporate' see PARA 86 note 11. As to the meaning of 'Great Britain' see PARA 2 note 3.
6 Financial Services and Markets Act 2000 s 262(2)(b).
7 Financial Services and Markets Act 2000 s 262(2)(c).
8 Financial Services and Markets Act 2000 s 262(2)(d).
9 Financial Services and Markets Act 2000 s 262(2)(e)(i). As to directors see PARA 639.
10 Financial Services and Markets Act 2000 s 262(2)(e)(ii). As to the meaning of 'depositary' see PARA 626.
11 Financial Services and Markets Act 2000 s 262(2)(e)(iii).
12 Financial Services and Markets Act 2000 s 262(2)(e)(iv).
13 Financial Services and Markets Act 2000 s 262(2)(e)(v).
14 Financial Services and Markets Act 2000 s 262(2)(f).
15 Financial Services and Markets Act 2000 s 262(2)(g).
16 Financial Services and Markets Act 2000 s 262(2)(h).

17 Financial Services and Markets Act 2000 s 262(2)(i). As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
18 Financial Services and Markets Act 2000 s 262(2)(j).
19 Financial Services and Markets Act 2000 s 262(2)(k). As to the Secretary of State see PARA 3.
20 Financial Services and Markets Act 2000 s 262(2)(l). The provisions referred to in the text are those of Pt XVII Ch III (ss 242–261): see PARA 608 et seq.
21 Financial Services and Markets Act 2000 s 262(3)(a).
22 Financial Services and Markets Act 2000 s 262(3)(b).
23 As to the meaning of 'rule' see PARA 23 note 2.
24 Financial Services and Markets Act 2000 s 262(3)(c).
25 Financial Services and Markets Act 2000 s 262(3)(d). As to the Financial Services and Markets Tribunal see PARAS 43 et seq.
26 Financial Services and Markets Act 2000 s 262(3)(e).
27 Financial Services and Markets Act 2000 s 262(3)(f). The provision that may be made by virtue of s 262(3)(f) includes provision extending or adapting any power to make subordinate legislation: s 262(4).
28 Financial Services and Markets Act 2000 s 262(3)(g). Regulations under s 262 may, in particular revoke the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996, SI 1996/2827 (Financial Services and Markets Act 2000 s 262(5)(a)), and provide for things done under or in accordance with those regulations to be treated as if they had been done under or in accordance with regulations under the Financial Services and Markets Act 2000 s 262 (s 262(5)(b)). The Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996, SI 1996/2827, have been revoked (see the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 85(1)); and anything done under or in accordance with the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996, SI 1996/2827, has effect as if done under or in accordance with the Open-Ended Investment Companies Regulations 2001, SI 2001/1228 (see reg 85(2)). Without prejudice to the generality of reg 85(2), the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, provide that:
    (1) a body incorporated by virtue of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996, SI 1996/2827, reg 3(1) (revoked) is to be treated as if it had been incorporated by virtue of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 3(1) (see PARA 623) (reg 85(3)(a));
    (2) where an application under the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996, SI 1996/2827, reg 7 (revoked) had not been determined by the Authority at the time when the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 85 came into force, it is to be treated as if it were an application made under reg 12 (see PARA 627) (reg 85(3)(b));
    (3) the Authority's registration functions under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Pt IV (regs 71–79) (see PARAS 668–670) apply to any documents or records delivered to the appropriate registrar pursuant to the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996, SI 1996/2827, reg 4 and Sch 1 (revoked) (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 85(3)(c)).
29 Financial Services and Markets Act 2000 s 262(3)(h).
30 Financial Services and Markets Act 2000 s 429(2).
31 See the Open-Ended Investment Companies Regulations 2001, SI 2001/1228; note 3; and PARA 622 et seq.

Certain provisions of the Financial Services and Markets Act 2000 apply in relation to notices given under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228:
    (1) the Financial Services and Markets Act 2000 s 387 (warning notices) (see PARA 769) applies to a warning notice given under any provision of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, in the same way as it applies to a warning notice given under any provision of the Financial Services and Markets Act 2000 (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 8(a));
    (2) the Financial Services and Markets Act 2000 s 388 (decision notices) (see PARA 770) applies to a decision notice given under any provision of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, in the same way as it applies to a decision notice given under any provision of the Financial Services and Markets Act 2000 (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 8(b));
    (3) the Financial Services and Markets Act 2000 s 389 (notices of discontinuance) (see

PARA 771) applies to the discontinuance of the action proposed in a warning notice or the action to which a decision notice relates given under any provision of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, in the same way as it applies to a warning notice or decision notice given under any provision of the Financial Services and Markets Act 2000 (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 8(c));

(4) the Financial Services and Markets Act 2000 s 390 (final notices) (see PARA 772) applies to a decision notice given under any provision of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, in the same way as it applies to a decision notice given under any provision of the Financial Services and Markets Act 2000 (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 8(d));

(5) the Financial Services and Markets Act 2000 s 391 (publication) (see PARA 774) applies to the notices mentioned in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 8 in the same way as it applies to any notice given under any provision of the Financial Services and Markets Act 2000 (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 9);

(6) the Financial Services and Markets Act 2000 s 395 (procedures of the Financial Services Authority) (see PARAS 773, 777) applies to the procedure relating to the Authority's functions in relation to supervisory notices, warning notices and decision notices given under any provision of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228 (reg 10).

The Financial Services and Markets Act 2000 s 133 (which makes general provision in relation to proceedings: see PARA 46), applies to any reference to the Financial Services and Markets Tribunal under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228 as it applies to any reference to the Tribunal under the Financial Services and Markets Act 2000: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 11. As to the Financial Services and Markets Tribunal see PARA 43 et seq.

622. Rules made by the Financial Services Authority. The powers of the Financial Services Authority[1] to make rules under the Financial Services and Markets Act 2000 in relation to authorised unit trust schemes[2] are, subject to the provisions of the Open-Ended Investment Companies Regulations 2001[3], exercisable in relation to open-ended investment companies[4] for like purposes, and subject to the same conditions[5].

The Authority may, on the application or with the consent of any person to whom any FSA rules[6] apply, direct that all or any of the FSA rules: (1) are not to apply to him as respects a particular open-ended investment company[7]; or (2) are to apply to him as respects such a company with such modifications as may be specified in the direction[8].

On the application or with the consent of an open-ended investment company and its depositary[9] acting jointly, the Authority may direct that all or any of the FSA rules: (a) are not to apply to the company[10]; or (b) are to apply to the company with such modifications as may be specified in the direction[11].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

2 Ie under the Financial Services and Markets Act 2000 s 247 (trust scheme rules) (see PARA 614) and s 248 (scheme particulars rules) (see PARA 615).

3 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.

4 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 6(1). In the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, any document which a person is required to submit and publish by virtue of rules made by the Authority under reg 6(1) for like purposes to those in the Financial Services and Markets Act 2000 s 248 (see PARA 615) is referred to as a prospectus, and 'prospectus' means such a document: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, regs 2(1), 6(2).

6 'FSA rules' means any rules made by the Authority under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 6(1): reg 2(1).

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 7(1)(a).

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 7(1)(b). In accordance with reg 7(3), the Financial Services and Markets Act 2000 s 148(3)–(9), (11) (modification or waiver of rules) (see PARA 23) has effect in relation to a direction under reg 7(1) as it has effect in relation to a direction under s 148(2) (see PARA 23) but with modifications: see the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 7(3) (amended by SI 2007/1973).
9 As to the meaning of 'depositary' see PARA 626.
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 7(2)(a).
11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 7(2)(b). In accordance with reg 7(4), the Financial Services and Markets Act 2000 s 148(3)–(9), (11) (modification or waiver of rules) (see PARA 23) has effect in relation to a direction under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 7(2) as it has effect in relation to a direction under the Financial Services and Markets Act 2000 s 148(2) but with modifications: see the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 7(4) (amended by SI 2007/1973).

(B) Formation, Supervision and Control

(a) In general

623. Incorporation and registration. If the Financial Services Authority[1] makes an authorisation order[2] then, immediately upon the coming into effect of the order, the body to which the authorisation order relates is to be incorporated as an open-ended investment company[3] (notwithstanding that, at the point of such incorporation, the body will not have any shareholders or property)[4]. The name of an open-ended investment company is the name mentioned in the authorisation order made in respect of the company or, if it changes its name in accordance with the Open-Ended Investment Companies Regulations 2001[5] and FSA rules[6], its new name[7].

Upon making an authorisation order, the Authority must forthwith register:

(1) the instrument of incorporation of the company[8];
(2) a statement of the address of the company's head office[9];
(3) a statement, with respect to each person named in the application for authorisation as director of the company, of the required particulars[10]; and
(4) a statement of the corporate name and registered or principal office of the person named in the application for authorisation as the depositary[11] of the company[12].

If an open-ended investment company which complies with the conditions necessary to enable it to enjoy the rights conferred by the UCITS Directive[13] so requests, the Authority may issue a certificate to the effect that the company complies with those conditions[14]. Such a certificate may be issued on the making of an authorisation order in respect of the company or at any subsequent time[15].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
2 'Authorisation order' means an order made by the Authority under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14 (see PARA 628): reg 2(1).
3 For the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, 'open-ended investment company' means a body incorporated by virtue of reg 3(1) or a body treated as if it had been so incorporated by virtue of reg 85(3)(a) (see PARA 621 note 28): reg 2(1). See also PARA 603.

As to the characterisation of an entity as an 'open-ended investment company' see *Seymour v Caroline Ockwell & Co* [2005] EWHC 1137, [2005] All ER (D) 297 (Jun).
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 3(1).
5 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.

6 As to the meaning of 'FSA rules' see PARA 622 note 6.
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 3(2).
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 4(1)(a). Any reference in reg 4 to 'the instrument of incorporation of a company' is a reference to the instrument of incorporation supplied for the purposes of reg 14(1)(c) (see PARA 628): reg 4(2).
9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 4(1)(b).
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 4(1)(c). The particulars referred to in the text are those required by reg 13: see PARA 627.
11 As to the meaning of 'depositary' see PARA 626.
12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 4(1)(d).
13 Ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities.
14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 17(1) (amended by SI 2003/2066).
15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 17(2).

624. Instruments of incorporation. The Open-Ended Investment Companies Regulations 2001[1] make provision with respect to the contents, alteration and binding nature of the instrument of incorporation of an open-ended investment company[2].

The instrument of incorporation of an open-ended investment company must contain the following statements[3]:

(1) the head office of the company is situated in England, Wales or Scotland (as the case may be)[4];
(2) the company is an open-ended investment company with variable share capital[5];
(3) the shareholders[6] are not liable for the debts of the company[7];
(4) the scheme property[8] is entrusted to a depositary[9] for safekeeping (subject to any exceptions permitted by FSA rules)[10]; and
(5) charges or expenses of the company may be taken out of the scheme property[11].

The instrument of incorporation must contain provision as to the following matters[12]:

(a) the object of the company[13];
(b) any matter relating to the procedure for the appointment, retirement and removal of any director of the company for which provision is not made in the Open-Ended Investment Companies Regulations 2001[14] or FSA rules[15]; and
(c) the currency in which the accounts of the company are to be prepared[16].

The instrument of incorporation must also contain provision as to the following matters[17]:

(i) the name of the company[18];
(ii) the category, as specified in FSA rules, to which the company belongs[19];
(iii) the maximum and minimum sizes of the company's capital[20];
(iv) in the case of an umbrella company[21], the investment objectives applicable to each part of the scheme property that is pooled separately[22];
(v) the classes of shares that the company may issue indicating, in the case of an umbrella company, which class or classes of shares may be issued in respect of each part of the scheme property that is pooled separately[23];
(vi) the rights attaching to shares of each class (including any provision for the expression in two denominations of such rights)[24];

(vii) if the company is to be able to issue bearer shares, a statement to that effect together with details of any limitations on the classes of the company's shares which are to include bearer shares[25];

(viii) in the case of a company which is a participating issuer, a statement to that effect together with an indication of any class of shares in the company which is a class of participating securities[26];

(ix) if the company is to dispense with the requirements relating to share certificates[27], the details of any substituted procedures for evidencing title to the company's shares[28]; and

(x) the form, custody and use of the company's common seal (if any)[29].

Once an authorisation order has been made in respect of a company, no amendment may be made to the statements contained in the company's instrument of incorporation which are required as set out in heads (1)–(5) above[30]. Subject to this and to any restriction imposed by FSA rules, a company may amend any provision which is contained in its instrument of incorporation[31]. No amendment to a provision which is contained in a company's instrument of incorporation by virtue of heads (a)–(c) above[32] may be made unless it has been approved by the shareholders of the company in general meeting[33].

The provisions of a company's instrument of incorporation are binding on the officers[34] and depositary of the company and on each of its shareholders; and all such persons (but no others) are to be taken to have notice of the provisions of the instrument[35].

1 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2.

2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(8). As to the meaning of 'open-ended investment company' see PARA 623 note 3.

3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 1(a).

4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 2(a).

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 2(b).

6 In the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, any reference to a shareholder of an open-ended investment company is a reference to the person who holds the share certificate, or other documentary evidence of title relating to that share mentioned in reg 48 (see PARA 653) (reg 2(2)(a)) and the person whose name is entered on the company's register of shareholders in relation to any share other than a bearer share (reg 2(2)(b)). As to the meaning of 'register of shareholders' see PARA 626 note 22. As to the meaning of 'bearer shares' see PARA 626 note 24. As to bearer shares see also PARA 653.

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 2(c).

8 As to the meaning of 'scheme property' see PARA 626 note 1.

9 As to the meaning of 'depositary' see PARA 626.

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 2(c). As to the meaning of 'FSA rules' see PARA 622 note 6.

11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 2(d).

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 paras 1(b), 3(1).

13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 3(1)(a). The provision as to the object of an open-ended investment company must state clearly the kind of property in which the company is to invest and must state that the object of the company is to invest in property of that kind with the aim of spreading investment risk and giving its shareholders the benefit of the results of the management of that property: Sch 2 para 3(2).

14 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.

15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 3(1)(b).

16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 3(1)(c).

17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 paras 1(b), 4(1).

18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 4(1)(a).

19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 4(1)(b).

20 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 4(1)(c). The size at any time of a company's capital is to be taken to be the value at that time, as determined in accordance with FSA rules, of the scheme property of the company less the liabilities of the company: Sch 2 para 4(2).

21 'Umbrella company' means an open-ended investment company whose instrument of incorporation provides for such pooling as is mentioned in the Financial Services and Markets Act 2000 s 235(3)(a) (collective investment schemes) (see PARA 603) in relation to separate parts of the scheme property and whose shareholders are entitled to exchange rights in one part for rights in another: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 2(1).

22 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 4(1)(d).

23 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 4(1)(e).

24 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 4(1)(f).

25 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 4(1)(g).

26 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 4(1)(h).

27 Ie the requirements of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46: see PARA 652.

28 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 4(1)(i).

29 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 4(1)(j).

30 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 5(1).

31 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 5(2).

32 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 3(1).

33 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 5(3).

34 As to the meaning of 'officer' see PARA 626 note 17.

35 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 6(1). A person is not debarred from obtaining damages or other compensation from a company by reason only of his holding or having held shares in the company: Sch 2 para 6(2).

625. Registrar's approval of names. Where, in respect of a proposed open-ended investment company[1], it appears to the Financial Services Authority[2] that certain requirements for authorisation[3] are or will be met, the Authority must notify the appropriate registrar[4] of the name by which it is proposed that the company should be incorporated[5].

Every open-ended investment company must obtain the Authority's approval to any proposed change in the name by which the company is incorporated and the Authority must notify the appropriate registrar of the proposed name[6]. If it appears to the appropriate registrar that the provisions in heads (1)–(3) below are not contravened in relation to the proposed name, he must notify the Authority to that effect[7].

No open-ended investment company is to have a name that:

(1) includes any of the following words or expressions: (a) limited, unlimited or public limited company, or their Welsh equivalents ('cyfyngedig', 'anghyfyngedig' and 'cwmni cyfyngedig cyhoeddus' respectively)[8]; or (b) European Economic Interest Grouping or any equivalent[9];

(2) includes an abbreviation of any of the words or expressions referred to in head (1)(a) above[10]; or

(3) is the same as any other name appearing in the registrar's index of company names[11].

Upon making an authorisation order in respect of an open-ended investment company or upon approving any change in the name of such a company, the Authority must notify the appropriate registrar of the name by which the company is incorporated or, as the case may be, of the company's new name[12].

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

3 Ie the requirements of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(1)(a)–(c): see PARA 628.

4 As to the meaning of 'appropriate registrar' see PARA 628 note 10.

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 18(1).

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 18(2).

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 18(3).

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 19(1)(a)(i).

9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 19(1)(a)(ii). The reference in the text is to any equivalent as set out in the European Economic Interest Grouping Regulations 1989, SI 1989/638, Sch 3: see COMPANIES vol 7(1) (2004 Reissue) PARA 314.

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 19(1)(b).

11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 19(1)(c). The Companies Act 1985 s 714 (prospectively repealed) (registrar's index of company and corporate names) (see COMPANIES vol 7(1) (2004 Reissue) PARA 279) (as to replacement provisions see the Companies Act 2006 s 1099) has effect as if the bodies listed in the Companies Act 1985 s 714(1) included open-ended investment companies in respect of which an authorisation order has come into effect (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 20(2)(a)) and collective investment schemes which are open-ended investment companies and which have a head office situated in Northern Ireland (reg 20(2)(b)).

In determining for the purposes of reg 19(1)(c) whether one name is the same as another, there are to be disregarded:

(1) the definite article, where it is the first word of the name (reg 19(2)(a));

(2) the following word and expressions where they appear at the end of the name: (a) 'company' or its Welsh equivalent ('cwmni'); (b) 'and company' or its Welsh equivalent ('a'r cwmni'); (c) 'company limited' or its Welsh equivalent ('cwmni cyfyngedig'); (d) 'limited' or its Welsh equivalent ('cyfyngedig'); (e) 'unlimited' or its Welsh equivalent ('anghyfyngedig'); (f) 'public limited company' or its Welsh equivalent ('cwmni cyfyngedig cyhoeddus'); (g) 'European Economic Interest Grouping' or any equivalent set out in European Economic Interest Grouping Regulations 1989, SI 1989/638, Sch 3; (h) 'investment company with variable capital' or its Welsh equivalent ('cwmni buddsoddi â chyfalaf newidiol'); (i) 'open-ended investment company' or its Welsh equivalent ('cwmni buddsoddiant penagored') (reg 19(2)(b));

(3) abbreviations of any of those words or expressions where they appear at the end of the name (reg 19(2)(c)); and

(4) type and case of letters, accents, spaces between letters and punctuation marks (reg 19(2)(d)),

and 'and' and '&' are to be taken as the same (reg 19(2)).

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 20(1).

626. Depositaries and safekeeping of property. All the scheme property[1] of an open-ended investment company[2] must be entrusted for safekeeping to a person appointed for the purpose (the 'depositary')[3]. However, nothing in that requirement:

(1) applies to any scheme property designated[4] by FSA rules[5];

(2) prevents a depositary from entrusting to a third party all or some of the assets in its safekeeping[6] or, in such a case, authorising the third party to entrust all or some of those assets to other specified persons[7].

On the coming into effect of an authorisation order[8] in respect of an open-ended investment company, the person named in the authorisation application[9] as depositary of the company is deemed to be appointed as its first depositary[10]. Any subsequent appointment of the depositary of a company must be made by the directors of the company[11].

Except upon the appointment of a new depositary, the depositary of a company may not retire voluntarily[12].

The depositary of a company has the following rights:

(a) to receive all such notices of, and other communications relating to, any general meeting of the company as a shareholder of the company is entitled to receive[13];

(b) to attend any general meeting of the company[14];

(c) to be heard at any general meeting which it attends on any part of the business of the meeting which concerns it as depositary[15];

(d) to convene a general meeting of the company when it sees fit[16];

(e) to require from the company's officers[17] such information and explanations as it thinks necessary for the performance of its functions as depositary[18]; and

(f) to have access, except in so far as they concern its appointment or removal, to any reports, statements or other papers which are to be considered at any meeting held by the directors of the company (when acting in their capacity as such), at any general meeting of the company or at any meeting of holders of shares of any particular class[19].

Where the depositary of a company ceases, for any reason other than by virtue of a court order[20], to hold office, it may deposit at the head office of the company a statement of any circumstances connected with its ceasing to hold office which it considers should be brought to the attention of the shareholders or creditors of the company or, if it considers that there are no such circumstances, a statement that there are none[21]. If such a statement is of circumstances which the depositary considers should be brought to the attention of the shareholders or creditors of the company, the company must, not later than 14 days after the deposit of the statement, either:

(i) send a copy of the statement to each of the shareholders whose name appears on the register of shareholders[22] (other than the designated person) and take such steps as FSA rules[23] may require for the purpose of bringing the fact that the statement has been made to the attention of the holders of any bearer shares[24]; or

(ii) apply to the court[25].

Where an application is made under head (ii) above, the company must notify the depositary[26]. Unless the depositary receives notice of such application to the court before the end of the period of 21 days beginning with the day on which it deposited the statement, it must, not later than seven days after the end of that period, send a copy of the statement to the Financial Services Authority[27].

If the court is satisfied that the depositary is using the statement to secure needless publicity for defamatory matter it must direct that copies of the statement need not be sent out and that the steps required by FSA rules need not be taken[28]. It may also order the company's costs on the application to be paid in whole or in part by the depositary notwithstanding that the depositary is not a party to the application[29]. The company must, not later than 14 days after the court's decision, take such steps in relation to a statement setting out the effect of the order as are required in head (i) above in relation to the statement deposited[30].

If the court is not so satisfied, the company must, not later than 14 days after the court's decision, take the steps required by head (i) above and notify the depositary of the court's decision[31]. The depositary must, not later than seven days after receiving such a notice, send a copy of the statement to the Authority[32].

The depositary who made the statement has, notwithstanding that it has ceased to hold office, the rights set out in heads (a) to (c) above[33] in relation to the general meeting of the company next following the date on which the copies were sent out[34].

1 'Scheme property', in relation to an open-ended investment company, means the property subject to the collective investment scheme constituted by the company: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 2(1). As to the meaning of 'collective investment scheme' see PARA 603.
2 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, regs 2(1), 5(1).
4 Ie designated for the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 5.
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 5(2)(a). As to the meaning of 'FSA rules' see PARA 622 note 6. See also the Financial Services Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22. As to the Financial Services Authority see PARAS 4, 6 et seq.
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 5(2)(b)(i).
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 5(2)(b)(ii).
8 As to the meaning of 'authorisation order' see PARA 623 note 2. As to authorisation orders see PARA 628.
9 Ie the application under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12: see PARA 627.
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 1.
11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 2. This is subject to reg 21 (see PARA 631) and reg 26 (see PARA 635).
12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 3.
13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 4(a).
14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 4(b).
15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 4(c). The reference in the text to business concerning the depositary as depositary is to be construed in relation to a depositary who has ceased to hold office as a reference to business concerning it as former depositary: Sch 1 para 6(3).
16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 4(d).
17 'Officer', in relation to an open-ended investment company, includes a director or any secretary or manager: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 2(1).
18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 4(e).
19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 4(f).
20 Ie a court order under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26: see PARA 635. 'Court', in relation to any proceedings under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, involving an open-ended investment company the head office of which is situated (1) in England and Wales, means the High Court; and (2) in Scotland, means the Court of Session: reg 2(1).
21 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 5(1).
22 'Register of shareholders' means the register kept under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 1(1) (see PARA 654): reg 2(1), Sch 3 para 1(1).
23 As to the meaning of 'FSA rules' see PARA 622 note 6.
24 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 5(2)(a). An open-ended investment company may, if its instrument of incorporation so provides, issue shares evidenced by a share certificate, or by any other documentary evidence of title for which provision is made in its instrument of incorporation, which indicates that the holder of the document is entitled to the shares specified in it (reg 48(a)) and that no entry will be made on the register of shareholders identifying the holder of those shares (reg 48(b)). 'Bearer shares' means such shares: regs 2(1), 48.
25 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 5(2)(b).
26 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 5(2).
27 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 5(3).
28 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 5(4)(a).
29 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 5(4)(b).

30 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 5(4). The statement referred to in the text is the one deposited under Sch 1 para 5(1): see the text to note 21.
31 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 5(5). Where a notice of appeal is filed not later than 14 days after the court's decision, any reference to that decision in Sch 1 paras 5(4) (see the text and notes 28–30) and Sch 1 para 5(5) is to be construed as a reference to the final determination or withdrawal of that appeal, as the case may be: Sch 1 para 5(7).
32 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 5(6).
33 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 4(a)–(c).
34 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 6(1), (2).

(b) Authorisation

627. Applications for authorisation. Any application for an authorisation order[1] in respect of a proposed open-ended investment company[2]:

(1) must be made in such manner as the Financial Services Authority[3] may direct[4];
(2) must state the required particulars with respect to each person proposed in the application as a director of the company[5];
(3) must state the corporate name and registered or principal office of the person proposed in the application as depositary[6] of the company[7]; and
(4) must contain or be accompanied by such other information as the Authority may reasonably require for the purpose of determining the application[8].

An application for an authorisation order must contain the following particulars with respect to each person proposed as a director of the company:

(a) in the case of an individual, his present name[9], any former name[10], his usual residential address, his nationality, his business occupation (if any), particulars of any other directorships[11] held by him or which have been held by him and his date of birth[12];
(b) in the case of a body corporate or Scottish firm, its corporate or firm name and the address of its registered or principal office[13].

At any time after receiving an application and before determining it the Authority may require the applicant to furnish additional information[14].

A person commits an offence if, for the purposes of or in connection with any application for authorisation[15] or in purported compliance with any requirement imposed on him[16], he furnishes information which he knows to be false or misleading in a material particular or recklessly furnishes information which is false or misleading in a material particular[17].

1 As to authorisation orders see PARA 628.
2 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebook, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12(1)(a).
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12(1)(b).
6 As to the meaning of 'depositary' see PARA 626.
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12(1)(c).
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12(1)(d).
9 'Name' means a person's Christian name (or other forename) and surname, except that in the case of a peer, or an individual usually known by a title, the title may be stated instead of his Christian name (or other forename) and surname or in addition to either or both of them: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 13(4)(a).
10 The reference to a former name does not include:

(1) in the case of a peer, or an individual normally known by a British title, the name by which he was known previous to the adoption of or succession to the title (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 13(4)(b)(i));
(2) in the case of any person, a former name which was changed or disused before he attained the age of 18 years or which has been changed or disused for 20 years or more (reg 13(4)(b)(ii)); or
(3) in the case of a married woman, the name by which she was known previous to the marriage (reg 13(4)(b)(iii)).

11 The reference in the text to directorships is a reference to directorships in any body corporate whether or not incorporated in Great Britain: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 13(4)(c). As to the meaning of 'Great Britain' see PARA 2 note 3.

The application need not contain particulars of a directorship:
(1) which has not been held by a director at any time during the five years preceding the date on which the application is delivered to the Authority (reg 13(2)(a));
(2) which is held by a director in a body corporate which is dormant and, if he also held that directorship for any period during those five years, which was dormant for the whole of that period (reg 13(2)(b)); or
(3) which was held by a director for any period during those five years in a body corporate which was dormant for the whole of that period (reg 13(2)(c)).

A body corporate is dormant during a period in which no significant transaction occurs, and it ceases to be dormant on the occurrence of such a transaction: reg 13(3). The reference to a significant transaction in reg 13(3) is, in relation to a company within the meaning of the Companies Act 1985 s 735(1) (prospectively repealed) (see COMPANIES) (as to replacement provisions see the Companies Act 2006 ss 1, 1171), a reference to a significant accounting transaction within the meaning of the Companies Act 2006 s 1169(2), other than a transaction to which s 1169(3) applies (see COMPANIES): Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 13(5) (amended by SI 2008/948).

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 13(1)(a).

13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 13(1)(b).

14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12(2). Different directions may be given and different requirements imposed in relation to different applications: reg 12(3). Any information to be furnished to the Authority under reg 12 must be in such form or verified in such manner as it may specify: reg 12(4).

15 Ie any application under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12.

16 Ie imposed by or under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12.

17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12(5). A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both (reg 12(6)(a)); and is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding the statutory maximum or to both (reg 12(6)(b)). As to the statutory maximum see PARA 56 note 24.

628. Authorisation orders. Where an application is duly made[1], the Financial Services Authority[2] may make an authorisation order in respect of an open-ended investment company[3] if:

(1) it is satisfied that the company will, on the coming into effect of the authorisation order, comply with the requirements for authorisation[4];
(2) it is satisfied that the company will, at that time, comply with the requirements of FSA rules[5];
(3) it has been provided with a copy of the proposed company's instrument of incorporation[6] and a certificate signed by a solicitor to the effect that the instrument of incorporation complies with the Open-Ended Investment Companies Regulations 2001[7] and with such of the requirements of FSA rules as relate to the contents of that instrument of incorporation[8]; and
(4) it has received a notification[9] from the appropriate registrar[10].

If the Authority makes an authorisation order[11], it must give written notice of the order to the applicant[12].

An application must be determined by the Authority before the end of the period of six months beginning with the date on which it receives a completed application[13]. The Authority may determine an incomplete application if it considers it appropriate to do so and, if it does so, it must determine the application within the period of 12 months beginning with the date on which it first receives the application[14].

The applicant may withdraw his application, by giving the Authority written notice, at any time before the Authority determines it[15].

An authorisation order must specify the date on which it is to come into effect[16].

1 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12: see PARA 627.
2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes(COLL); Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.
3 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(1)(a). As to the requirements for authorisation see reg 15; and PARA 629.
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(1)(b). As to the meaning of 'FSA rules' see PARA 622 note 6.
6 As to the instrument of incorporation see PARA 624.
7 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2: see PARA 624.
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(1)(c).
9 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 18(3): see PARA 625.
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(1)(d). 'Appropriate registrar' means: (1) the registrar of companies for England and Wales if the company's instrument of incorporation states that its head office is to be situated in England or Wales; (2) the registrar of companies for Scotland if the company's instrument of incorporation states that its head office is to be situated in Scotland: reg 2(1).
11 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(1).
12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(2).
13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(4).
14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(5).
15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(6).
16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(7).

629. Requirements for authorisation. There are several requirements under the Open-Ended Investment Companies Regulations 2001[1] in regard to authorisation[2]. The company and its instrument of incorporation[3] must comply with the requirements of the Open-Ended Investment Companies Regulations 2001 and FSA rules[4].

The head office of the company must be situated in England, Wales, or Scotland[5]. The company must have at least one director[6]. The directors of the company must be fit and proper persons to act as such[7]. If the company has only one director, that director must be a body corporate which is an authorised person[8] and which has permission under the Financial Services and Markets Act 2000[9] to act as sole director of an open-ended investment company[10]. If the company has two or more directors, the combination of their experience and expertise must be such as is appropriate for the purposes of carrying on the business of the company[11]. The person appointed as the depositary[12] of the company:

(1) must be a body corporate incorporated in the United Kingdom[13] or another EEA state[14];
(2) must have a place of business in the United Kingdom[15];
(3) must have its affairs administered in the country in which it is incorporated[16];
(4) must be an authorised person[17];
(5) must have permission under Part IV of the Financial Services and Markets Act 2000 to act as the depositary of an open-ended investment company[18]; and
(6) must be independent of the company and of the persons appointed as directors of the company[19].

The name of the company must not be undesirable or misleading[20], and the aims of the company must be reasonably capable of being achieved[21].

The company must meet one or both of the following requirements:

(a) shareholders[22] are entitled to have their shares redeemed or repurchased upon request at a price related to the net value of the scheme property[23] and determined in accordance with the company's instrument of incorporation and FSA rules[24]; or
(b) shareholders are entitled to sell their shares on an investment exchange at a price not significantly different from that mentioned in head (a)[25].

1 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.
2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, regs 14(1)(a), 15(1). See also PARA 628.
3 As to instruments of incorporation see PARA 624.
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(2). As to the meaning of 'FSA rules' see PARA 622 note 6.
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(3).
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(4).
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(5). In determining whether the requirement referred to in reg 15(5) is satisfied in respect of any proposed director of a company, the Financial Services Authority may take into account:
   (1) any matter relating to any person who is or will be employed by or associated with the proposed director, for the purposes of the business of the company (reg 14(3)(a));
   (2) if the proposed director is a body corporate, any matter relating to any director or controller of the body, to any other body corporate in the same group, or to any director or controller of any such other body corporate (reg 14(3)(b));
   (3) if the proposed director is a partnership, any matter relating to any of the partners (reg 14(3)(c)); and
   (4) if the proposed director is an unincorporated association, any matter relating to any member of the governing body of the association or any officer or controller of the association (reg 14(3)(d)).

   As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL); Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.
8 As to authorised persons see PARA 314.
9 As to permission under the Financial Services and Markets Act 2000 Pt IV (ss 40–55) see PARA 348 et seq.
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(6) (amended by SI 2003/2066).
11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(7).
12 As to the meaning of 'depositary' see PARA 626.
13 As to the meaning of 'United Kingdom' see PARA 2 note 3.
14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(8)(a).
15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(8)(b).
16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(8)(c).
17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(8)(d).

18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(8)(e).
19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(8)(f).
20 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(9). As to company names see PARA 625.
21 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(10).
22 As to shareholders see PARA 624 note 6.
23 As to the meaning of 'scheme property' see PARA 626 note 1.
24 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(11)(a).
25 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(11)(b).

630. Refusal of authorisation. If the Financial Services Authority[1] proposes to refuse an application for authorisation[2], it must give the applicant a warning notice[3]. If the Authority decides to refuse the application it must give the applicant a decision notice[4] and the applicant may refer the matter to the Financial Services and Markets Tribunal[5].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes Sourcebook (COLL); Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.
2 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12: see PARA 628.
3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 16(1). As to the application of relevant provisions of the Financial Services and Markets Act 2000 in relation to notices see PARA 621 note 31.
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 16(2)(a).
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 16(2)(b). As to the application of relevant provisions of the Financial Services and Markets Act 2000 in relation to references to the Financial and Services and Markets Tribunal see PARA 621 note 31. As to the Financial Services and Markets Tribunal see PARA 43 et seq.

631. Approval of the Financial Services Authority required for certain changes. An open-ended investment company[1] must give written notice to the Financial Services Authority[2] of:

(1) any proposed alteration to the company's instrument of incorporation[3];
(2) any proposed alteration to the company's prospectus[4] which, if made, would be significant[5];
(3) any proposed reconstruction or amalgamation involving the company[6];
(4) any proposal to wind up the affairs of the company otherwise than by the court[7];
(5) any proposal to replace a director of the company, to appoint any additional director, or to decrease the number of directors in post[8]; and
(6) any proposal to replace the depositary[9] of the company[10].

Any proposal falling within heads (1) to (6) above may not be give effect unless: (a) the Authority, by written notice, has given its approval to the proposal[11]; or (b) one month, beginning with the date on which notice of the proposal was given, has expired without the company or the depositary having received from the Authority a warning notice[12] in respect of the proposal[13].

If the Financial Services Authority proposes to refuse approval of a proposal to replace the depositary or any director of an open-ended investment company, it must give a warning notice[14] to the company[15]. If the Authority proposes to refuse approval of any other proposal[16], it must give separate warning notices to the company and its depositary[17]. In order to be valid, the warning notice must be received by that person before the end of one month beginning with the date on which notice of the proposal was given[18].

If, having given a warning notice to a person, the Authority decides to refuse approval, it must give him a decision notice[19]; and he may refer the matter to the Financial Services and Markets Tribunal[20]. If, having given a warning notice to a person, the Authority decides to approve the proposal, it must give him a written notice[21].

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes Sourcebook (COLL); Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.
3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 21(1)(a). Any notice given under reg 21(1)(a) must be accompanied by a certificate signed by a solicitor to the effect that the change in question will not affect the compliance of the instrument of incorporation with Sch 2 (see PARA 624) and with such of the requirements of FSA rules as relate to the contents of that instrument: reg 21(2). As to the meaning of 'FSA rules' see PARA 622 note 6.
4 As to the meaning of 'prospectus' see PARA 622 note 5.
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 21(1)(b).
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 21(1)(c).
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 21(1)(d).
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 21(1)(e). No change falling within reg 21(1)(e) may be made if any of the requirements set out in reg 15(4)–(7), (8)(f) (see PARA 629) would not be satisfied if the change were made: reg 21(4).
9 As to the meaning of 'depositary' see PARA 626.
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 21(1)(f). No change falling within reg 21(1)(f) may be made if any of the requirements in reg 15(8) (see PARA 629) would not be satisfied if the change were made: reg 21(4).
11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 21(3)(a).
12 Ie a warning notice under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 22.
13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 21(3)(b).
14 As to notices generally see PARA 621.
15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 22(1).
16 Ie any other proposal falling within the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 21.
17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 22(2).
18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 22(3).
19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 22(4)(a).
20 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 22(4)(b). As to the Financial Services and Markets Tribunal see PARA 43 et seq.
21 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 22(5) (amended by SI 2005/923).

632. Revocation. The Financial Services Authority[1] may revoke an authorisation order[2] if it appears to it that:

(1) any requirement for the making of the order is no longer satisfied[3];
(2) the company, any of its directors or its depositary[4] has contravened any relevant provision[5] or has, in purported compliance with any such provision, knowingly or recklessly given the Authority information which is false or misleading in a material particular[6];
(3) no regulated activity has been carried on in relation to the company for the previous 12 months[7]; or
(4) it is desirable to revoke the authorisation order in order to protect the interests of shareholders[8] or potential shareholders in the company[9].

For the purposes of head (4) above, the Authority may take into account any matter relating to:

(a) the company or its depositary[10];
(b) any director or controller of the depositary[11];

(c) any person employed by or associated, for the purposes of the business of the company, with the company or its depositary[12];
(d) any director of the company[13];
(e) any person exercising influence over any director of the company or its depositary[14];
(f) any body corporate in the same group as any director of the company or its depositary[15];
(g) any director of any such body corporate[16];
(h) any person exercising influence over any such body corporate[17];
(i) any person who would be such a person as is mentioned in the 'fit and proper person' requirement[18] were it to apply to a director as it applies to a proposed director[19].

Before revoking any authorisation order that has come into effect, the Authority must ensure that such steps as are necessary and appropriate to secure the winding up of the company (whether by the court[20] or otherwise) have been taken[21].

If the Authority proposes to make an order revoking an authorisation order (a 'revoking order'), it must give separate warning notices[22] to the company and its depositary[23]. If, having given warning notices, the Authority decides to make a revoking order it must without delay give the company and its depositary a decision notice[24] and either of them may refer the matter to the Financial Services and Markets Tribunal[25].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes Sourcebook (COLL); Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.
2 As to the meaning of 'authorisation order' see PARA 623 note 2. As to authorisation orders see PARA 628.
3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(1)(a).
4 As to the meaning of 'depositary' see PARA 626.
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(1)(b)(i).
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(1)(b)(ii).
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(1)(c).
8 As to shareholders see PARA 624 note 9.
9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(1)(d).
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(2)(a).
11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(2)(b).
12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(2)(c).
13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(2)(d).
14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(2)(e).
15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(2)(f).
16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(2)(g).
17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(2)(h).
18 Ie in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(3)(a)–(d): see PARA 629 note 7.
19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(2)(i).
20 As to the meaning of 'court' see PARA 626 note 20.
21 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(3).
22 The Financial Services and Markets Act 2000 s 393 (see PARA 775) and s 394 (see PARA 776) apply to a warning notice given under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 24: reg 24(3).
23 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 24(1). As to the meaning of 'depositary' see PARA 626.
24 The Financial Services and Markets Act 2000 s 393 (see PARA 775) and s 394 (see PARA 776) apply to a decision notice given under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 24: reg 24(3).

25 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 24(2). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

(c) Powers of Intervention

633. Directions. The Financial Services Authority[1] may give a direction[2] if it appears to it that:

(1) one or more requirements for the making of an authorisation order[3] are no longer satisfied[4];

(2) the company, any of its directors or its depositary[5] has contravened or is likely to contravene any relevant provision[6], or has, in purported compliance with any such provision, knowingly or recklessly given the Authority information which is false or misleading in a material particular[7]; or

(3) it is desirable to give a direction in order to protect the interests of shareholders or potential shareholders in the company[8].

A direction[9] may:

(a) require the company to cease the issue or redemption, or both the issue and redemption, of shares or any class of shares in the company[10];

(b) in the case of a director of the company who is the designated person[11], require that director to cease transfers to or from, or both to and from, his own holding of shares, or of any class of shares, in the company[12];

(c) in the case of an umbrella company[13], require that investments made in respect of one or more parts of the scheme property[14] which are pooled separately be realised and, following the discharge of such liabilities of the company as are attributable to the relevant part or parts of the scheme property, that the resulting funds be distributed to shareholders[15] in accordance with FSA rules[16];

(d) require any director of the company to present a petition to the court[17] to wind up the company[18]; or

(e) require that the affairs of the company be wound up otherwise than by the court[19].

If the authorisation order is revoked, the revocation does not affect the operation of any direction[20] which is then in force; and a direction may be given in relation to a company in the case of which an authorisation order has been revoked if such a direction was already in force at the time of revocation[21]. However, where a winding-up order has been made by the court, no such direction is to have effect in relation to the company concerned[22].

If a person contravenes a direction[23], the provision of the Financial Services and Markets Act 2000 relating to actions for damages[24] applies to that contravention[25].

The Authority may, on its own initiative or on the application of the company or its depositary, revoke or vary a direction[26] if it appears to the Authority, in the case of revocation, that it is no longer necessary for the direction to take effect or continue in force[27], and, in the case of variation, that the direction should take effect or continue in force in a different form[28].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL); Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

2 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25.

3 As to the meaning of 'authorisation order' see PARA 623 note 2. As to authorisation orders see PARA 628.
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(1)(a).
5 As to the meaning of 'depositary' see PARA 626.
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(1)(b)(i). 'Relevant provision' means any requirement imposed by or under the Financial Services and Markets Act 2000: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 2(1).
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(1)(b)(ii).
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(1)(c). For the purposes of reg 25(1)(c), the Authority may take into account any matter relating to any of the persons mentioned in reg 23(2) (see PARA 632): reg 25(5).
9 Ie a direction under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25.
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(2)(a).
11 'Designated person' means the person designated in the company's instrument of incorporation for the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 4 (see PARA 656): reg 2(1).
12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(2)(b).
13 As to the meaning of 'umbrella company' see PARA 624 note 21.
14 As to the meaning of 'scheme property' see PARA 626 note 1.
15 As to shareholders see PARA 624 note 6.
16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(2)(c). As to the meaning of 'FSA rules' see PARA 622 note 6.
17 As to the meaning of 'court' see PARA 626 note 20.
18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(2)(d).
19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(2)(e).
20 Ie any direction under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25.
21 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(3).
22 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(4).
23 Ie a direction under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25.
24 Ie the Financial Services and Markets Act 2000 s 150: see PARA 33.
25 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(6).
26 Ie a direction given under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25.
27 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(7)(a).
28 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(7)(b).

634. Procedure in regard to directions. A direction[1] takes effect: (1) immediately, if the notice[2] states that that is the case[3]; (2) on such date as may be specified in the notice[4]; or (3) if no date is specified in the notice, when the matter to which it relates is no longer open to review[5].

A direction may be expressed to take effect immediately (or on a specified date) only if the Financial Services Authority[6], having regard to the ground on which it is exercising its power[7], considers that it is necessary for the direction to take effect immediately (or on that date)[8].

If the Authority proposes to give a direction[9], or gives such a direction with immediate effect, it must give separate written notices to the company and its depositary[10]. The notice must:

(a) give details of the direction[11];
(b) inform the person to whom it is given of when the direction takes effect[12];
(c) state the Authority's reasons for giving the direction and for its determination as to when the direction takes effect[13];
(d) inform the person to whom it is given that he may make representations

to the Authority within such period as may be specified in it (whether or not he has referred the matter to the Financial Services and Markets Tribunal)[14]; and

(e) inform him of his right to refer the matter to the Tribunal[15].

If the direction imposes certain specific requirements in regard to the cessation of share issues and transfers[16], the notice must state that the requirement has effect until either a specified date, or a further direction[17].

If the direction imposes certain specific requirements in regard to the winding up of the company[18], the petition must be presented (or, as the case may be, the company must be wound up) either by a date specified in the notice, or (if no date is specified) as soon as possible[19].

The Authority may extend the period allowed under the notice for making representations[20].

If, having considered any representations made by a person to whom the notice was given, the Authority decides to give the direction in the way proposed[21] or if it decides, where a direction has been given, not to revoke the direction[22], the Authority must give separate written notices to the company and its depositary[23].

If, having considered any representations made by a person to whom the notice was given, the Authority decides not to give the direction in the way proposed[24], to give the direction in a way other than that proposed[25], or to revoke a direction which has effect[26], then it must give separate written notices to the company and its depositary[27]. If a notice informs a person of his right to refer a matter to the Tribunal[28], it must give an indication of the procedure on such a reference[29].

The provisions described above[30] apply to the variation of a direction on the Authority's own initiative as they apply to the giving of a direction[31].

If on an application[32] for a direction[33] to be revoked or varied the Authority proposes to vary the direction otherwise than in accordance with the application[34] or to refuse to revoke or vary the direction[35], it must give the applicant a warning notice[36]. If the Authority decides to refuse to revoke or vary the direction, it must give the applicant a decision notice[37] and the applicant may refer the matter to the Tribunal[38]. If the Authority decides on its own initiative to revoke a direction[39], it must give separate written notices of its decision to the company and its depositary[40]. If, on an application[41] for a direction to be revoked or varied, the Authority decides to revoke or vary it in accordance with the application, it must give the applicant written notice of its decision[42]. The notice[43] must specify the date on which the decision takes effect[44].

The Authority may publish such information about the revocation or variation in such way as it considers appropriate[45].

1 Ie a direction under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25: see PARA 633.

2 Ie the notice under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(3): see the text to note 10.

3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(1)(a).

4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(1)(b).

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(1)(c). For the purposes of reg 27(1)(c), whether a matter is open to review is to be determined in accordance with the Financial Services and Markets Act 2000 s 391(8) (see PARA 774): Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(14).

6 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL); Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.
7 Ie its power under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25: see PARA 633.
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(2).
9 Ie a direction under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25: see PARA 633.
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(3). The Financial Services and Markets Act 2000 s 395 (the Authority's procedures) (see PARAS 773, 777) has effect as if s 395(13) included a reference to a notice given in accordance with the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(3): reg 27(15).
11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(4)(a).
12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(4)(b).
13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(4)(c).
14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(4)(d). As to the Financial Services and Markets Tribunal see PARA 43 et seq.
15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(4)(e).
16 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(2)(a) or (b): see PARA 633.
17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(5).
18 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(2)(d) or (e): see PARA 633.
19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(6).
20 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(7).
21 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(8)(a).
22 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(8)(b).
23 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(8). A notice given under reg 27(8) must inform the person to whom it is given of his right to refer the matter to the Tribunal: reg 27(10). The Financial Services and Markets Act 2000 s 395 (the Authority's procedures) (see PARAS 773, 777) has effect as if s 395(13) included a reference to a notice given in accordance with the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(8): reg 27(15).
24 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(9)(a).
25 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(9)(b). A notice under reg 27(9)(b) must comply with reg 27(4) (see heads (a)–(e) in the text): reg 27(11). The Financial Services and Markets Act 2000 s 395 (the Authority's procedures) (see PARAS 773, 777) has effect as if s 395(13) included a reference to a notice given in accordance with the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(9)(b): reg 27(15).
26 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(9)(c).
27 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(9).
28 Eg as in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(4)(e) (see the text to note 15), reg 27(10) (see note 23) and reg 27(11) (see note 25).
29 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(12).
30 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27.
31 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(13).
32 Ie an application under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(7): see PARA 633.
33 As to directions see PARA 633.
34 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 28(1)(a).
35 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 28(1)(b).
36 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 28(1). As to notices see PARA 621.
37 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 28(2)(a).
38 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 28(2)(b).
39 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25: see PARA 633.
40 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 29(1). As to the meaning of 'depositary' see PARA 626.
41 See note 32.
42 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 29(2).
43 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 29.

44 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 29(3).

45 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 29(4).

635. Applications to the High Court. In situations where the Financial Services Authority[1] could give a direction[2] in relation to an open-ended investment company[3], it may apply to the High Court for an order removing the depositary[4] or any director of the company and replacing any such person with a person or persons nominated by the Authority[5].

If it appears to the Authority that there is no person whom it may nominate for the above purposes[6], it may apply to the court for an order removing the director in question or the depositary (or both) and appointing an authorised person[7] to wind up the company[8]. On such an application[9] the court may make such order as it thinks fit[10].

The Authority must:

(1) give written notice of the making of an application[11] to the company[12], its depositary[13] and, where the application seeks the removal of any director of the company, that director[14]; and

(2) take such steps as it considers appropriate for bringing the making of the application to the attention of the shareholders of the company[15].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL); Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

2 Ie a direction under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25: see PARA 633.

3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26(1). As to the meaning of 'open-ended investment company' see PARA 623 note 3.

4 As to the meaning of 'depositary' see PARA 626.

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26(2). The Authority may nominate a person for the purposes of reg 26(2) only if it is satisfied that, if the order were made, the requirements of reg 15(4)–(7) (see PARA 629) or, as the case may be, of reg 15(8) (see PARA 629) would be met: reg 26(3).

6 Ie for the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26(2).

7 As to authorised persons see PARA 314.

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26(4). The court may, on the application of the Authority, rescind any such order as is mentioned in reg 26(4) and substitute such an order as is mentioned in reg 26(2) (see the text to note 5): reg 26(6).

9 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26.

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26(5).

11 Ie an application under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26.

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26(7)(a)(i).

13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26(7)(a)(ii).

14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26(7)(a)(iii).

15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26(7)(b).

(d) Winding Up and Dissolution

636. Winding up by the court. Where an open-ended investment company[1] is wound up as an unregistered company under Part V of the Insolvency Act 1986[2], the provisions of that Act apply for the purposes of the winding up with a number of modifications[3].

Where a petition for the winding up of an open-ended investment company is presented by a person other than the Financial Services Authority[4]: (1) that person must serve a copy of the petition on the Authority[5]; and (2) the Authority is entitled to be heard on the petition[6].

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

2 Ie the Insolvency Act 1986 Pt V (ss 220–229).

3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 31(1). The modifications are as follows:

(1) a petition for the winding up of an open-ended investment company may be presented by the depositary of the company as well as by any person authorised under the Insolvency Act 1986 s 124 (application for winding up) (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 450 et seq) or s 124A (petition for winding up on grounds of public interest) (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 444), as those provisions apply by virtue of Pt V, to present a petition for the winding up of the company (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 31(2));

(2) if, before the presentation of a petition for the winding up by the court of an open-ended investment company as an unregistered company under the Insolvency Act 1986 Pt V, the affairs of the company are being wound up otherwise than by the court:

(a) s 129(2) (commencement of winding up by the court) (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 489) is not to apply (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 31(4)(a)); and

(b) any winding up of the company by the court is to be deemed to have commenced at the time at which the Authority gave its approval to a proposal mentioned in reg 21(1)(d) (see PARA 631), or in a case falling within reg 21(3)(b) (see PARA 631), on the day following the end of the one-month period mentioned in reg 21(3)(b) (reg 31(4)(b)).

As to the meaning of 'depositary' see PARA 626.

4 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 31(3)(a).

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 31(3)(b).

637. Dissolution on winding up by the court. The provisions in Part V of the Insolvency Act 1986[1] in regard to the winding up of unregistered companies on the final meeting of creditors and vacation of office by the liquidator[2] have effect, in relation to open-ended investment companies[3], as if the reference to the registrar of companies was a reference to the Financial Services Authority[4].

Where, in respect of an open-ended investment company, the Authority receives:

(1) a notice given for the purposes of the final meeting of creditors and vacation of office by the liquidator as described above[5]; or

(2) a notice from the official receiver that the winding up, by the court, of the company is complete[6],

the Authority must, on receipt of the notice, forthwith register it and[7], at the end of the period of three months beginning with the day of the registration of the notice, the company is to be dissolved[8]. The Secretary of State[9] may, on the application of the official receiver or any other person who appears to the Secretary of State to be interested, give a direction deferring the date at which the dissolution of the company is to take effect for such period as the Secretary of State thinks fit[10]. An appeal to the court lies from any decision of the Secretary of State on such an application for a direction[11].

It is the duty of the person:

(a) on whose application such a direction[12] is given[13];
(b) in whose favour an appeal with respect to an application for such a direction is determined[14]; or
(c) on whose application an order for deferral is made where the winding-up order was made by the court in Scotland[15],

not later than seven days after the giving of the direction, the determination of the appeal or the making of the order, to deliver to the Authority for registration a copy of the direction or determination or, in respect of an order under head (c) above, a certified copy of the interlocutor[16]. If a person without reasonable excuse fails to fulfil this duty to deliver a copy[17], he is guilty of an offence[18].

1 Ie the Insolvency Act 1986 Pt V (ss 220–229): see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 1146 et seq.
2 Ie the Insolvency Act 1986 s 172(8): see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 618.
3 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(1).
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(2)(a). The notice referred to in the text is a notice given for the purposes of the Insolvency Act 1986 s 172(8).
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(2)(b).
7 Ie subject to the provisions of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32.
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(2).
9 As to the Secretary of State see PARA 3.
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(3). Regulation 32(3) does not apply to a case where the winding-up order was made by the Court of Session in Scotland, but in such a case the court may, on an application by any person appearing to the court to have an interest, order that the date at which the dissolution of the company is to take effect be deferred for such period as the court thinks fit: reg 32(5).
11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(4). The direction referred to in the text is a direction under reg 32(3): see the text and note 10.
12 Ie a direction under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(3).
13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(6)(a).
14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(6)(b).
15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(6)(c). As to the order for deferral see note 10.
16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(6).
17 Ie as required by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(6): see the text and note 16.
18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(7). A person guilty of such an offence is liable on summary conviction: (1) to a fine not exceeding level 1 on the standard scale (reg 32(8)(a)); and (2) on a second or subsequent conviction, instead of to the penalty set out in head (1) above, to a fine of £100 for each day on which the contravention is continued (reg 32(8)(b)). As to the standard scale see PARA 27 note 21.

638. Dissolution in other circumstances. Where the affairs of an open-ended investment company[1] have been wound up otherwise than by the court, the Financial Services Authority[2] must, as soon as is reasonably practicable after the winding up is complete, register that fact and[3], at the end of the period of three months beginning with the day of the registration, the company is to be dissolved[4].

The court may, on the application of the Authority or the company, make an order deferring the date at which the dissolution of the company is to take effect for such period as the court thinks fit[5]. It is the duty of the company, on whose application such an order of the court[6] is made, to deliver to the Authority, not later than seven days after the making of the order, a copy of the order for registration[7].

Where any company, the head office of which is situated in England or Wales, is dissolved[8], any sum of money (including unclaimed distributions) standing to the account of the company at the date of the dissolution must, on such date as is determined in accordance with FSA rules[9], be paid into court[10].

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
3 Ie subject to the provisions of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 33.
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 33(1).
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 33(2).
6 Ie an order under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 33(2): see the text and note 5.
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 33(3).
8 Ie by virtue of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 33(1): see the text and note 4.
9 As to the meaning of 'FSA rules' see PARA 622 note 6.
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 33(4).
Where any company, the head office of which is situated in Scotland, is dissolved, any sum of money (including unclaimed dividends and unapplied or undistributable balances) standing to the account of the company at the date of the dissolution must, on such date as is determined in accordance with FSA rules, be lodged in an appropriate bank or institution as defined in the Bankruptcy (Scotland) Act 1985 s 73(1) in the name of the Accountant of the Court (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 33(5)(a)) and thereafter be treated as if it were a sum of money lodged in such an account by virtue of the Insolvency Act 1986 s 193 (unclaimed dividends (Scotland)) as that provision applies by virtue of Pt V (ss 220–229) (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 33(5)(b)).

(C) Corporate Code

(a) Administrative Provisions

639. Directors. On the coming into effect of an authorisation order[1] in respect of an open-ended investment company[2], the persons proposed in the application for authorisation[3] as directors of the company are deemed to be appointed as its first directors[4]. Any subsequent appointment as a director of a company must be made by the company in general meeting, except that the directors of the company may appoint a person to act as director to fill any vacancy until such time as the next annual general meeting of the company takes place or, if the company does not hold annual general meetings, the directors of the company may appoint a person to act as director[5].

Any act of a director is valid notwithstanding any defect that may thereafter be discovered in his appointment or qualifications[6] or that it is afterwards discovered that his appointment had terminated by virtue of any provision contained in FSA rules[7] which required a director to retire upon attaining a specified age[8].

The business of a company must be managed: (1) where a company has only one director, by that director[9]; or (2) where a company has more than one director, by the directors but subject to any provision contained in FSA rules as to the allocation between the directors of responsibilities for the management of the company (including any provision there may be as to the allocation of such responsibility to one or more directors to the exclusion of others)[10].

Subject to the provisions of the Open-Ended Investment Companies Regulations 2001[11], FSA rules and the company's instrument of incorporation, the directors of a company may exercise all the powers of the company[12].

The matters to which a director of an open-ended investment company must have regard in the performance of his functions include the interests of the company's employees in general, as well as the interests of its shareholders[13]. This duty[14] on a director is owed by him to the company (and the company alone) and is enforceable in the same way as any other fiduciary duty owed to a company by its directors[15].

1 As to the meaning of 'authorisation order' see PARA 623 note 2. As to authorisation orders see PARA 628.
2 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
3 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12: see PARA 627.
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 34(1).
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 34(2) (substituted by SI 2005/923). The Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 34(2) is subject to reg 21 (see PARA 631) and reg 26 (see PARA 635).

The directors of an open-ended investment company must, on a members' requisition, forthwith proceed duly to convene an extraordinary general meeting of the company and this applies notwithstanding anything in the company's instrument of incorporation: reg 34A(1) (reg 34A added by SI 2005/923). A members' requisition is a requisition (1) by members of the company holding at the date of the deposit of the requisition not less than one-tenth of such of the paid-up capital of the company as at that date carries the right of voting at general meetings of the company; and (2) which states as the object of the meeting the removal of one or more directors appointed in accordance with the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 34(2) and which must be signed by the requisitionists and deposited at the registered office of the company: reg 34A(2) (as so added). As to instruments of incorporation see PARA 624.

A company may by ordinary resolution at an extraordinary general meeting convened in accordance with reg 34A(1) remove any director or directors appointed in accordance with reg 34(2): reg 34A(3) (as so added). Regulation 34A is not to be treated as depriving a person removed under it of compensation or damages payable to him in respect of the termination of his appointment as director or as derogating from any power to remove a director which exists apart from that provision: reg 34A(4) (as so added).

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 34(3)(a).
7 As to the meaning of 'FSA rules' see PARA 622 note 6.
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 34(3)(b).
9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 34(4)(a).
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 34(4)(b).
11 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.
12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 34(5).
13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 35(1). As to shareholders see PARA 624 note 6.
14 Ie the duty imposed by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 35.
15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 35(2). See COMPANIES vol 7(2) (2004 Reissue) PARA 1084.

640. Inspection of directors' service contracts. Every open-ended investment company[1] must keep at an appropriate place[2]: (1) in the case of each director whose contract of service with the company is in writing, a copy of that contract[3]; and (2) in the case of each director whose contract of service with the company is not in writing, a written memorandum setting out its terms[4].

All copies and memoranda kept by a company in accordance with heads (1) and (2) above must be kept at the same place[5]. Every copy and memorandum required by heads (1) and (2) above to be kept must be open to the inspection of any shareholder[6] of the company[7]. If such an inspection is refused, the High

Court may by order compel an immediate inspection of the copy or memorandum concerned[8]. Every copy and memorandum required to be kept by heads (1) and (2) above must be made available, for inspection, by the company at the company's annual general meeting[9] or, if the company does not hold annual general meetings, sent to any shareholder at his request within ten days of the company's receipt of such request by the company for inspection by any shareholder at the company's annual general meeting[10].

The requirements in heads (1) and (2) above apply to a variation of a director's contract of service as they apply to the contract[11].

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
2 Appropriate places are the company's head office (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 36(3)(a)), the place where the company's register of shareholders is kept (reg 36(3)(b)) and, where the designated person is a director of the company and is a body corporate, the registered or principal office of that person (reg 36(3)(c)).
3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 36(1)(a).
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 36(1)(b).
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 36(2).
6 As to shareholders see PARA 624 note 6.
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 36(4).
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 36(5).
9 As to the meaning of 'annual general meeting' see PARA 641 note 2.
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 36(6) (substituted by SI 2005/923).
11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 36(7).

641. General meetings. Every open-ended investment company[1] incorporated before 6 April 2005 must in each year hold a general meeting (the 'annual general meeting')[2] in addition to any other meetings, whether general or otherwise, it may hold in that year[3]. However, if a company holds its first annual general meeting within 18 months of the date on which the authorisation order made by the Financial Services Authority[4] in respect of the company comes into effect, the company is not required[5] to hold any other meeting as its annual general meeting in the year of its incorporation or in the following year[6]. In addition, the directors of an open-ended investment company may elect to dispense with the holding of an annual general meeting by giving 60 days' written notice to all the company's shareholders[7].

Subject to the above[8], not more than 15 months may elapse between the date of one annual general meeting of a company and the date of the next[9].

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
2 'Annual general meeting' means such a meeting: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, regs 2(1), 37(1).
3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 37(1) (amended by SI 2005/923). The Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 37(1) is subject to regs 37(2) and 37A.
4 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
5 Ie by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 37(1) (see the text and note 3).
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 37(2).
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 37A(1) (reg 37A added by SI 2005/923). Such an election has effect for the year in which it is made and subsequent years, but does not affect any liability already incurred by reason of default in holding an annual general meeting: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 37A(2) (as so added).
8 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, regs 37(2), 37A.

9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 37(3). The Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 37(3) is subject to regs 37(2) and 37A.

642. Name and particulars to be mentioned in documents. Every open-ended investment company[1] must have its name mentioned in legible characters in all letters of the company and in all other documents issued by the company in the course of business[2].

If an officer[3] of a company or a person on the company's behalf signs or authorises to be signed on behalf of the company any cheque or order for money or goods in which the company's name is not mentioned as required above[4], he is personally liable to the holder of the cheque or order for money or goods for the amount of it (unless it is duly paid by the company)[5].

Every open-ended investment company must have the following particulars mentioned in legible characters in all letters of the company and in all other documents issued by the company in the course of business:

(1) the company's place of registration[6];
(2) the number with which it is registered[7];
(3) the address of its head office[8]; and
(4) the fact that it is an investment company with variable capital[9].

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 54(1).
3 As to the meaning of 'officer' see PARA 626 note 17.
4 Ie by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 54(1) (see the text and note 2).
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 54(2).
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 55(1)(a).
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 55(1)(b). Where, in accordance with reg 72 (see PARA 668), the Financial Services Authority makes any change of existing registered numbers in respect of any open-ended investment company then, for a period of three years beginning with the date on which the notification of the change is sent to the company by the Authority, the requirement of reg 55(1)(b) is, notwithstanding reg 72(4), satisfied by the use of either the old number or the new: reg 55(2). As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 55(1)(c).
9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 55(1)(d).

643. Power and capacity of company, etc. An open-ended investment company[1] has power to do all such things as are incidental or conducive to the carrying on of its business[2].

The validity of an act done by an open-ended investment company cannot be called into question on the ground of lack of capacity by reason of anything in the Open-Ended Investment Companies Regulations 2001[3], FSA rules[4] or the company's instrument of incorporation[5]. However, this does not affect the duty of the directors to observe any limitation on their powers[6].

In favour of a person dealing in good faith: (1) the power of the directors of an open-ended investment company (whether or not acting as a board) to bind the company, or authorise others to do so[7]; and (2) the power of such a company in general meeting to bind the company, or authorise others to do so[8], are deemed to be free of any limitation under the company's constitution[9]. This does not affect any liability incurred by the directors or any other person by reason of the directors exceeding their powers[10].

A party to a transaction with an open-ended investment company is not bound to inquire:

(a) as to whether the transaction is permitted by the Open-Ended Investment Companies Regulations 2001[11], FSA rules or the company's instrument of incorporation[12]; or

(b) as to any limitation on the powers referred to in head (1) or head (2) above[13].

A person is not to be taken to have notice of any matter merely because of its being disclosed in any document made available by an open-ended investment company for inspection; but this does not affect the question whether a person is affected by notice of any matter by reason of a failure to make such inquiries as ought reasonably to be made[14].

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 53.
3 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.
4 As to the meaning of 'FSA rules' see PARA 622 note 6.
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 38(1). As to instruments of incorporation see PARA 624.
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 38(2).
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 39(1)(a).
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 39(1)(b).
9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 39(1). The reference in reg 39(1) to any limitation under the company's constitution on the powers therein set out includes any limitation deriving from the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, from FSA rules or from a resolution of the company in general meeting or of a meeting of any class of shareholders: reg 39(3). As to general meetings see PARA 641; and as to shareholders see PARA 624 note 6. As to the meaning of 'FSA rules' see PARA 622 note 6.

For the purposes of reg 39:

(1) a person deals with a company if he is party to any transaction or other act to which the company is a party (reg 39(2)(a));

(2) a person is not to be regarded as acting in bad faith by reason only of his knowing that, under the company's constitution, an act is beyond any of the powers referred to in reg 39(1)(a) or (b) (see heads (1) and (2) in the text) (reg 39(2)(b)); and

(3) a person is presumed to have acted in good faith unless the contrary is proved (reg 39(2)(c)).

Heads (2) and (3) above do not apply where:

(a) by virtue of a limitation deriving from the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, or from FSA rules, an act is beyond any of the powers referred to in reg 39(1)(a) or (b) (see heads (1) and (2) in the text) (reg 39(4)(a)); and

(b) the person in question has actual knowledge of that fact (reg 39(4)(b)(i)) or has deliberately failed to make inquiries in circumstances in which a reasonable and honest person would have done so (reg 39(4)(b)(ii)).

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 39(5).
11 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.
12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 40(a). As to instruments of incorporation see PARA 624.
13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 40(b).
14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 41.

644. Restraint and ratification by shareholders. A shareholder[1] of an open-ended investment company[2] may bring proceedings to restrain the doing of an act which but for the statutory provisions relating to company capacity[3] would be beyond the company's capacity[4]. The provisions relating to the powers of directors and the general meeting to bind the company[5] do not affect any right of a shareholder of an open-ended investment company to bring proceedings to restrain the doing of an act which is beyond any of the powers referred to in those provisions[6].

Any action by the directors of a company: (1) which, but for the provision on company capacity[7], would be beyond the company's capacity[8]; or (2) which is within the company's capacity but beyond the powers of directors to bind the company[9], may only be ratified by a resolution of the company in general meeting[10]. A resolution ratifying such an action does not affect any liability incurred by the directors or any other person, as relief from any such liability requires agreement by a separate resolution of the company in general meeting[11].

Nothing in the provisions described above[12] affects any power or right conferred by or arising under the provisions in the Financial Services and Markets Act 2000 relating to actions for damages[13] or injunctions and restitution orders[14].

1 As to shareholders see PARA 624 note 6.
2 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
3 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 38(1): see PARA 643.
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 42(1). No proceedings may be brought under reg 42(1) in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company; and reg 42(2) (see the text and note 6) does not have the effect of enabling proceedings to be brought in respect of any such act: reg 42(3).
5 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 39(1): see PARA 643.
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 42(2).
7 See note 3.
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 42(4)(a).
9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 42(4)(b). The powers referred to in the text are those mentioned in reg 39(1)(a): see PARA 643.
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 42(4)(b).
11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 42(5). As to general meetings see PARA 641.
12 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 42.
13 Ie the Financial Services and Markets Act 2000 s 150: see PARA 33.
14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 42(6). The provisions relating to injunctions and restitution orders are the Financial Services and Markets Act 2000 s 380 (see PARA 470), s 382 (see PARA 474) or s 384 (see PARA 474).

645. Events affecting company status. Where either of the conditions mentioned in heads (a) and (b) below[1] is satisfied, an open-ended investment company[2] is not entitled to rely against other persons on the happening of any of the following events:

(1) any alteration of the company's instrument of incorporation[3];
(2) any change among the directors of the company[4];
(3) as regards service of any document on the company, any change in the situation of the head office of the company[5]; or
(4) the making of a winding-up order in respect of the company or, in circumstances in which the affairs of a company are to be wound up otherwise than by the court, the commencement of the winding up[6].

The conditions mentioned above are that:

(a) the event in question had not been officially notified[7] at the material time and is not shown by the company to have been known at that time by the other person concerned[8]; and
(b) if the material time fell on or before the fifteenth day after the date of official notification (or where the fifteenth day was a non-business day, on or before the next day that was a business day), it is shown that the other person concerned was unavoidably prevented from knowing of the event at that time[9].

1 Ie in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 43(2).
2 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 43(1)(a). As to instruments of incorporation see PARA 624.
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 43(1)(b). As to directors see PARA 639.
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 43(1)(c).
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 43(1)(d).
7 For the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 43, 'official notification' means the notification in the Gazette (by virtue of reg 78 (see PARA 670)) of any document containing the information referred to in reg 43(1); and 'officially notified' is to be construed accordingly: reg 43(3).
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 43(2)(a).
9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 43(2)(b).

646. Invalidity of certain transactions involving directors. Where: (1) an open-ended investment company[1] enters into a transaction[2] the parties to which include a director[3] of the company or any person who is an associate[4] of such a director[5]; and (2) in connection with the transaction, the directors of the company (whether or not acting as a board) exceed any limitation on their powers under the company's constitution[6], the transaction is voidable at the instance of the company[7].

Whether or not the transaction is avoided, any such party to the transaction as is mentioned in head (1) above[8], and any director of the company who authorised the transaction, is liable to account to the company for any gain which he has made directly or indirectly by the transaction[9] and to indemnify the company for any loss or damage resulting from the transaction[10].

Nothing in the provisions described above[11] is to be construed as excluding the operation of any other enactment or rule of law by virtue of which the transaction may be called into question or any liability to the company may arise[12].

The transaction ceases to be voidable if:

(a) restitution of any money or other asset which was the subject-matter of the transaction is no longer possible[13];
(b) the company is indemnified for any loss or damage resulting from the transaction[14];
(c) rights which are acquired, bona fide for value and without actual notice of the directors concerned having exceeded their powers, by a person who is not a party to the transaction would be affected by the avoidance[15]; or
(d) the transaction is ratified by resolution of the company in general meeting[16].

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
2 'Transaction' includes any act: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(8)(b).
3 As to directors see PARA 639.
4 'Associate', in relation to any person who is a director of the company, means that person's spouse, civil partner, child or stepchild (if under 18), employee, partner or any body corporate of which that person is a director; and if that person is a body corporate, any subsidiary undertaking or director of that body corporate (including any director or employee of such subsidiary undertaking): Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(8)(a) (amended by SI 2005/2114).
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(1)(a).
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(1)(b). The reference in reg 44(1)(b) to any limitation on directors' powers under the company's constitution includes any limitation deriving from the Open-Ended Investment Companies Regulations 2001,

SI 2001/1228, from FSA rules or from a resolution of the company in general meeting or of a meeting of any class of shareholders: reg 44(8)(c). As to the meaning of 'FSA rules' see PARA 622 note 6. As to shareholders see PARA 624 note 6.

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(2).

8 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(1)(a).

9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(3)(a). A person other than a director of the company is not liable under reg 44(3) if he shows that at the time the transaction was entered into he did not know that the directors concerned were exceeding their powers: reg 44(6).

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(3)(b). See note 9.

11 Ie in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(1)–(3).

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(4). Regulation 44 does not affect the operation of reg 39 (see PARA 643) in relation to any party to the transaction not within reg 39(1)(a) (see PARA 643); but where a transaction is voidable by virtue of reg 44 and valid by virtue of reg 39 in favour of such a person, the High Court may, on the application of that person or of the company, make such order affirming, severing or setting aside the transaction, on such terms as appear to the court to be just: reg 44(7).

13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(5)(a).

14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(5)(b).

15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(5)(c).

16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(5)(d). As to general meetings see PARA 641.

647. Contracts, execution of documents, etc. A contract may be made by an open-ended investment company[1] by writing under its common seal[2] or on behalf of such a company, by any person acting under its authority (whether expressed or implied)[3]. Furthermore, any formalities required by law in the case of a contract made by an individual also apply, unless a contrary intention appears, to a contract made by or on behalf of such a company[4].

In relation to the execution of documents by an open-ended investment company[5]:

(1) a document is executed by a company by the affixing of its common seal[6];

(2) a company need not, however, have a common seal, and heads (3) to (5)[7] below apply whether it does or not[8];

(3) a document that is signed by at least one director[9] and expressed (in whatever form of words) to be executed by the company has the same effect as if executed under the common seal of the company[10];

(4) a document executed by a company which makes it clear on its face that it is intended by the person or persons making it to be a deed has effect, upon delivery, as a deed and it is to be presumed, unless a contrary intention is proved, to be delivered upon its being executed[11];

(5) in favour of a purchaser[12], a document is deemed to have been duly executed by a company if it purports to be signed by at least one director or, in the case of a director which is a body corporate, it purports to be executed by that director; and, where it makes it clear on its face that it is intended by the person or persons making it to be a deed, it is deemed to have been delivered upon its being executed[13].

An open-ended investment company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place elsewhere than in the United Kingdom[14]. A deed executed by such an attorney on behalf of the company has the same effect as if it were executed under the company's common seal[15].

A document or proceeding requiring authentication by an open-ended investment company is sufficiently authenticated for the purposes of the law of

England and Wales by the signature of a director or other authorised officer of the company[16] or, in the case of a director which is a body corporate, if it is executed by that director[17].

An open-ended investment company which has a common seal may have, for use for sealing shares[18] issued by the company and for sealing documents creating or evidencing shares so issued, an official seal which is a facsimile of its common seal with the addition on its face of the word 'securities'[19]. The official seal when duly affixed to a document has the same effect as the company's common seal[20].

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 56(a).
3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 56(b).
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 56.
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 57(1).
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 57(2).
7 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 57(4)–(6).
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 57(3).
9 As to directors see PARA 639.
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 57(4).
11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 57(5).
12 For the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 57(6), 'purchaser' means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property: reg 57(7).
13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 57(6).
14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 58(1). As to the meaning of 'United Kingdom' see PARA 2 note 3.
15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 58(2).
16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 59(a).
17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 59(b).
18 As to shares see PARA 651 et seq.
19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 60(1).
20 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 60(2). Nothing in reg 60 affects the right of an open-ended investment company whose head office is in Scotland to subscribe such shares and documents in accordance with the Requirements of Writing (Scotland) Act 1995: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 60(3).

648. Personal liability for contracts and deeds. A contract, which purports to be made by or on behalf of an open-ended investment company[1] at a time before the coming into effect of an authorisation order[2] in relation to that company, has effect (subject to any agreement to the contrary) as a contract made with the person purporting to act for the company or as agent for it, and he is accordingly personally liable under the contract[3]. This applies to the making of a deed as it applies to the making of a contract[4].

If a company enters into a transaction at any time after the authorisation order made in respect of the company has been revoked and the company fails to comply with its obligations in respect of that transaction within 21 days of being called upon to do so, the person who authorised the transaction is liable, and where the transaction was authorised by two or more persons they are jointly and severally liable, to indemnify the other party to the transaction in respect of any loss or damage suffered by him by reason of the company's failure to comply with those obligations[5].

Any provision, whether contained in the instrument of incorporation[6] of an open-ended investment company or in any contract with the company or otherwise:

(1) which exempts any officer[7] of the company or any person (whether or not an officer of the company) employed by the company as auditor[8] from, or indemnifies him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company[9]; or

(2) which exempts the depositary[10] of the company from, or indemnifies him against, any liability for any failure to exercise due care and diligence in the discharge of his functions in respect of the company[11],

is void[12]. However this does not prevent a company: (a) from purchasing and maintaining for any such officer, auditor or depositary insurance against any such liability[13]; or (b) from indemnifying any such officer, auditor or depositary against any liability incurred by him in defending any proceedings (whether civil or criminal) in which judgment is given in his favour or he is acquitted[14] or in connection with any application[15] in which relief is granted to him by the court[16].

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
2 As to the meaning of 'authorisation order' see PARA 623 note 2. As to authorisation orders see PARA 628.
3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 61(1).
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 61(2).
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 61(3).
6 As to instruments of incorporation see PARA 624.
7 As to the meaning of 'officer' see PARA 626 note 17.
8 As to auditors see PARA 658 et seq.
9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 62(1)(a).
10 As to the meaning of 'depositary' see PARA 626.
11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 62(1)(b).
12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 62(2).
13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 62(3)(a).
14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 62(3)(b)(i).
15 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63: see PARA 649.
16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 62(3)(b)(ii).

649. Relief from liability. The provisions described below[1] apply to: (1) any proceedings for negligence, default, breach of duty or breach of trust against an officer[2] of an open-ended investment company[3] or a person (whether or not an officer of the company) employed by the company as auditor[4]; or (2) any proceedings against the depository[5] of such a company for failure to exercise due care and diligence in the discharge of his functions in respect of the company[6].

If, in any such proceedings[7], it appears to the court hearing the case:

(a) that the officer, auditor or depositary is or may be liable in respect of the cause of action in question[8];

(b) that, nevertheless, he has acted honestly and reasonably[9]; and

(c) that, having regard to all the circumstances of the case (including those connected with his appointment), he ought fairly to be excused from the liability sought to be enforced against him[10],

the court may relieve him, either wholly or partly, from his liability on such terms as it may think fit[11].

If any such officer, auditor or depositary has reason to apprehend that any claim will or might be made against him in proceedings to which these provisions apply, he may apply to the court for relief[12]. The court, on such an application[13],

has the same power to relieve the applicant as it would have had[14] if it had been a court before which the relevant proceedings against the applicant had been brought[15].

1 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63.
2 As to the meaning of 'officer' see PARA 626 note 17.
3 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63(1)(a). As to auditors see PARA 658 et seq.
5 As to the meaning of 'depositary' see PARA 626.
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63(1)(b).
7 Ie proceedings to which the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63 applies.
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63(2)(a).
9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63(2)(b).
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63(2)(c).
11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63(2). Where a case to which reg 63(2) applies is being tried by a judge with a jury, the judge, after hearing the evidence, may, if he is satisfied that the defendant or defender ought in pursuance of reg 63(2) to be relieved either in whole or in part from the liability sought to be enforced against him, withdraw the case in whole or in part from the jury and forthwith direct judgment to be entered for the defendant or defender on such terms as to costs or otherwise as the judge may think proper: reg 63(5).
12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63(3).
13 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63(3).
14 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63.
15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63(4).

650. Punishment for fraudulent trading. If any business of an open-ended investment company[1] is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, every person who was knowingly a party to the carrying on of the business in that manner is guilty of an offence[2]. This applies whether or not the company has been, or is in the course of being, wound up (whether by the court or otherwise)[3].

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 64(1). Such a person is liable on conviction on indictment to imprisonment not exceeding a term of two years or to a fine or to both (reg 64(1)(a)), and on summary conviction to imprisonment not exceeding a term of three months or to a fine not exceeding the statutory maximum or to both (reg 64(1)(b)). As to the statutory maximum see PARA 56 note 24.
3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 64(2).

(b) Shares

651. Shares generally. An open-ended investment company[1] may issue more than one class of shares[2]. A shareholder[3] may not have any interest in the scheme property[4] of the company[5].

The rights which attach to each share of any given class are:

(1) the right, in accordance with the instrument of incorporation[6], to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the scheme property[7];

(2) the right, in accordance with the instrument of incorporation, to vote at any general meeting[8] of the company or at any relevant class meeting[9]; and

(3) such other rights as may be provided for, in relation to shares of that class, in the instrument of incorporation of the company[10].

In respect of any class of shares, the rights mentioned above[11] may, if the company's instrument of incorporation so provides, be expressed in two denominations; and in the case of any such class, one (the 'smaller') denomination is to be such proportion of the other (the 'larger') denomination as is fixed by the instrument of incorporation[12]. In respect of any class of shares thus expressed in two denominations[13], any share to which rights expressed in the smaller denomination are attached is to be known as a 'smaller denomination share'; and any share to which rights expressed in the larger denomination are attached is to be known as a 'larger denomination share'[14].

In respect of any class of shares, the rights which attach to each share of that class are:

(a) except in respect of a class of shares expressed in two denominations[15], equal to the rights that attach to each other share of that class[16]; and

(b) in respect of a class of shares expressed in two denominations[17], equal to the rights that attach to each other share of that class of the same denomination[18].

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(1).
3 As to shareholders see PARA 624 note 6.
4 As to the meaning of 'scheme property' see PARA 626 note 1.
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(2).
6 As to instruments of incorporation see PARA 624.
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(3)(a).
8 As to general meetings see PARA 641.
9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(3)(b).
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(3)(c).
11 Ie the rights mentioned in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(3).
12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(4). In respect of any class of shares within reg 45(4), the rights that attach to any smaller denomination share of that class are to be a proportion of the rights that attach to any larger denomination share of that class and that proportion is to be the same as the proportion referred to in reg 45(4): reg 45(7).
13 Ie shares within the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(4).
14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(5). 'Smaller denomination share' and 'larger denomination share' have the meanings described in the text: regs 2(1), 45(5).
15 Ie shares within the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(4).
16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(6)(a).
17 Ie shares within the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(4).
18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(6)(b).

652. Share certificates. An open-ended investment company[1] must prepare documentary evidence of title to its shares (known as 'share certificates'[2]) as follows:

(1) in respect of any new shares issued by it[3];

(2) where a shareholder[4] has transferred part only of his holding back to the company, in respect of the remainder of that holding[5];

(3) where a shareholder has transferred part only of his holding to the designated person[6], in respect of the remainder of that holding[7];

(4) where a company has registered a transfer of shares made to a person other than the company or a person designated as mentioned in head (3) above[8], in respect of the shares transferred to the transferee[9] and in

respect of any shares retained by the transferor which were evidenced by any certificate sent to the company for the purposes of registering the transfer[10];

(5) in respect of any holding of bearer shares for which a certificate evidencing title has already been issued but where the certificate has been surrendered to the company for the purpose of being replaced by two or more certificates which between them evidence title to the shares comprising that holding[11]; and

(6) in respect of any shares for which a certificate has already been issued but where it appears to the company that the certificate needs to be replaced as a result of having been lost, stolen or destroyed or having become damaged or worn out[12].

A company must exercise due diligence and take all reasonable steps to ensure that certificates prepared in accordance with heads (1) to (5) above[13] are ready for delivery as soon as reasonably practicable[14]. Certificates need be prepared in the circumstances referred to in heads (5) and (6) above[15] only if the company has received:

(a) a request for a new certificate[16];

(b) the old certificate (if there is one)[17];

(c) such indemnity as the company may require[18]; and

(d) such reasonable sum as the company may require in respect of the expenses incurred by it in complying with the request[19].

A company is not required to prepare share certificates in the following cases[20]:

(i) where the company's instrument of incorporation[21] states that share certificates will not be issued and contains provision as to other procedures for evidencing a person's entitlement to shares[22];

(ii) where a shareholder has indicated to the company in writing that he does not wish to receive a certificate[23];

(iii) where shares are issued or transferred to the designated person[24];

(iv) where shares are issued or transferred to a nominee of a recognised investment exchange[25] who is designated for these purposes[26].

Each share certificate must state: (A) the number of shares the title to which is evidenced by the certificate[27]; (B) where the company has more than one class of shares, the class of shares title to which is evidenced by the certificate[28]; and (C) except in the case of bearer shares[29], the name of the holder[30].

A share certificate specifying any shares held by any person which is under the common seal of the company[31], or authenticated in accordance with the Open-Ended Investment Companies Regulations 2001[32], is prima facie evidence of that person's title to the shares[33].

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
2 'Share certificate' has the meaning described in the text: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, regs 2(1), 46(1).
3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(1)(a). Regulation 46(1) is subject to regs 47, 48: see PARA 653.
4 As to shareholders see PARA 624 note 6.
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(1)(b).
6 As to the meaning of 'the designated person' see PARA 633 note 11.
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(1)(c).
8 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(1)(c).
9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(1)(d)(i).
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(1)(d)(ii).
11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(1)(e).

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(1)(f).
13 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(1)(a)–(f).
14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(2).
15 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(1)(e), (f).
16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(3)(a).
17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(3)(b).
18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(3)(c).
19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(3)(d).
20 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 47(2).
21 As to instruments of incorporation see PARA 624.
22 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 47(3).
23 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 47(4).
24 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 47(5).
25 As to recognised investment exchanges see PARA 684 et seq.
26 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 47(6). The nominee is designated in the rules of the investment exchange in question.
27 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(4)(a). Regulation 46(5) provides that where, in respect of any class of shares, the rights that attach to shares of that class are expressed in two denominations, the reference in reg 46(4)(a) (as it applies to shares of that class) to the number of shares is a reference to the total of:

$$N + n/p$$

where:
(1) *N* is the relevant number of the larger denomination shares of the class in question (reg 46(6)(a));
(2) *n* is the relevant number of the smaller denomination shares of that class (reg 46(6)(b)); and
(3) *p* is the number of smaller denomination shares of that class that are equivalent to one larger denomination share of that class (reg 46(6)(c)).

Nothing in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, is to be taken as preventing the total arrived at under reg 46(5) being expressed on the certificate as a single entry representing the result derived from the formula set out above: reg 46(7).
28 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(4)(b).
29 As to the meaning of 'bearer shares' see PARA 626 note 24. As to bearer shares see PARA 653.
30 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(4)(c).
31 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(8)(a).
32 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(8)(b). As to authentication see reg 59; and PARA 647.
33 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(8). In Scotland, a share certificate specifying any shares held by any person which is under the common seal of the company (reg 46(9)(a)), or subscribed by the company in accordance with the Requirements of Writing (Scotland) Act 1995 (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(9)(b)), is, unless the contrary is shown, sufficient evidence of that person's title to the shares (reg 46(9)).

653. Bearer shares. An open-ended investment company[1] may, if its instrument of incorporation so provides, issue shares ('bearer shares')[2] evidenced by a share certificate, or by any other documentary evidence of title for which provision is made in its instrument of incorporation, which indicates that the holder of the document is entitled to the shares specified in it[3] and that no entry will be made on the register of shareholders[4] identifying the holder of those shares[5].

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
2 As to the meaning of 'bearer shares' see PARA 626 note 24.
3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 48(a).
4 As to the register of shareholders see PARA 654.
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 48(b).

654. The register of shareholders. Every open-ended investment company[1] must keep a register of persons who hold shares in the company[2]. The register of shareholders is prima facie evidence of any matters which are directed or authorised[3] to be contained in it[4]. In the case of companies registered in England and Wales, no notice of any trust, express, implied or constructive, is to be entered on the company's register or to be receivable by the company[5]. A company must exercise all due diligence and take all reasonable steps to ensure that the information contained in the register is at all times complete and up to date[6].

The register of shareholders must contain an entry consisting of the name of the designated person[7], and a statement of the aggregate number of all shares in the company held by that person[8]. Where a company issues a share to any person and the name of that person is not already entered on the register, the company must enter his name on the register[9].

In respect of any person whose name is entered on the register under these provisions[10] or on the transfer of registered shares[11], the register must contain an entry consisting of:

(1) the address of the shareholder[12];
(2) the date on which the shareholder's name was entered on the register[13];
(3) a statement of the aggregate number of shares held by the shareholder, distinguishing each share by its number (if it has one) and, where the company has more than one class of shares, by its class[14].

The register of shareholders must contain a monthly statement of the aggregate number of all the bearer shares in issue except for any bearer shares in issue which, at the time when the statement is made, are held by the designated person[15].

Where the aggregate number of shares referred to above[16] includes any shares to which rights expressed in two denominations are attached[17], in respect of each class of such shares[18], the number of shares of that class held by any person[19], or the number of bearer shares of that class[20], is to be taken[21] to be the total of:

$$N + n/p$$

where:

(a) *N* is the relevant number of larger denomination shares of that class[22];
(b) *n* is the relevant number of smaller denomination shares of that class[23]; and
(c) *p* is the number of smaller denomination shares of that class that are equivalent to one larger denomination share of that class[24].

The register of shareholders of a company must be kept at its head office, except that, if the work of making it up is done at another office of the company, it may be kept there[25] and, if the company arranges with some other person for the making up of the register to be undertaken on its behalf by that other person, it may be kept at the office of the other person at which the work is being done[26].

Every company must keep an index of the names of the holders of its registered shares[27]. The index must contain, in respect of each shareholder, a sufficient indication to enable the account of that shareholder in the register to be readily found[28]. The index must be at all times kept at the same place as the register of shareholders[29]. Not later than 14 days after the date on which any alteration is made to the register of shareholders, the company must make any necessary alteration in the index[30].

The register of shareholders and the index of names must be open to the inspection of any shareholder (including any holder of bearer shares) without charge[31]. Any shareholder may require a copy of the entries on the register relating to him and the company must cause any copy so required by a person to be sent to him free of charge[32]. If an inspection[33] is refused, or if a copy so required is not sent, the High Court may by order compel an immediate inspection of the register and index, or direct that the copy required be sent to the person requiring it[34].

Where the register of shareholders is kept at the office of some person other than the company[35] and by reason of any default of his the company fails to comply with any of the requirements relating to the index or inspection[36], the person at whose office the register of shareholders is kept is guilty of an offence if he knowingly or recklessly authorises or permits the default in question[37].

The power of the court in regard to inspection of the register and index[38] extends to the making of orders directed to the person at whose office the register of shareholders is kept and to any officer or employee of his[39].

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 1(1). This register is the 'register of shareholders': see PARA 626 note 22.

There is an exception to Sch 3 para 1(1) in that, to the extent that the aggregate numbers of shares mentioned in Sch 3 para 5(1)(b) and Sch 3 para 7 include bearer shares, nothing in Sch 3 requires any entry to be made in the register in respect of bearer shares: Sch 3 para 1(2). As to the meaning of 'bearer shares' see PARA 626 note 24. As to bearer shares see PARA 653.

3 Ie by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.

4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 2(1) (amended by SI 2001/3755).

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 3(1).

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 3(2).

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 5(1)(a). As to the meaning of 'designated person' see PARA 633 note 11.

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 5(1)(b). For the purposes of Sch 3 para 5(1)(b), the designated person is to be taken as holding all shares in the company which are in issue and in respect of which no other person's name is entered on the register: Sch 3 para 5(2). The statement referred to in Sch 3 para 5(1)(b) must be updated at least once a day: Sch 3 para 5(3).

9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 6(2). Note that Sch 3 para 6 does not apply to any issue or transfer of shares to the designated person: Sch 3 para 6(1).

10 Ie in accordance with the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 6(2): see note 9.

11 Ie in accordance with the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 6. As to the transfer of shares see PARA 656.

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 6(3)(a). As to shareholders see PARA 624 note 6.

13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 6(3)(b).

14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 6(3)(c).

15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 7.

16 Ie in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 paras 5–7: see the text to notes 7–9, 12–15.

17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 8(1).

18 Ie shares to which rights expressed in two denominations are attached.

19 Ie as referred to in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 5 or 6: see the text to notes 7–9, 12–14.

20 Ie as referred to in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 7: see the text to note 15.

21 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 8(2). Nothing in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, is to be taken as

preventing the total arrived at under Sch 3 para 8(2) being expressed on the register as a single entry representing the result derived from the formula set out in the text: Sch 3 para 8(4).

22 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 8(3)(a). As to larger denomination shares see PARA 651.

23 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 8(3)(b). As to smaller denomination shares see PARA 651.

24 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 8(3)(c).

25 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 9(a).

26 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 9(b).

27 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 10(1).

28 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 10(2).

29 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 10(3).

30 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 10(4).

31 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 11(1). This is subject to reg 50 (see PARA 655) and to FSA rules. As to the meaning of 'FSA rules' see PARA 622 note 6.

32 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 11(2).

33 Ie required under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 11.

34 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 11(3).

35 Ie in accordance with the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 9(b): see the text to note 26.

36 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 12(1). As to the requirements relating to the index and inspection see Sch 3 para 10 (see the text to notes 27–30) or Sch 3 para 11 (see the text to notes 31–34).

37 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 12(2). A person guilty of such an offence is liable in respect of each default on summary conviction to a fine not exceeding level 1 on the standard scale: Sch 3 para 12(3). As to the standard scale see PARA 27 note 21.

38 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 11(3): see the text to note 34.

39 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 12(4).

655. Closure and rectification of register of shareholders. An open-ended investment company[1] may, on giving notice by advertisement in a national newspaper circulating in all the countries in which shares in the company are sold, close the register of shareholders[2] for any time or times not exceeding, in the whole, 30 days in each year[3]. This is subject to any requirements contained in FSA rules[4].

An application to the High Court to rectify the register of shareholders of an open-ended investment company may be made[5] if:

(1) the name of any person is, without sufficient cause, entered in or omitted from the register[6];

(2) default is made as to the details contained in any entry on the register in respect of a person's holding of shares in the company[7]; or

(3) default is made or unnecessary delay takes place in amending the register so as to reflect the fact of any person having ceased to be a shareholder[8].

Such an application may be made by the person aggrieved, by any shareholder of the company or by the company itself[9].

The court may refuse the application or may order rectification of the register of shareholders and payment by the company of any damages sustained by any party aggrieved[10]. On such an application the court may decide any question necessary or expedient to be decided for rectification of the register including, in particular, any question relating to the right of a person who is a party to the application to have his name entered in or omitted from the register (whether the

question arises as between shareholders and alleged shareholders, or as between shareholders or alleged shareholders on the one hand and the company on the other hand)[11].

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
2 As to the register of shareholders see PARA 654.
3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 50(1).
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 50(2) (substituted by SI 2001/3755). As to the meaning of 'FSA rules' see PARA 622 note 6.
5 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 51.
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 51(1)(a).
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 51(1)(b).
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 51(1)(c). As to shareholders see PARA 624 note 6.
9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 51(2).
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 51(3).
11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 51(4).

656. Share transfers. The instrument of incorporation[1] may contain provision as to share transfers for the transfer of registered and bearer shares[2] in an open-ended investment company[3] in respect of any matter for which provision is not made in the Open-Ended Investment Companies Regulations 2001[4] or FSA rules[5]. Where any shares are transferred to the company, the company must cancel those shares[6].

Where a transfer of shares is made by the person (if any) who is designated in the company's instrument of incorporation[7], the company may not register the transfer unless such evidence as the company may require to prove that the transfer has taken place has been delivered to the company[8].

Where for any reason a person ceases to be so designated[9]: (1) any shares held by that person which are not disposed of on or before his ceasing to be so designated are to be deemed to be the subject of a new transfer to him which takes effect immediately after he ceases to be so designated[10]; and (2) the company must make such adjustments to the register[11] as are necessary to reflect his change of circumstances[12].

Except in the case of any transfer of shares mentioned above[13], the company may not register any transfer unless the transfer documents[14] relating to that transfer have been delivered to the company[15]. In the case of any transfer of shares which meets the requirements described above[16], the company must register the transfer[17] and, where the name of the transferee is not already entered on the register, enter that name on the register[18].

A company may, before the end of the period of 21 days commencing with the date of receipt of the transfer documents relating to any transfer of shares, refuse to register the transfer if: (a) there exists a minimum requirement as to the number or value of shares that must be held by any shareholder[19] of the company and the transfer would result in either the transferor or transferee holding less than the required minimum[20]; or (b) the transfer would result in a contravention of any provision of the company's instrument of incorporation or would produce a result inconsistent with any provision of the company's prospectus[21].

A company must give the transferee written notice of any refusal to register a transfer of shares[22]. Nothing in the Open-Ended Investment Companies Regulations 2001[23] requires a company to register a transfer or give notice to any person of a refusal to register a transfer where registering the transfer or

giving the notice would result in a contravention of any provision of law (including any law that is for the time being in force in a country or territory outside the United Kingdom)[24].

Where, in respect of any transfer of shares, the company certifies that it has received the transfer documents consisting of a share certificate or such other evidence of title[25] (as the case may be), that certification is to be taken as a representation by the company to any person acting on the faith of the certification that there has been produced to the company such evidence as on its face shows a prima facie title to the shares in the transferor named in the instrument of transfer[26].

Where a person acts on the faith of a false certification by a company which is made negligently or fraudulently, the company is liable to make a payment to that person for any damage sustained by him[27].

A transfer of title to any bearer share in a company is effected by the transfer from one person to another of the relevant instrument[28] which relates to that share[29]. Where the holder of bearer shares proposes to transfer to another person a number of shares which is less than the number specified in the instrument relating to those shares, he may only do so if he surrenders the instrument to the company and obtains a new instrument specifying the number of shares to be transferred[30].

Nothing in the provisions described above[31] prejudices any power of the company to register as shareholder any person to whom the right to any shares in the company has been transmitted by operation of law[32].

A transfer of registered shares that are held by a deceased person at the time of his death which is made by his personal representative is as valid as if the personal representative had been the holder of the shares at the time of the execution of the instrument of transfer[33]. On the death of any one of the joint holders of any shares, the survivor is to be the only person recognised by the company as having any title to or any interest in those shares[34].

1 As to instruments of incorporation see PARA 624.
2 As to the meaning of 'bearer shares' see PARA 626 note 24. As to bearer shares see PARA 653.
3 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
4 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 1. As to the meaning of 'FSA rules' see PARA 622 note 6.
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 2.
7 Ie for the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 4.
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 4(1).
9 Ie for the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 4.
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 4(2)(a).
11 As to the register of shareholders see PARA 654.
12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 4(2)(b).
13 Ie in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 4: see the text to notes 8–12.
14 For the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, 'transfer documents', in relation to any transfer of registered shares, means:
   (1) a stock transfer within the meaning of the Stock Transfer Act 1963 (see COMPANIES vol 7(1) (2004 Reissue) PARA 872) which complies with the requirements of that Act as to the execution and contents of a stock transfer or such other instrument of transfer as is authorised by, and completed and executed in accordance with any requirements in, the company's instrument of incorporation (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 2(1), Sch 4 para 5(3)(a));
   (2) except in a case falling within reg 47(3) or (4) (see PARA 652), a share certificate relating to the shares in question (reg 2(1), Sch 4 para 5(3)(b));

(3) in a case falling within reg 47(3) (see PARA 652), such other evidence of title to those shares as is required by the instrument of incorporation of the company (reg 2(1), Sch 4 para 5(3)(c)); and

(4) such other evidence (if any) as the company may require to prove the right of the transferor to transfer the shares in question (reg 2(1), Sch 4 para 5(3)(d)).

15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 5(1). No share certificate has to be delivered by virtue of Sch 4 para 5(1) in any case where shares are transferred by a nominee of a recognised investment exchange who is designated for the purposes of reg 47(6) (see PARA 652) in the rules of the investment exchange in question: Sch 4 para 5(2).

16 Ie the requirements of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 5(4) or (5): see the text to notes 8–15.

17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 6(a).

18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 6(b).

19 As to shareholders see PARA 624 note 6.

20 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 7(1)(a).

21 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 7(1)(b). As to the meaning of 'prospectus' see PARA 622 note 5.

22 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 7(2).

23 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.

24 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 7(3). As to the meaning of 'United Kingdom' see PARA 2 note 3.

25 See the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 5(3)(b) or (c); and note 14.

26 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 8(1). For the purposes of Sch 4 para 8(1), a certification is made by a company if the instrument of transfer bears the words 'certificate lodged' (or words to the like effect) (Sch 4 para 8(2)(a)) and is signed by a person acting under authority (whether express or implied) given by the company to issue and sign such certifications (Sch 4 para 8(2)(b)). A certification under Sch 4 para 8(1) is not to be taken as a representation that the transferor has any title to the shares in question: Sch 4 para 8(3).

27 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 8(4).

28 See the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 48; and PARA 653.

29 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 9.

30 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 10.

31 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 paras 1–10.

32 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 11.

33 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 12. The production to a company of any document which is by law sufficient evidence of probate of the will, or letters of administration of the estate, or confirmation as executor, of a deceased person having been granted to some person must be accepted by the company as sufficient evidence of the grant: reg 83.

34 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 13.

(c) Reports and Auditors

657. Reports. The directors[1] of an open-ended investment company[2] must prepare a report ('annual report') for each annual accounting period[3] of the company[4] and prepare a report ('half-yearly report') for each half-yearly accounting period[5] of the company[6]. However, where a company's first annual accounting period is a period of less than 12 months, a half-yearly report need not be prepared for any part of that period[7].

The directors of a company must lay copies of the annual report before the company in general meeting[8]. The annual report of an open-ended investment company must, in respect of the annual accounting period to which it relates, contain accounts of the company[9]. The company's auditors[10] must make a report

to the company's shareholders in respect of the accounts of the company contained in its annual report[11]. A copy of the auditor's report must form part of the company's annual report[12].

If it appears to the directors of an open-ended investment company that any annual report of the company did not comply with the requirements of the Open-Ended Investment Companies Regulations 2001[13] or FSA rules, they may prepare a revised annual report[14]. Where copies of the previous report have been laid before the company in general meeting or delivered to the Financial Services Authority, the revisions must be confined to the correction of anything in the previous report which did not comply with the requirements of the Open-Ended Investment Companies Regulations 2001 or FSA rules[15] and the making of any necessary consequential alterations[16].

1 As to directors see PARA 639.
2 As to the meaning of 'open-ended investment company' see PARA 622 note 3.
3 For the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 66, any reference to annual and half-yearly accounting periods of a company is a reference to those periods as determined in relation to that company in accordance with FSA rules: reg 66(5). Nothing in reg 66 or reg 67 prejudices the generality of reg 6(1) (see PARA 622) in relation to the powers of the Financial Services Authority as set out in that regulation: reg 66(4). As to the meaning of 'FSA rules' see PARA 622 note 6. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 66(1)(a). 'Annual report' has the meaning described in the text: regs 2(1), 66(1)(a).
5 See note 3.
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 66(1)(b).
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 66(2).
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 66(3). As to general meetings see PARA 641.
9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 67(1).
10 As to auditors see PARA 658 et seq.
11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 67(2).
12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 67(3).
13 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.
14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 68(1).
15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 68(2)(a).
16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 68(2)(b).

658. Eligibility of auditors. No person is eligible for appointment as auditor of an open-ended investment company[1] unless he is eligible under the Companies Act 2006[2] for appointment as a statutory auditor[3]. A person is ineligible for appointment as auditor of an open-ended investment company if he is an officer[4] or employee of the company[5] or a partner or employee of such a person, or a partnership of which such a person is a partner[6].

A person is also ineligible for appointment if there exists between that person, or any associate[7] of that person, and the company a connection of any such description as may be specified by regulations made by the Secretary of State[8] under the Companies Act 2006[9].

No person is to act as auditor of a company if he is ineligible for appointment to the office[10]. If during his term of office an auditor of a company becomes ineligible for appointment to the office, he must vacate office and give notice in writing to the company concerned that he has vacated it by reason of ineligibility[11]. A person who acts as auditor of a company in contravention of the requirements described above[12] is guilty of an offence[13].

An auditor who has failed to comply with a duty imposed on him by trust scheme rules[14] may be disqualified from being the auditor for any authorised open-ended investment company[15].

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
2 Ie the Companies Act 2006 Pt 42 (ss 1209–1264): see COMPANIES.
3 See the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 1 (amended by SI 2008/948). As to actuaries and auditors see also PARA 764 et seq.
4 As to the meaning of 'officer' see PARA 626 note 17.
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 2(1)(a).
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 2(1)(b). For the purposes of Sch 5 para 2(1), an auditor of a company is not to be regarded as an officer or employee of the company: Sch 5 para 2(2).
7 For these purposes, 'associate' has the same meaning as in the Companies Act 2006 Pt 42 (ss 1209–1264) (see s 1260) (see COMPANIES): Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 2(4) (Sch 5 para 2(3) substituted and Sch 5 para 2(4), (5) added by SI 2008/948).
8 As to the Secretary of State see PARA 3.
9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 2(3) (as substituted: see note 7). The regulations are under the Companies Act 2006 s 1214(4): see COMPANIES. The power of the Secretary of State to make regulations under s 1214(4) for the purposes of s 1214(1) in relation to statutory auditors is exercisable, subject to the same conditions, for the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 2(3) in relation to auditors of open-ended investment companies: Sch 5 para 2(5) (as added: see note 7).
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 3(1).
11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 3(2).
12 Ie contravention of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 3(1) or failure to give notice of vacating his office as required by Sch 5 para 3(2).
13 Such a person is liable, on conviction on indictment, to a fine (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 3(3)(a)) or, on summary conviction, to a fine not exceeding the statutory maximum (Sch 5 para 3(3)(b)). As to the statutory maximum see PARA 56 note 24.

In the case of continued contravention he is liable on a second or subsequent summary conviction to a fine not exceeding £100 in respect of each day on which the contravention is continued (instead of the fine mentioned in Sch 5 para 3(3)(b)): Sch 5 para 3(4). In proceedings against a person for an offence under Sch 5 para 3, it is a defence for him to show that he did not know and had no reason to believe that he was, or had become, ineligible for appointment: Sch 5 para 3(5).
14 As to the trust scheme rules see PARA 614.
15 See the Financial Services and Markets Act 2000 s 249(1); and PARA 616. As to the meaning of 'authorised open-ended investment company' see PARA 603.

659. Appointment of auditors. Every company must appoint an auditor or auditors[1]. A company must, at each general meeting[2] at which the company's annual report[3] is laid, appoint an auditor or auditors to hold office from the conclusion of that meeting until the conclusion of the next general meeting at which an annual report is laid[4].

The first auditors of a company may be appointed by the directors[5] of the company at any time before the first general meeting of the company at which an annual report is laid; and auditors so appointed are to hold office until the conclusion of that meeting[6]. Where no such appointment is made[7], the first auditors of any company may be appointed by the company in general meeting[8].

No rules made under the Financial Services and Markets Act 2000[9] in regard to appointment of auditors apply in relation to open-ended investment companies[10].

If, in any case, no auditors are appointed[11], the Financial Services Authority[12] may appoint a person to fill the vacancy[13]. The directors of a company, or the

company in general meeting, may fill a casual vacancy in the office of auditor[14]. While such a vacancy continues, any surviving or continuing auditor or auditors may continue to act[15].

Where a partnership constituted under the law of England and Wales or Northern Ireland, or under the law of any country or territory in which a partnership is not a legal person, is appointed as auditor of a company[16]:

(1) the appointment is, unless the contrary intention appears, an appointment of the partnership as such and not of the partners[17];

(2) where the partnership ceases, the appointment is to be treated as extending to any partnership which succeeds to the practice of that partnership and is eligible for the appointment[18] and any person who succeeds to that practice having previously carried it on in partnership and is eligible for the appointment[19];

(3) where the partnership ceases and no person succeeds to the appointment under head (2) above[20], the appointment may with the consent of the company be treated as extending to a partnership or other person eligible for the appointment who succeeds to the business of the former partnership or to such part of it as is agreed by the company to be treated as comprising the appointment[21].

1 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 4(1). The appointment must be made in accordance with Sch 5 para 4.

2 As to general meetings see PARA 641.

3 As to the meaning of 'annual report' see PARA 657 note 4.

4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 4(2) (amended by SI 2005/923). The Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 4(2) is subject to Sch 5 para 4(6), (7).

On the date on which the holding of an annual general meeting is dispensed with in accordance with reg 37A (see PARA 641), any auditor or auditors appointed in accordance with Sch 5 para 4(2) or Sch 5 para 4(3) (see the text to note 6) ceases to hold office and the directors must forthwith re-appoint the auditor or auditors or appoint a new auditor or auditors: Sch 5 para 4(6) (Sch 5 para 4(6), (7) added by SI 2005/923). The directors of any company which does not hold annual general meetings must appoint the auditor or auditors: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 4(7) (as so added).

5 As to directors see PARA 639.

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 4(3) (amended by SI 2005/923). The Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 4(3) is subject to Sch 5 para 4(6): see note 4.

7 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 4(3).

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 4(4).

9 Ie the Financial Services and Markets Act 2000 s 340: see PARA 764.

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 4(5).

11 Ie as required by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 4(4).

12 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 5.

14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 6(1).

15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 6(2).

16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 7(1).

17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 7(2).

18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 7(3)(a). For the purposes of Sch 5 para 7(3), a partnership is to be regarded as succeeding to the practice of another partnership only if the members of the successor partnership are substantially the same as those of the former partnership; and a partnership or other person is to be regarded as succeeding to the practice of a partnership only if it or he succeeds to the whole or substantially the whole of the business of the former partnership: Sch 5 para 7(4).

19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 7(3)(b).
20 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 7(3).
21 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 7(5).

660. Rights of auditors. The auditors of a company have a right of access at all times to the company's books, accounts and vouchers and are entitled to require from the company's officers[1] such information and explanations as they think necessary for the performance of their duties as auditors[2].

An officer of a company commits an offence if he knowingly or recklessly makes to the company's auditors a statement (whether written or oral) which conveys or purports to convey any information or explanations which the auditors require, or are entitled to require, as auditors of the company[3] and which is misleading, false or deceptive in a material particular[4].

The auditors of a company are entitled:

(1) to receive all such notices of, and other communications relating to, any general meeting[5] of the company as a shareholder[6] of the company is entitled to receive[7];
(2) to attend any general meeting of the company[8]; and
(3) to be heard at any general meeting which they attend on any part of the business of the meeting which concerns them as auditors[9].

The right to attend and be heard at a meeting is exercisable in the case of a body corporate or partnership by an individual authorised by it in writing to act as its representative at the meeting[10].

1 As to the meaning of 'officer' see PARA 626 note 17.
2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 8(1).
3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 8(2)(a).
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 8(2)(b). A person guilty of such an offence is liable, on conviction on indictment, to imprisonment not exceeding a term of two years or to a fine or to both (Sch 5 para 8(3)(a)) or, on summary conviction, to imprisonment not exceeding a term of three months or to a fine not exceeding the statutory maximum or to both (Sch 5 para 8(3)(b)). As to the statutory maximum see PARA 56 note 24.
5 As to general meetings see PARA 641.
6 As to shareholders see PARA 624 note 6.
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 9(1)(a).
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 9(1)(b).
9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 9(1)(c).
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 9(2).

661. Remuneration of auditors. The remuneration of auditors of a company who are appointed by the company in general meeting[1] must be fixed by the company in general meeting or in such manner as the company in general meeting may decide[2].

The remuneration of auditors who are appointed by the directors[3] or the Financial Services Authority[4] must be fixed by the directors or the Authority, as the case may be (and is payable by the company even where it is fixed by the Authority)[5].

The power of the Secretary of State[6] to make regulations under the Companies Act 2006[7] in regard to the remuneration of auditors or their associates for non-audit work in relation to company auditors is to be exercisable in relation to auditors of open-ended investment companies[8] for like purposes[9] and subject to the same conditions[10].

1 As to general meetings see PARA 641.
2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 10(1).

3 As to directors see PARA 639.
4 As to the Financial Services Authority see PARAS 4, 6 et seq.
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 10(2).
6 As to the Secretary of State see PARA 3.
7 Ie the Companies Act 2006 s 494: see COMPANIES.
8 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
9 See the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 11(1)(a) (Sch 5 para 11(1) amended by SI 2008/948).
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 11(1)(b). For the purposes of the exercise of the power to make regulations under the Companies Act 2006 s 494 (see COMPANIES), as extended by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 11(1), the reference in the Companies Act 2006 s 494(4) to a note to a company's accounts is to be taken to be a reference to the annual report of an open-ended investment company: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 11(2) (amended by SI 2008/948). As to the meaning of 'annual report' see PARA 657 note 4.

662. Removal of auditors. A company may by resolution remove an auditor from office notwithstanding anything in any agreement between it and him[1]. Where a resolution removing an auditor is passed at a general meeting[2] of a company, the company must, not later than 14 days after the holding of the meeting, notify the Financial Services Authority[3] of the passing of the resolution[4].

A resolution at a general meeting of a company removing an auditor before the expiration of his period of office[5] or appointing as auditor a person other than the retiring auditor[6] is not effective unless notice of the intention to move it has been given to the open-ended investment company[7] at least 28 days before the meeting at which it is moved[8]. On receipt of notice of such an intended resolution, the company must forthwith send a copy to the person proposed to be removed or, as the case may be, to the person proposed to be appointed and to the retiring auditor[9].

The auditor proposed to be removed or, as the case may be, the retiring auditor may make with respect to the intended resolution representations in writing to the company (not exceeding a reasonable length) and request their notification to the shareholders[10] of the company[11].

The company must (unless the representations are received by the company too late for it to do so):

(1) in any notice of the resolution given to the shareholders of the company, state the fact of the representations having been made[12];

(2) send a copy of the representations to each of the shareholders whose name appears on the register of shareholders[13] (other than the designated person) and to whom notice of the meeting is or has been sent[14];

(3) take such steps as FSA rules[15] may require for the purpose of bringing the fact that the representations have been made to the attention of the holders of any bearer shares[16]; and

(4) at the request of any holder of bearer shares, provide a copy of the representations[17].

If a copy of any such representations is not sent out as required because they were received too late or because of the company's default or if, for either of those reasons, any steps in head (3) or head (4) above[18] are not taken, the auditor may (without prejudice to his right to be heard orally) require that the representations be read out at the meeting[19].

Copies of the representations need not be sent out, the steps in head (3) or head (4) above[20] need not be taken and the representations need not be read out at the meeting if, on the application of the company or any other person claiming to be aggrieved, the High Court is satisfied that the rights conferred[21] are being abused to secure needless publicity for defamatory matter; and the court may order the costs of the company on such an application to be paid in whole or in part by the auditor, notwithstanding that he is not a party to the application[22].

An auditor who has been removed from office has, notwithstanding his removal, the various rights to receive notices, attend and be heard[23] in relation to any general meeting of the company at which his term of office would otherwise have expired or at which it is proposed to fill the vacancy caused by his removal[24].

1 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 12(1).
2 As to general meetings see PARA 641.
3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 12(2). Nothing in Sch 5 para 12 is to be taken as depriving a person removed under it of compensation or damages payable to him in respect of the termination of his appointment as auditor or of any appointment terminating with that as auditor: Sch 5 para 12(3).
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(1)(a).
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(1)(b).
7 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(1).
9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(2).
10 As to shareholders see PARA 624 note 6.
11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(3).
12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(4)(a).
13 As to the register of shareholders see PARA 654.
14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(4)(b).
15 As to the meaning of 'FSA rules' see PARA 622 note 6.
16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(4)(c). As to the meaning of 'bearer shares' see PARA 626 note 24. As to bearer shares see PARA 653.
17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(4)(d).
18 Ie required by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(4)(c) or (d).
19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(5).
20 See note 18.
21 Ie conferred by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13.
22 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(6).
23 Ie conferred by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 9: see PARA 660. The reference in Sch 5 para 9 to business concerning the auditors as auditors is to be construed in relation to an auditor who has been removed from office as a reference to business concerning him as former auditor: Sch 5 para 14(2).
24 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 14(1).

663. Resignation of auditors. An auditor of a company may resign his office by depositing a notice in writing to that effect at the company's head office[1]. Such a notice is not effective unless it is accompanied by the required statement[2]. An effective notice of resignation operates to bring the auditor's term of office to an end as of the date on which the notice is deposited or on such later date as may be specified in it[3]. The company must, not later than 14 days after the deposit of a notice of resignation, send a copy of the notice to the Financial Services Authority[4].

Where a notice of resignation of an auditor is accompanied by a statement of circumstances which he considers ought to be brought to the attention of the shareholders or creditors of the company[5], the auditor may deposit with the notice a signed requisition that a general meeting[6] of the company be convened forthwith for the purpose of receiving and considering such explanation of the circumstances connected with his resignation as he may wish to place before the meeting[7].

The company must, not later than 21 days after the date of the deposit of such a requisition[8], proceed to convene a meeting for a day not later than 28 days after the date on which the notice convening the meeting is given[9].

The auditor may request the company to circulate a statement in writing (not exceeding a reasonable length) of the circumstances connected with his resignation to each of the shareholders of the company whose name appears on the register of shareholders[10] (other than the designated person): (1) before the meeting convened on his requisition[11]; or (2) before any general meeting at which his term of office would otherwise have expired or at which it is proposed to fill the vacancy caused by his resignation[12], and to take such steps as FSA rules[13] may require for the purpose of bringing the fact that the statement has been made to the attention of the holders of any bearer shares[14].

The company must (unless the statement is received by it too late for it to do so):

(a) in any notice or advertisement of the meeting given or made to shareholders of the company, state the fact of the statement having been made[15];

(b) send a copy of the statement to every shareholder of the company to whom notice of the meeting is or has been sent[16]; and

(c) at the request of any holder of bearer shares, provide a copy of the statement[17].

If a copy of the statement is not sent out or provided as required because it was received too late or because of the company's default, the auditor may (without prejudice to his right to be heard orally) require that the statement be read out at the meeting[18].

Copies of a statement need not be sent out or provided and the statement need not be read out at the meeting if, on the application of the company or any other person claiming to be aggrieved, the High Court is satisfied that the rights conferred[19] are being abused to secure needless publicity for defamatory matter; and the court may order the costs of the company on such an application to be paid in whole or in part by the auditor, notwithstanding that he is not a party to the application[20].

An auditor who has resigned has, notwithstanding his removal, the various rights to receive notices, attend and be heard[21] in relation to any such general meeting of the company as is mentioned in head (1) or head (2) above[22].

1 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 15(1).
2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 15(2). The statement is required by Sch 5 para 18: see PARA 664.
3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 15(3).
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 15(4). As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(1).
6 As to general meetings see PARA 641.
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(2).

8 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16.
9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(3).
10 As to the register of shareholders see PARA 654.
11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(4)(a).
12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(4)(b).
13 As to the meaning of 'FSA rules' see PARA 622 note 6.
14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(4). As to the meaning of 'bearer shares' see PARA 626 note 24. As to bearer shares see PARA 653.
15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(5)(a).
16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(5)(b).
17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(5)(c).
18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(6).
19 Ie conferred by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16.
20 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(7).
21 Ie conferred by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 9: see PARA 660. The reference in Sch 5 para 9 to business concerning the auditors as auditors is to be construed in relation to an auditor who has resigned as a reference to business concerning him as former auditor: Sch 5 para 17(2).
22 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 17(1). The general meeting referred to in the text is the one mentioned in Sch 5 para 16(4)(a) or (b): see heads (1) and (2) in the text.

664. Statement by auditor ceasing to hold office. Where an auditor ceases for any reason to hold office, he must deposit at the head office of the company a statement of any circumstances connected with his ceasing to hold office which he considers should be brought to the attention of the shareholders[1] or creditors of the company or, if he considers that there are no such circumstances, a statement that there are none[2].

The statement must be deposited:

(1) in the case of resignation, along with the notice of resignation[3];
(2) in the case of failure to seek re-appointment, not less than 14 days before the end of the time allowed for next appointing auditors[4]; and
(3) in any other case, not later than the end of the period of 14 days beginning with the date on which he ceases to hold office[5].

If the statement is of circumstances which the auditor considers should be brought to the attention of the shareholders or creditors of the company, the company must, not later than 14 days after the deposit of the statement, either: (a) send a copy of the statement to each of the shareholders whose name appears on the register of shareholders[6] (other than the designated person) and take such steps as FSA rules[7] may require for the purpose of bringing the fact that the statement has been made to the attention of the holders of any bearer shares[8]; or (b) apply to the court[9]. Where an application is made under head (b) above[10], the company must notify the auditor[11].

Unless the auditor receives notice of an application to the court before the end of the period of 21 days beginning with the day on which he deposited the statement, he must, not later than seven days after the end of that period, send a copy of the statement to the Financial Services Authority[12].

If the court is satisfied that the auditor is using the statement to secure needless publicity for defamatory matter it must direct that copies of the statement need not be sent out and that the steps required by FSA rules need not be taken[13] and it may further order the company's costs on the application to be paid in whole or in part by the auditor notwithstanding that he is not a party to the application[14]. In addition, the company must, not later than 14 days after the

court's decision, take such steps in relation to a statement setting out the effect of the order as are required by head (a) above[15] in relation to the statement of circumstances deposited at the company's head office[16].

If the court is not so satisfied, the company must, not later than 14 days after the court's decision, send to each of the shareholders a copy of the auditor's statement and notify the auditor of the court's decision[17]. The auditor must, not later than seven days after receiving such a notice, send a copy of the statement to the Authority[18]. Where notice of appeal is filed not later than 14 days after the court's decision, any reference to that decision[19] is to be construed as a reference to the final determination or withdrawal of that appeal, as the case may be[20].

If a person ceasing to hold office as auditor fails to comply with the requirements described above[21], he is guilty of an offence[22].

1 As to shareholders see PARA 624 note 6.
2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(1).
3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(2)(a).
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(2)(b).
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(2)(c).
6 As to the register of shareholders see PARA 654.
7 As to the meaning of 'FSA rules' see PARA 622 note 6. The Financial Services and Markets Act 2000 s 249(1) (disqualification of auditor for breach of trust scheme rules) (see PARA 616) applies to a failure by an auditor to comply with a duty imposed on him by FSA rules as it applies to a breach of trust scheme rules: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 20.
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(3)(a). As to the meaning of 'bearer shares' see PARA 626 note 24. As to bearer shares see PARA 653.
9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(3)(b). As to the meaning of 'court' see PARA 626 note 20.
10 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(3)(b).
11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(3).
12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(4). As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(5)(a).
14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(5)(b).
15 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(3)(a).
16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(5). As to the requirement for such a statement to be deposited see Sch 5 para 18(1); and the text and note 2.
17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(6).
18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(7).
19 Ie in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(5), (6): see the text to notes 13–17.
20 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(8).
21 Ie the requirements of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18.
22 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 19. Such a person is liable, on conviction on indictment, to a fine (Sch 5 para 19(1)(a)) or, on summary conviction, to a fine not exceeding the statutory maximum (Sch 5 para 19(1)(b)). As to the statutory maximum see PARA 56 note 24. In proceedings for such an offence, it is a defence for the person charged to show that he took all reasonable steps and exercised all due diligence to avoid the commission of the offence: Sch 5 para 19(2).

(d) Mergers and Divisions

665. Application to court. An open-ended investment company[1] may apply to the court under the Companies Act 2006[2] for an order in respect of a particular scheme[3] where:

(1) the scheme in question involves a compromise or arrangement with its shareholders[4] or creditors or any class of its shareholders or creditors[5]; and

(2) the consideration for the transfer or each of the transfers envisaged by the scheme is to be shares[6] in the transferee company receivable by shareholders of the transferor company[7] or, where there is more than one transferor company and any one or more of them is a public company, shares in the transferee company receivable by shareholders or members of the transferor companies (as the case may be)[8],

in each case with or without any cash payment to shareholders[9].

A public company may apply to the court under the Companies Act 1985[10] for an order sanctioning a particular scheme[11] where:

(a) the scheme in question involves a compromise or arrangement with its members or creditors or any class of its members or creditors[12]; and

(b) the consideration for the transfer or each of the transfers envisaged by the scheme is to be shares in the transferee company receivable by members of the transferor company[13] or where there is more than one transferor company and any one or more of them is an open-ended investment company, shares in the transferee company receivable by shareholders or members of the transferor companies (as the case may be)[14],

in each case with or without any cash payment to shareholders[15].

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

2 Ie the Companies Act 2006 s 896 or s 899 (power of company to compromise with creditors and members): see COMPANIES.

An application made by virtue of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 2 or Sch 6 para 3 (see the text and notes 3–15) is treated as one to which the Companies Act 2006 Pt 27 (ss 902–941) applies (mergers and divisions of public companies), and the provisions of Pt 27 and Pt 26 (ss 895–901) (see COMPANIES) have effect accordingly, subject to the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 6 (see below): Sch 6 para 5 (substituted by SI 2008/948). The provisions of the Companies Act 2006 have effect with such modifications as are necessary or appropriate for mergers and divisions involving open-ended investment companies: Sch 6 para 6(1) (amended by SI 2008/948). In particular, any reference in those provisions to a merger by absorption, a merger by formation of a new company or a division is to be taken to be a reference to a scheme falling within the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 4(1)(a), (b) or (c) (see PARA 666): Sch 6 para 6(2) (amended by SI 2008/948). Without prejudice to the generality of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 6(1), the following references in those provisions have effect as follows, unless the context otherwise requires:

(1) any reference to a scheme is to be taken to be a reference to a scheme falling within any of the provisions of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 4(1)(a), (b) or (c) (Sch 6 para 6(3)(a));

(2) any reference to a company is to be taken to be a reference to an open-ended investment company (Sch 6 para 6(3)(b));

(3) any reference to members is to be taken to be a reference to shareholders of an open-ended investment company (Sch 6 para 6(3)(c));

(4) any reference to the registered office of a company is to be taken to be a reference to the head office of an open-ended investment company (Sch 6 para 6(3)(d));

(5) any reference to the memorandum and articles of a company is to be taken to be a reference to the instrument of incorporation of an open-ended investment company (Sch 6 para 6(3)(e));

(6) any reference to a report under the Companies Act 1985 s 103 (prospectively repealed) (non-cash consideration to be valued before allotment) (see COMPANIES vol 7(1) (2004 Reissue) PARA 556) (as to replacement provisions see the Companies Act 2006 ss 593–595) is to be taken to be a reference to any report with respect to the valuation of any non-cash consideration given for shares in an open-ended investment company

which may be required by FSA rules (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 6(3)(f));

(7) any reference to annual accounts is to be taken to be a reference to the accounts contained in the annual report of an open-ended investment company (Sch 6 para 6(3)(g));

(8) any reference to the requirements of the Companies Act 2006 as to balance sheets forming part of a company's annual accounts is to be taken to be a reference to any requirements arising by virtue of FSA rules (see PARA 622 note 6) as to balance sheets drawn up for the purposes of the accounts contained in the annual report of an open-ended investment company (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 6(3)(i) (amended by SI 2008/948));

(9) any reference to paid up capital is to be taken to be a reference to the share capital of an open-ended investment company (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 6(3)(j)).

3 Ie a scheme falling within the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 4(1)(a)–(c): see PARA 666.
4 As to shareholders see PARA 624 note 6.
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 2(a) (Sch 6 para 2 amended by SI 2008/948).
6 As to shares see PARA 651 et seq.
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 2(b)(i).
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 2(b)(ii).
9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 2(b).
10 See note 2.
11 Ie a scheme falling within the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 4(1)(b) or (c): see PARA 666.
12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 3(a).
13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 3(b)(i).
14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 3(b)(ii).
15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 3(b).

666. Relevant schemes. The schemes[1] are:

(1) any scheme under which the undertaking, property and liabilities of an open-ended investment company[2] are to be transferred to another such company, other than one formed for the purpose of, or in connection with the scheme[3];

(2) any scheme under which the undertaking, property and liabilities of two or more bodies corporate, each of which is either an open-ended investment company[4] or a public company[5], are to be transferred to an open-ended investment company formed for the purpose of, or in connection with, the scheme[6];

(3) any scheme under which the undertaking, property and liabilities of an open-ended investment company or a public company are to be divided among and transferred to two or more open-ended investment companies whether or not formed for the purpose of, or in connection with, the scheme[7].

The court cannot sanction a scheme under which the whole or any part of the undertaking, property or liabilities of an open-ended investment company may be transferred to any person other than another such company[8].

1 Ie the schemes referred to in PARA 665.
2 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 paras 1, 4(1)(a).
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 4(1)(b)(i).
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 4(1)(b)(ii).
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 4(1)(b).
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 4(1)(c).
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 4(2). Nothing in Sch 6 is to be taken as enabling the court to sanction such a scheme: see Sch 6 para 4(2).

(e) Provision for Employees on Cessation or Transfer of Business

667. Power to provide for employees on cessation or transfer of business. The powers of an open-ended investment company[1] include power to make provision for the benefit of persons employed or formerly employed by the company, that is to say, provision in connection with the cessation or the transfer to any person of the whole or part of the undertaking of the company[2]. This power[3] is exercisable notwithstanding that its exercise is not in the best interests of the company[4].

The power which a company may exercise by virtue of the provisions described above[5] may only be exercised by the company:

(1) in a case not falling within head (2) or head (3) below[6], if sanctioned by a resolution of the company in general meeting[7];

(2) if so authorised by the instrument of incorporation[8], in the case of a company that has only one director[9], by a resolution of that director[10] and, in any other case, by such resolution of directors as is required by FSA rules[11]; or

(3) if the instrument of incorporation requires the exercise of the power to be sanctioned by a resolution of the company in general meeting for which more than a simple majority of the shareholders[12] voting is necessary, by a resolution of that majority[13].

In any case the power can only be exercised after compliance with any other requirements of the instrument of incorporation applicable to the exercise of the power[14].

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(1).
3 Ie the power conferred by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(1).
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(2).
5 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(1).
6 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(3)(b) or (c).
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(3)(a). As to general meetings see PARA 641.
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(3)(b). As to instruments of incorporation see PARA 624.
9 As to directors see PARA 639.
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(3)(b)(i).
11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(3)(b)(ii). As to the meaning of 'FSA rules' see PARA 622 note 6.
12 As to shareholders see PARA 624 note 6.
13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(3)(b).
14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(3).

(D) The Register, Records and Documents

668. Register of open-ended investment companies. The Financial Services Authority[1] must maintain a register of open-ended investment companies[2]. The Authority may keep the register in any form it thinks fit provided that it is possible to inspect the information contained on it and to obtain a copy of that information (or any part of it) for inspection[3].

The Authority must allocate to every open-ended investment company a number, which is to be known as the company's registered number[4]. Companies' registered numbers must be in such form, consisting of one or more sequences of figures or letters, as the Authority may from time to time determine[5]. The

Authority may, upon adopting a new form of registered number, make such changes of existing registered numbers (including numbers allocated by the appropriate registrar) as appear to it to be necessary[6]. A change in a company's registered number has effect from the date on which the company is notified by the Authority of the change[7].

Any document which is required by the Open-Ended Investment Companies Regulations 2001[8] to be delivered to the Authority in order to be recorded on the register[9] must be delivered in such form as the Authority may from time to time specify[10].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 71(1). As to the meaning of 'open-ended investment company' see PARA 623 note 3.
3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 71(2). Any requirement of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, as to the supply by the Authority of a document may, if the Authority thinks fit, be satisfied by the communication of the information in any non-legible form the Authority thinks appropriate: reg 76.
4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 72(1).
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 72(2).
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 72(3).
7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 72(4).
8 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.
9 Ie the register maintained pursuant to the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 71.
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 73. Any document which is delivered to the Authority under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, and relates to an open-ended investment company (whether already registered or to be registered) whose instrument of incorporation states that its head office is to be situated in Wales, may be in Welsh but must be accompanied by a certified translation into English: reg 77(1), (2). For the purposes of reg 77, 'certified translation' means a translation which is certified in the manner specified in FSA rules to be a correct translation: reg 77(5). As to the meaning of 'FSA rules' see PARA 622 note 6. As to instruments of incorporation see PARA 624. The requirement for a translation does not apply to documents of such description as may be specified in FSA rules (see reg 77(3)(a)) or to documents in a form prescribed by virtue of the Welsh Language Act 1993 s 26 (see COMPANIES vol 7(1) (2004 Reissue) PARA 291) in Welsh, or partly in Welsh and partly in English (see the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 77(3)(b)). An open-ended investment company whose instrument of incorporation states that its head office is to be situated in Wales may deliver to the Authority a certified translation into Welsh of any document in English which relates to the company and which is or has been delivered to the Authority: reg 77(4).

669. Company records. The information contained in a document delivered to the Financial Services Authority[1] under any provision of the Open-Ended Investment Companies Regulations 2001[2] may be recorded and kept by the Authority in any form it thinks fit, provided that it is possible to inspect the information and produce a copy of it in legible form[3].

The originals of documents delivered to the Authority[4] in legible form must be kept by it for ten years after which they may be destroyed[5]. Where a company has been dissolved, the Authority may, at any time after the expiration of two years from the date of the dissolution, direct that any records in its custody relating to the company may be removed to the Public Record Office; and records in respect of which such a direction is given must be disposed of in accordance with the enactments relating to the Public Record Office and the rules made under them[6].

Any person may inspect any records kept by the Authority for the purposes of the Open-Ended Investment Companies Regulations 2001[7] and may require a copy, in such form as the Authority considers appropriate, of any information contained in those records[8] or a certified copy of, or extract from, any such record[9]. The right of inspection extends to the originals of documents delivered to the Authority in legible form only where the record kept by the Authority of the contents of the document is illegible or unavailable[10].

A copy of or extract from a record kept by the Authority under the Open-Ended Investment Companies Regulations 2001[11], on which is indorsed a certificate signed by a member of the Authority's staff authorised by it for that purpose certifying that it is an accurate record of the contents of any document delivered to the Authority, is in all legal proceedings admissible in evidence as of equal validity with the original document and as evidence of any fact stated in it of which direct oral evidence would be admissible[12].

No process for compelling the production of a document kept by the Authority under the Open-Ended Investment Companies Regulations 2001[13] is to issue from any court except with the leave of the court; and any such process must bear on it a statement that it is issued with the leave of the court[14].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
2 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.
3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 74(1).
4 Ie delivered to the Authority under any provision of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 74(2).
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 74(3). Note that reg 74(3) does not apply to Scotland: reg 74(4).
7 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Pt IV (regs 71–79).
8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 75(1)(a).
9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 75(1)(b).
10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 75(2).
11 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.
12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 75(3).
13 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.
14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 75(4).

670. Restriction of deemed notice in regard to documents received by the Financial Services Authority. A person is not to be taken to have deemed notice of any matter merely because of its being disclosed in any document kept by the Financial Services Authority[1] (and thus available for inspection) under any provision of the Open-Ended Investment Companies Regulations 2001[2].

1 As to the Financial Services Authority see PARAS 4, 6 et seq.
2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 79.

(E) Contraventions and Offences

671. Contraventions and offences. Any of the following persons, that is to say: (1) a person who contravenes any provision of the Open-Ended Investment Companies Regulations 2001[1]; and (2) an open-ended investment company[2] (including any director[3] or depositary[4] of such a company) which contravenes any provision of FSA rules[5], is to be treated as having contravened rules made under the general rule-making power in the Financial Services and Markets Act 2000[6].

The provisions of the Financial Services and Markets Act 2000 relating to offences by bodies corporate[7], and those relating to jurisdiction and procedure in respect of offences[8], apply to offences under the Open-Ended Investment Companies Regulations 2001 as they apply to offences under the Financial Services and Markets Act 2000[9].

1 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 80(a).
2 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
3 As to directors see PARA 639.
4 As to the meaning of 'depositary' see PARA 626.
5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 80(b). As to the meaning of 'FSA rules' see PARA 622 note 6.
6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 80. As to the general rule-making power see the Financial Services and Markets Act 2000 s 138; and PARA 21.
7 Ie the Financial Services and Markets Act 2000 s 400: see PARA 571.
8 Ie the Financial Services and Markets Act 2000 s 403: see PARA 574.
9 See the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, regs 81, 82.

E. RECOGNISED OVERSEAS SCHEMES

(A) Schemes Constituted in Other EEA States

672. Schemes constituted in other EEA states. A collective investment scheme[1] constituted in another EEA state[2] is a recognised scheme[3] if: (1) it satisfies the prescribed[4] requirements[5]; and (2) not less than two months before inviting persons in the United Kingdom to become participants[6] in the scheme, the operator[7] of the scheme gives notice to the Financial Services Authority[8] of his intention to do so, specifying the way in which the invitation is to be made[9]. However, these provisions do not make the scheme a recognised scheme if within two months of receiving the notice[10] the Authority notifies: (a) the operator of the scheme; and (b) the authorities of the state in question who are responsible for the authorisation of collective investment schemes, that the way in which the invitation is to be made does not comply with the law in force in the United Kingdom[11].

The notice to be given to the Authority[12] must: (i) be accompanied by a certificate from the authorities mentioned in head (b) above to the effect that the scheme complies with the conditions necessary for it to enjoy the rights conferred by any relevant Community instrument; (ii) contain the address of a place in the United Kingdom for the service on the operator of notices or other documents[13] required or authorised to be served on him under the Financial Services and Markets Act 2000; and (iii) contain or be accompanied by such other information and documents as may be prescribed[14].

The operator of a recognised scheme may give written notice to the Authority that he desires the scheme to be no longer recognised[15].

1 As to the meaning of 'collective investment scheme' see PARA 603.
2 As to the meaning of 'EEA state' see PARA 315 note 1. For the purposes of the Financial Services and Markets Act 2000 s 264, a collective investment scheme is constituted in another EEA state if: (1) it is constituted under the law of that state by a contract or under a trust and is managed by a body corporate incorporated under that law; or (2) it takes the form of an open-ended investment company incorporated under that law: s 264(5). As to the meaning of 'body corporate' see PARA 86 note 11. As to the meaning of 'open-ended investment company' see PARA 603.
3 As to the meaning of 'recognised scheme' see PARA 603.
4 'Prescribed' means prescribed in regulations made by the Treasury: Financial Services and Markets Act 2000 s 417(1). As to the regulations made see the Financial Services and Markets

Act 2000 (Collective Investment Schemes Constituted in Other EEA States) Regulations 2001, SI 2001/2383. As to regulations made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

5 Financial Services and Markets Act 2000 s 264(1)(a). The requirements prescribed for the purposes of s 264 are that a collective investment scheme is one which, in accordance with the UCITS Directive (ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities), is an undertaking for collective investment in transferable securities subject to that directive (the 'undertaking'): Financial Services and Markets Act 2000 (Collective Investment Schemes Constituted in Other EEA States) Regulations 2001, SI 2001/2383, reg 3 (amended by SI 2003/2066).

6 As to the meaning of 'participants' see PARA 603.

7 As to the meaning of 'operator' see PARA 606 note 16.

8 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

9 Financial Services and Markets Act 2000 s 264(1).

10 Ie under the Financial Services and Markets Act 2000 s 264(1): see the text to notes 1–9.

11 Financial Services and Markets Act 2000 s 264(2). As to the meaning of 'United Kingdom' see PARA 2 note 3. A notice given by the Authority under s 264(2) must: (1) give the reasons for which the Authority considers that the law in force in the United Kingdom will not be complied with; and (2) specify a reasonable period (which may not be less than 28 days) within which any person to whom it is given may make representations to the Authority: s 264(4).

If any representations are made to the Authority, before the period for making representations has ended, by a person to whom a notice was given by the Authority under s 264(2), then the Authority must, within a reasonable period, decide in the light of those representations whether or not to withdraw its notice: s 265(1), (2). If the Authority withdraws its notice the scheme is a recognised scheme from the date on which the notice is withdrawn: s 265(3). If the Authority decides not to withdraw its notice, it must give a decision notice to each person to whom the notice under s 264(2) was given: s 265(4). As to decision notices see PARA 770. The operator of the scheme to whom the decision notice is given may refer the matter to the Financial Services and Markets Tribunal: s 265(5). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

12 Ie under the Financial Services and Markets Act 2000 s 264(1).

13 As to the meaning of 'document' see PARA 10 note 10.

14 Financial Services and Markets Act 2000 s 264(3). The notice to be given to the Authority under s 264(1) must contain or be accompanied by: (1) the fund rules or instrument of incorporation of the undertaking (see note 5); (2) its full and simplified prospectus within the meaning of the UCITS Directive (ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3)) Section VI; and (3) where appropriate, its latest annual report and any subsequent half-yearly report: Financial Services and Markets Act 2000 (Collective Investment Schemes Constituted in Other EEA States) Regulations 2001, SI 2001/2383, reg 4 (amended by SI 2003/2066).

15 Financial Services and Markets Act 2000 s 264(6): On the giving of notice under s 264(6), the scheme ceases to be a recognised scheme: s 264(7).

673. Disapplication of certain rules. Apart from: (1) financial promotion rules[1]; and (2) rules relating to facilities and information in the United Kingdom[2], rules made by the Financial Services Authority[3] under the Financial Services and Markets Act 2000 do not apply to the operator[4], trustee[5] or depositary[6] of a recognised scheme[7] in relation to the carrying on by him of regulated activities[8] for which he has permission in that capacity[9].

1 As to financial promotion rules see PARA 29.

2 Ie rules under the Financial Services and Markets Act 2000 s 283(1): see PARA 680. As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

4 As to the meaning of 'operator' see PARA 606 note 16.

5 As to the meaning of 'trustee' see PARA 606 note 16.

6 As to the meaning of 'depositary' see PARA 606 note 18.

7 'Scheme' means a scheme which is a recognised scheme by virtue of the Financial Services and Markets Act 2000 s 264 (see PARA 672): s 266(2).
8 As to regulated activities see PARA 84 et seq.
9 Financial Services and Markets Act 2000 s 266(1). However s 266(1) does not affect the application of rules to an operator of a scheme if the operator is an EEA firm falling within Sch 3 para 5(f) (ie a management company) (see PARA 315 note 1) who qualifies for authorisation under Sch 3: s 266(1A) (added by SI 2003/2066).

674. Power to suspend promotion of scheme. If it appears to the Financial Services Authority[1] that the operator[2] of a scheme[3] has communicated an invitation or inducement in relation to the scheme in a manner contrary to financial promotion rules[4], the Authority may give a direction suspending promotion of the scheme[5].

A direction[6] takes effect: (1) immediately, if the notice given under head (a) below states that that is the case; (2) on such date as may be specified in the notice; or (3) if no date is specified in the notice, when the matter to which it relates is no longer open to review[7]. A direction may be expressed to take effect immediately (or on a specified date) only if the Authority, having regard to its reasons for exercising its power[8], considers that it is necessary for the direction to take effect immediately (or on that date)[9]. If the Authority proposes to give a direction, or gives such a direction with immediate effect, it must: (a) give the operator of the scheme concerned written notice; and (b) inform the competent authorities in the scheme's home state of its proposal or (as the case may be) of the direction[10]. The notice must:

(i) give details of the direction[11];
(ii) inform the operator of when the direction takes effect[12];
(iii) state the Authority's reasons for giving the direction and for its determination as to when the direction takes effect[13];
(iv) inform the operator that he may make representations to the Authority within such period as may be specified in it (whether or not he has referred the matter to the Financial Services and Markets Tribunal)[14]; and
(v) inform him of his right to refer the matter to the Tribunal[15].

If, having considered any representations made by the operator, the Authority decides to give the direction in the way proposed or if it decides, where a direction has been given, not to revoke the direction, the Authority must give the operator of the scheme concerned written notice, and inform the competent authorities in the scheme's home state of the direction[16]. If, having considered any representations made by a person to whom the notice was given, the Authority decides not to give the direction in the way proposed, to give the direction in a way other than that proposed, or to revoke a direction which has effect, the Authority must give the operator of the scheme concerned written notice, and inform the competent authorities in the scheme's home state of its decision[17]. The provisions described above[18] apply to the variation of a direction on the Authority's own initiative as they apply to the giving of a direction[19].

If, on an application[20], the Authority proposes to vary a direction otherwise than in accordance with the application, or to refuse the application, it must give the operator of the scheme concerned a warning notice[21]. If, on such an application, the Authority decides to vary a direction otherwise than in accordance with the application, or to refuse the application, it must give the operator of the scheme concerned a decision notice[22]. If the application is refused, the operator of the scheme may refer the matter to the Tribunal[23]. If, on such an application, the Authority decides to grant the application it must give

the operator of the scheme concerned written notice[24]. If the Authority decides on its own initiative to revoke a direction[25], it must give the operator of the scheme concerned written notice[26]. The Authority must inform the competent authorities in the scheme's home state of any notice given[27].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
2 As to the meaning of 'operator' see PARA 606 note 16.
3 'Scheme' means a scheme which is a recognised scheme by virtue of the Financial Services and Markets Act 2000 s 264 (see PARA 672): s 267(8).
4 As to financial promotion rules see PARA 29.
5 Financial Services and Markets Act 2000 s 267(1), (2). The Authority may direct: (1) that the exemption for a recognised scheme from the restriction on promotion in s 238(1) provided by s 238(4)(c) (see PARA 606) is not to apply in relation to the scheme; and (2) that s 238(5) (see PARA 606) is not to apply with respect to things done in relation to the scheme: s 267(2).

A direction under s 267(2) has effect: (a) for a specified period; (b) until the occurrence of a specified event; or (c) until specified conditions are complied with: s 267(3). 'Specified', in relation to a direction, means specified in it: s 267(9). The Authority may, either on its own initiative or on the application of the operator of the scheme concerned, vary a direction given under s 267(2) if it appears to the Authority that the direction should take effect or continue in force in a different form: s 267(4). The Authority may, either on its own initiative or on the application of the operator of the recognised scheme concerned, revoke a direction given under s 267(2) if it appears to the Authority that the conditions specified in the direction have been complied with, or that it is no longer necessary for the direction to take effect or continue in force: s 267(5). If an event is specified, the direction ceases to have effect (unless revoked earlier) on the occurrence of that event: s 267(6).

For the purposes of ss 267–269: (i) the scheme's home state is the EEA state in which the scheme is constituted (within the meaning given by s 264 (see PARA 672)); (ii) the competent authorities in the scheme's home state are the authorities in that state who are responsible for the authorisation of collective investment schemes: s 267(7). As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'collective investment scheme' see PARA 603.
6 Ie a direction under the Financial Services and Markets Act 2000 s 267: see the text and notes 1–5.
7 Financial Services and Markets Act 2000 s 268(1). For the purposes of head (3) in the text, whether a matter is open to review is to be determined in accordance with s 391(8) (see PARA 774): s 268(14).
8 Ie under the Financial Services and Markets Act 2000 s 267: see the text and notes 1–5.
9 Financial Services and Markets Act 2000 s 268(2).
10 Financial Services and Markets Act 2000 s 268(3).
11 Financial Services and Markets Act 2000 s 268(4)(a).
12 Financial Services and Markets Act 2000 s 268(4)(b).
13 Financial Services and Markets Act 2000 s 268(4)(c).
14 Financial Services and Markets Act 2000 s 268(4)(d). As to the Financial Services and Markets Tribunal see PARA 43 et seq. The Authority may extend the period allowed under the notice for making representations: s 268(5).
15 Financial Services and Markets Act 2000 s 268(4)(e). If a notice informs a person of his right to refer a matter to the Tribunal, it must give an indication of the procedure on such a reference: s 268(12).
16 Financial Services and Markets Act 2000 s 268(6), (7). A notice given to the operator must inform him of his right to refer the matter to the Tribunal: s 268(10).
17 Financial Services and Markets Act 2000 s 268(8), (9). A notice given to the operator as a result of the Authority deciding to give the direction in a way other than that proposed must comply with s 268(4) (see heads (i)–(v) in the text): s 268(11).
18 Ie the Financial Services and Markets Act 2000 s 268: see the text and notes 8–17.
19 Financial Services and Markets Act 2000 s 268(13).
20 Ie under the Financial Services and Markets Act 2000 s 267(4) or s 267(5): see the text and notes 11–15.
21 Financial Services and Markets Act 2000 s 269(1). As to warning notices see PARA 769.
22 Financial Services and Markets Act 2000 s 269(2). As to decision notices see PARA 770.
23 Financial Services and Markets Act 2000 s 269(3).
24 Financial Services and Markets Act 2000 s 269(4).

25 Ie a direction given under the Financial Services and Markets Act 2000 s 267: see the text and notes 1–5.
26 Financial Services and Markets Act 2000 s 269(5).
27 Financial Services and Markets Act 2000 s 269(6).

(B) Schemes Authorised in Designated Countries and Territories, and Individually Recognised Schemes

675. Schemes authorised in designated countries or territories. A collective investment scheme[1] which is not a scheme constituted in another EEA state[2] but is managed in, and authorised under the law of, a country or territory outside the United Kingdom[3] is a recognised scheme[4] if[5]:

(1) that country or territory is so designated[6] by an order made by the Treasury[7];
(2) the scheme is of a class specified by the order[8];
(3) the operator[9] of the scheme has given written notice to the Financial Services Authority[10] that he wishes it to be recognised[11]; and
(4) either: (a) the Authority, by written notice, has given its approval to the scheme's being recognised; or (b) two months, beginning with the date on which notice was given under head (3) above, have expired without the operator receiving a warning notice from the Authority[12].

The Treasury may not make an order designating any country or territory for the purposes of these provisions unless satisfied: (i) that the law and practice under which relevant collective investment schemes[13] are authorised and supervised in that country or territory affords to investors in the United Kingdom protection at least equivalent to that provided for them by or under Part XVII of the Financial Services and Markets Act 2000[14] in the case of comparable authorised schemes[15]; and (ii) that adequate arrangements exist, or will exist, for co-operation between the authorities of the country or territory responsible for the authorisation and supervision of relevant collective investment schemes and the Authority[16]. If the Treasury is considering whether to make an order designating a country or territory for the purposes of these provisions: (A) the Treasury must ask the Authority for a report on the law and practice of that country or territory in relation to the authorisation and supervision of relevant collective investment schemes and on any existing or proposed arrangements for co-operation between it and the authorities responsible in that country or territory for the authorisation and supervision of relevant collective investment schemes[17]; (B) the Authority must provide the Treasury with such a report[18]; and (C) the Treasury must have regard to it in deciding whether to make the order[19].

If the Authority proposes to refuse approval of a scheme's being a recognised scheme[20], it must give the operator of the scheme a warning notice[21]. In order to be valid, the warning notice must be received by the operator before the end of two months beginning with the date on which notice was given to the Authority requesting it to recognise the scheme[22]. If, having given a warning notice, the Authority decides to refuse approval, it must give the operator of the scheme a decision notice[23]; and the operator may refer the matter to the Financial Services and Markets Tribunal[24].

1 As to the meaning of 'collective investment scheme' see PARA 603.
2 Ie by virtue of the Financial Services and Markets Act 2000 s 264: see PARA 672. As to the meaning of 'EEA state' see PARA 315 note 1.
3 As to the meaning of 'United Kingdom' see PARA 2 note 3.
4 As to the meaning of 'recognised scheme' see PARA 603.
5 Financial Services and Markets Act 2000 s 270(1).

6 Ie for the purposes of the Financial Services and Markets Act 2000 s 270.
7 Financial Services and Markets Act 2000 s 270(1)(a). As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

See the Financial Services and Markets Act 2000 (Collective Investment Schemes) (Designated Countries and Territories) Order 2003, SI 2003/1181, which designates Guernsey, Jersey and the Isle of Man for the purposes of the Financial Services and Markets Act 2000 s 270. See also the Financial Services (Designated Countries and Territories) (Overseas Collective Investment Schemes) (Bermuda) Order 1988, SI 1988/2284, which was made under the Financial Services and Markets Act 1986 s 87 (repealed), designates Bermuda and has effect as if made under the Financial Services and Markets Act 2000 s 270(1): see the Financial Services and Markets Act 2000 (Transitional Provisions) (Authorised Persons etc) Order 2001, SI 2001/2636, art 67(1).

8 Financial Services and Markets Act 2000 s 270(1)(b). See note 7.
9 As to the meaning of 'operator' see PARA 606 note 16.
10 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
11 Financial Services and Markets Act 2000 s 270(1)(c). The notice to be given by the operator under s 270(1)(c) must: (1) contain the address of a place in the United Kingdom for the service on the operator of notices or other documents required or authorised to be served on him under the Financial Services and Markets Act 2000; and (2) contain or be accompanied by such information and documents as may be specified by the Authority: s 270(6). As to the meaning of 'document' see PARA 10 note 10.
12 Financial Services and Markets Act 2000 s 270(1)(d). A warning notice is given under s 271: see the text and notes 20–24. As to warning notices see PARA 769.
13 'Relevant collective investment schemes' means collective investment schemes of the class or classes to be specified by the order: Financial Services and Markets Act 2000 s 270(3).
14 Ie the Financial Services and Markets Act 2000 Pt XVII (ss 235–284).
15 Financial Services and Markets Act 2000 s 270(2)(a). 'Comparable authorised schemes' means whichever of the following the Treasury considers to be the most appropriate, having regard to the class or classes of scheme to be specified by the order: (1) authorised unit trust schemes; (2) authorised open-ended investment companies; (3) both such unit trust schemes and such companies: s 270(4). As to the meanings of 'authorised unit trust scheme', 'authorised open-ended investment company' and 'unit trust scheme' see PARA 603.
16 Financial Services and Markets Act 2000 s 270(2).
17 Financial Services and Markets Act 2000 s 270(5)(a). The Authority must make such a report having regard to the Treasury's need to be satisfied as mentioned in s 270(2): see the text and notes 13–16.
18 Financial Services and Markets Act 2000 s 270(5)(b).
19 Financial Services and Markets Act 2000 s 270(5)(c).
20 Ie by virtue of the Financial Services and Markets Act 2000 s 270: see the text and notes 1–19.
21 Financial Services and Markets Act 2000 s 271(1).
22 Financial Services and Markets Act 2000 s 271(2). Such a notice is given under s 270(1)(c): see head (3) in the text.
23 As to decision notices see PARA 770.
24 Financial Services and Markets Act 2000 s 271(3). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

676. Individually recognised overseas schemes. The Financial Services Authority[1] may, on the application of the operator[2] of a collective investment scheme[3] which: (1) is managed in a country or territory outside the United Kingdom[4]; (2) is not a scheme constituted in another EEA state[5]; (3) is not managed in a designated country or territory[6] or, if it is so managed, is of a class not specified by the designation order; and (4) appears to the Authority to satisfy the following requirements, make an order declaring the scheme to be a recognised scheme[7]. The requirements are that:

(a) adequate protection must be afforded to participants[8] in the scheme[9];
(b) the arrangements for the scheme's constitution and management must be adequate[10];

(c) the powers and duties of the operator and, if the scheme has a trustee[11] or depositary[12], of the trustee or depositary must be adequate[13];

(d) the scheme must take the form of an open-ended investment company or (if it does not take that form) the operator must be a body corporate[14];

(e) the operator of the scheme must: (i) if an authorised person[15], have permission to act as operator; (ii) if not an authorised person, be a fit and proper person to act as operator[16];

(f) the trustee or depositary (if any) of the scheme must: (i) if an authorised person, have permission to act as trustee or depositary; (ii) if not an authorised person, be a fit and proper person to act as trustee or depositary[17];

(g) the operator and the trustee or depositary (if any) of the scheme must be able and willing to co-operate with the Authority by the sharing of information and in other ways[18];

(h) the name of the scheme must not be undesirable or misleading[19];

(i) the purposes of the scheme must be reasonably capable of being successfully carried into effect[20];

(j) the participants must be entitled to have their units[21] redeemed in accordance with the scheme at a price related to the net value of the property to which the units relate and determined in accordance with the scheme[22].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

2 As to the meaning of 'operator' see PARA 606 note 16.

3 As to the meaning of 'collective investment scheme' see PARA 603.

4 As to the meaning of 'United Kingdom' see PARA 2 note 3.

5 Ie does not satisfy the requirements prescribed for the purposes of the Financial Services and Markets Act 2000 s 264: see PARA 672. As to the meaning of 'EEA state' see PARA 315 note 1.

6 Ie designated for the purposes of the Financial Services and Markets Act 2000 s 270: see PARA 675.

7 Financial Services and Markets Act 2000 s 272(1). As to the meaning of 'recognised scheme' see PARA 603.

8 As to the meaning of 'participants' see PARA 603.

9 Financial Services and Markets Act 2000 s 272(2).

10 Financial Services and Markets Act 2000 s 272(3). In deciding whether the matters mentioned in s 272(3) or s 272(4) (see the text to notes 11–13) are adequate, the Authority must have regard to: (1) any rule of law; and (2) any matters which are, or could be, the subject of rules, applicable in relation to comparable authorised schemes: s 272(5). 'Comparable authorised schemes' means whichever of the following the Authority considers the most appropriate, having regard to the nature of the scheme in respect of which the application is made: (a) authorised unit trust schemes; (b) authorised open-ended investment companies; (c) both such unit trust schemes and such companies: s 272(6). As to the meanings of 'authorised unit trust scheme', 'authorised open-ended investment company' and 'unit trust scheme' see PARA 603.

11 As to the meaning of 'trustee' see PARA 606 note 16.

12 As to the meaning of 'depositary' see PARA 606 note 18.

13 Financial Services and Markets Act 2000 s 272(4). See note 10.

14 Financial Services and Markets Act 2000 s 272(7). As to the meaning of 'body corporate' see PARA 86 note 11.

15 As to authorised persons see PARA 314.

16 Financial Services and Markets Act 2000 s 272(8). For the purposes of heads (e)(ii) and (f)(ii) in the text, the Authority may take into account any matter relating to: (1) any person who is or will be employed by or associated with the operator, trustee or depositary in connection with the scheme; (2) any director of the operator, trustee or depositary; (3) any person exercising influence over the operator, trustee or depositary; (4) any body corporate in the same group as the operator, trustee or depositary; (5) any director of any such body corporate; (6) any person

exercising influence over any such body corporate: s 273. As to the meaning of 'group' see PARA 351 note 37; and as to the meaning of 'director' see PARA 86 note 11.

17 Financial Services and Markets Act 2000 s 272(9). See note 16.

18 Financial Services and Markets Act 2000 s 272(10).

19 Financial Services and Markets Act 2000 s 272(11).

20 Financial Services and Markets Act 2000 s 272(12).

21 As to the meaning of 'units' see PARA 603.

22 Financial Services and Markets Act 2000 s 272(13). A scheme is to be treated as complying with s 272(13) if it requires the operator to ensure that a participant is able to sell his units on an investment exchange at a price not significantly different from that mentioned in s 272(13): s 272(14). Section 272(13) is not to be read as imposing a requirement that the participants must be entitled to have their units redeemed (or sold as mentioned in s 272(14)) immediately following a demand to that effect: s 272(15). As to investment exchanges see PARA 684 et seq.

677. Applications for recognition of individual schemes. An application[1] for an order declaring a scheme to be a recognised scheme[2] must be made to the Financial Services Authority[3] by the operator[4] of the scheme[5]. The application must: (1) be made in such manner as the Authority may direct; (2) contain the address of a place in the United Kingdom[6] for the service on the operator of notices or other documents[7] required or authorised to be served on him under the Financial Services and Markets Act 2000; (3) contain or be accompanied by such information as the Authority may reasonably require for the purpose of determining the application[8]. At any time after receiving an application and before determining it, the Authority may require the applicant to provide it with such further information as it reasonably considers necessary to enable it to determine the application[9]. Different directions may be given, and different requirements imposed, in relation to different applications[10]. The Authority may require an applicant to present information which he is required to give under the provisions described above in such form, or to verify it in such a way, as the Authority may direct[11].

An application[12] must be determined by the Authority before the end of the period of six months beginning with the date on which it receives the completed application[13]. The Authority may determine an incomplete application if it considers it appropriate to do so; and it must in any event determine such an application within 12 months beginning with the date on which it first receives the application[14]. If the Authority makes an order declaring a scheme to be a recognised scheme[15], it must give written notice of the order to the applicant[16].

If the Authority proposes to refuse an application[17] it must give the applicant a warning notice[18]. If the Authority decides to refuse the application it must give the applicant a decision notice[19], and the applicant may refer the matter to the Financial Services and Markets Tribunal[20].

1 Ie under the Financial Services and Markets Act 2000 s 272: see PARA 676.

2 As to the meaning of 'recognised scheme' see PARA 603.

3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

4 As to the meaning of 'operator' see PARA 606 note 16.

5 Financial Services and Markets Act 2000 s 274(1).

6 As to the meaning of 'United Kingdom' see PARA 2 note 3.

7 As to the meaning of 'document' see PARA 10 note 10.

8 Financial Services and Markets Act 2000 s 274(2).

9 Financial Services and Markets Act 2000 s 274(3).

10 Financial Services and Markets Act 2000 s 274(4).

11 Financial Services and Markets Act 2000 s 274(5).

12 Ie under the Financial Services and Markets Act 2000 s 272: see PARA 676.

13 Financial Services and Markets Act 2000 s 275(1).

14 Financial Services and Markets Act 2000 s 275(2).
15 Ie under the Financial Services and Markets Act 2000 s 272(1): see PARA 676.
16 Financial Services and Markets Act 2000 s 275(3).
17 Ie an application made under the Financial Services and Markets Act 2000 s 272: see PARA 676.
18 Financial Services and Markets Act 2000 s 276(1). As to warning notices see PARA 769.
19 Financial Services and Markets Act 2000 s 276(2)(a). As to decision notices see PARA 770.
20 Financial Services and Markets Act 2000 s 276(2)(b). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

678. Alteration of individually recognised schemes and changes of operator, trustee or depositary. The operator[1] of an individually recognised scheme[2] must give written notice to the Financial Services Authority[3] of any proposed alteration to the scheme[4]. Any such proposal may not be given effect unless: (1) the Authority, by written notice, has given its approval to the proposal; or (2) one month, beginning with the date on which notice was given[5], has expired without the Authority having given written notice to the operator that it has decided to refuse approval[6]. At least one month before any replacement of the operator, trustee[7] or depositary[8] of such a scheme, notice of the proposed replacement must be given to the Authority by the operator, trustee or depositary (as the case may be), or by the person who is to replace him[9].

1 As to the meaning of 'operator' see PARA 606 note 16.
2 Ie a scheme recognised by virtue of the Financial Services and Markets Act 2000 s 272: see PARA 676.
3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
4 Financial Services and Markets Act 2000 s 277(1).
5 Ie under the Financial Services and Markets Act 2000 s 277(1).
6 Financial Services and Markets Act 2000 s 277(2).
7 As to the meaning of 'trustee' see PARA 606 note 16.
8 As to the meaning of 'depositary' see PARA 606 note 18.
9 Financial Services and Markets Act 2000 s 277(3).

679. Requirements for schemes authorised in designated countries or territories and for individually recognised schemes. The Financial Services Authority[1] may make rules[2] imposing duties or liabilities on the operator[3] of a scheme authorised in a designated country or territory or an individually recognised scheme[4] for purposes corresponding to those for which rules may be made[5] in relation to authorised unit trust schemes[6].

The Authority may direct that a scheme is to cease to be recognised[7] or revoke a recognition order[8] if it appears to the Authority[9]:

(1) that the operator, trustee[10] or depositary[11] of the scheme has contravened a requirement imposed on him by or under the Financial Services and Markets Act 2000[12];
(2) that the operator, trustee or depositary of the scheme has, in purported compliance with any such requirement, knowingly or recklessly given the Authority information which is false or misleading in a material particular[13];
(3) in the case of an order[14], that one or more of the requirements for the making of the order are no longer satisfied[15]; or
(4) that none of heads (1) to (3) above applies, but it is undesirable in the interests of the participants[16] or potential participants that the scheme should continue to be recognised[17].

If the Authority proposes to give a direction[18] or to make an order[19] revoking a recognition order, it must give a warning notice to the operator and (if any) the

trustee or depositary of the scheme[20]. If the Authority decides to give such a direction or make such an order it must without delay give a decision notice[21] to the operator and (if any) the trustee or depositary of the scheme; and the operator or the trustee or depositary may refer the matter to the Financial Services and Markets Tribunal[22].

If it appears to the Financial Services Authority that: (a) the operator, trustee or depositary of a relevant recognised scheme[23] has contravened, or is likely to contravene, a requirement imposed on him by or under the Financial Services and Markets Act 2000; (b) the operator, trustee or depositary of such a scheme has, in purported compliance with any such requirement, knowingly or recklessly given the Authority information which is false or misleading in a material particular; (c) one or more of the requirements for the recognition of a scheme[24] are no longer satisfied; or (d) none of heads (a) to (c) above applies, but the exercise of the power to give directions[25] is desirable in order to protect the interests of participants or potential participants in a relevant recognised scheme who are in the United Kingdom, it may direct that the scheme is not to be a recognised scheme for a specified period or until the occurrence of a specified event or until specified conditions are complied with[26].

A direction takes effect: (i) immediately, if the notice given by the Authority[27] states that that is the case; (ii) on such date as may be specified in the notice; or (iii) if no date is specified in the notice, when the matter to which it relates is no longer open to review[28]. A direction may be expressed to take effect immediately (or on a specified date) only if the Authority, having regard to the ground on which it is exercising its power[29], considers that it is necessary for the direction to take effect immediately (or on that date)[30]. If the Authority proposes to give a direction[31], or gives such a direction with immediate effect, it must give separate written notice to the operator and (if any) the trustee or depositary of the scheme concerned[32]. The notice must: (A) give details of the direction; (B) inform the person to whom it is given of when the direction takes effect; (C) state the Authority's reasons for giving the direction and for its determination as to when the direction takes effect; (D) inform the person to whom it is given that he may make representations to the Authority within such period as may be specified in it (whether or not he has referred the matter to the Tribunal); and (E) inform him of his right to refer the matter to the Tribunal[33]. The Authority may extend the period allowed under the notice for making representations[34]. If, having considered any representations made by a person to whom the notice was given, the Authority decides to give the direction in the way proposed, or if it decides, where a direction has been given, not to revoke the direction, it must give separate written notice to the operator and (if any) the trustee or depositary of the scheme concerned[35]. If, having considered any representations made by a person to whom the notice was given, the Authority decides not to give the direction in the way proposed, to give the direction in a way other than that proposed, or to revoke a direction which has effect, it must give separate written notice to the operator and (if any) the trustee or depositary of the scheme concerned[36]. The provisions described above[37] apply to the variation of a direction on the Authority's own initiative as they apply to the giving of a direction[38].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

2 As to the meaning of 'rule' see PARA 23 note 2.

3 As to the meaning of 'operator' see PARA 606 note 16.

4 Ie a scheme recognised under the Financial Services and Markets Act 2000 s 270 (see PARA 675) or s 272 (see PARA 676).
5 Ie under the Financial Services and Markets Act 2000 s 248: see PARA 615.
6 Financial Services and Markets Act 2000 s 278. As to the meaning of 'authorised unit trust scheme' see PARA 603.
7 Ie by virtue of the Financial Services and Markets Act 2000 s 270: see PARA 675.
8 Ie under the Financial Services and Markets Act 2000 s 272: see PARA 676.
9 Financial Services and Markets Act 2000 s 279.
10 As to the meaning of 'trustee' see PARA 606 note 16.
11 As to the meaning of 'depositary' see PARA 606 note 18.
12 Financial Services and Markets Act 2000 s 279(a).
13 Financial Services and Markets Act 2000 s 279(b).
14 Ie under the Financial Services and Markets Act 2000 s 272: see PARA 676.
15 Financial Services and Markets Act 2000 s 279(c).
16 As to the meaning of 'participants' see PARA 603.
17 Financial Services and Markets Act 2000 s 279(d).
18 Ie under the Financial Services and Markets Act 2000 s 279: see the text to notes 7–17.
19 Ie under the Financial Services and Markets Act 2000 s 279: see the text to notes 7–17.
20 Financial Services and Markets Act 2000 s 280(1).
21 As to decision notices see PARA 770.
22 Financial Services and Markets Act 2000 s 280(2). As to the Financial Services and Markets Tribunal see PARA 43 et seq.
23 A 'relevant recognised scheme' means a scheme recognised under the Financial Services and Markets Act 2000 s 270 (see PARA 675) or s 272 (see PARA 676): s 281(1).
24 Ie under the Financial Services and Markets Act 2000 s 272: see PARA 676.
25 Ie the power conferred by the Financial Services and Markets Act 2000 s 281.
26 Financial Services and Markets Act 2000 s 281(2).
27 Ie the notice given under the Financial Services and Markets Act 2000 s 282(3): see the text to notes 31–32.
28 Financial Services and Markets Act 2000 s 282(1). For the purposes of head (iii) in the text, whether a matter is open to review is to be determined in accordance with s 391(8) (see PARA 774): s 282(12).
29 Ie under the Financial Services and Markets Act 2000 s 281: see the text and notes 23–26.
30 Financial Services and Markets Act 2000 s 282(2).
31 Ie under the Financial Services and Markets Act 2000 s 281: see the text and notes 23–26.
32 Financial Services and Markets Act 2000 s 282(3).
33 Financial Services and Markets Act 2000 s 282(4). If a notice informs a person of his right to refer a matter to the Tribunal, it must give an indication of the procedure on such a reference: s 282(10).
34 Financial Services and Markets Act 2000 s 282(5).
35 Financial Services and Markets Act 2000 s 282(6). A notice given under s 282(6) must inform the person to whom it is given of his right to refer the matter to the Tribunal: s 282(8).
36 Financial Services and Markets Act 2000 s 282(7). A notice that the Authority has decided to give a direction in a way other than that proposed must comply with s 282(4) (see the text to note 33): s 282(9).
37 Ie the Financial Services and Markets Act 2000 s 282: see the text and notes 29–36.
38 Financial Services and Markets Act 2000 s 282(11).

(C) Facilities and Information

680. Facilities. The Financial Services Authority[1] may make rules[2] requiring operators[3] of recognised schemes[4] to maintain in the United Kingdom[5], or in such part or parts of it as may be specified, such facilities as the Authority thinks desirable in the interests of participants[6] and as are specified in rules[7].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
2 As to the meaning of 'rule' see PARA 23 note 2.
3 As to the meaning of 'operator' see PARA 606 note 16.
4 As to the meaning of 'recognised scheme' see PARA 603.
5 As to the meaning of 'United Kingdom' see PARA 2 note 3.

6 As to the meaning of 'participants' see PARA 603.
7 Financial Services and Markets Act 2000 s 283(1).

681. Information. The Financial Services Authority[1] may by notice in writing require the operator[2] of any recognised scheme[3] to include such explanatory information as is specified in the notice in any communication of his which: (1) is a communication of an invitation or inducement[4]; and (2) names the scheme[5].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
2 As to the meaning of 'operator' see PARA 606 note 16.
3 As to the meaning of 'recognised scheme' see PARA 603.
4 Ie of a kind mentioned in the Financial Services and Markets Act 2000 s 21(1): see PARA 225.
5 Financial Services and Markets Act 2000 s 283(2). In the case of a communication originating outside the United Kingdom, s 283(2) only applies if the communication is capable of having an effect in the United Kingdom: s 283(3). As to the meaning of 'United Kingdom' see PARA 2 note 3.

F. POWER TO INVESTIGATE

682. The power to investigate in relation to open-ended investment companies. The Financial Services Authority[1] or the Secretary of State[2] may appoint one or more competent persons to investigate and report on the affairs of, or of any director or depositary[3] of, an open-ended investment company[4] if it appears to either of them that it is in the interests of shareholders[5] or potential shareholders of the company to do so or that the matter is of public concern[6].

A person so appointed[7] to investigate the affairs of, or of any director or depositary of, a company may also, if he thinks it necessary for the purposes of that investigation, investigate the affairs of (or of the directors, depositary, trustee or operator of):

(1) an open-ended investment company, the directors of which include any of the directors of the company whose affairs are being investigated as described above[8];
(2) an open-ended investment company, the directors of which include any of the directors of the depositary whose affairs are being so investigated[9];
(3) an open-ended investment company, the depositary of which is: (a) the same as the depositary of the company whose affairs are being so investigated[10]; or (b) the depositary whose affairs are being so investigated[11];
(4) an open-ended investment company, the directors of which include: (a) the director whose affairs are being so investigated[12]; or (b) any director of a body corporate which is the director whose affairs are being so investigated[13];
(5) a collective investment scheme[14], the manager, depositary or operator of which is a director of the company whose affairs are being so investigated[15];
(6) a collective investment scheme, the trustee of which is: (a) the same as the depositary of the company whose affairs are being so investigated[16]; or (b) the depositary whose affairs are being so investigated[17]; or
(7) a collective investment scheme, the manager, depositary or operator of

which is: (a) the director whose affairs are being so investigated[18]; or (b) a director of a body corporate which is the director whose affairs are being so investigated[19].

If the person ('A') appointed to conduct an investigation[20] considers that a person ('B') is or may be able to give information which is relevant to the investigation, A may require B:

(i) to produce to A any documents in B's possession or under his control which appear to A to be relevant to that investigation[21];

(ii) to attend before A[22]; and

(iii) otherwise to give A all such assistance in connection with the investigation which B is reasonably able to give[23].

It is B's duty to comply with that requirement[24].

Certain provisions of the Financial Services and Markets Act 2000 relating to investigations apply in certain circumstances[25].

No person may be required[26] to disclose information or produce a document in respect of which he owes an obligation of confidence by virtue of carrying on a banking business unless:

(A) the imposition of the requirement is authorised by the Authority or the Secretary of State (as the case may be) or the person to whom the obligation of confidence is owed[27]; or

(B) the person to whom it is owed is a director or depositary of any open-ended investment company which is under investigation, or any other person whose own affairs are under investigation[28].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialists Sourcebooks, Collective Investment Schemes (COLL); Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

2 As to the Secretary of State see PARA 3.

3 As to the meaning of 'depositary' see PARA 626.

4 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

5 As to shareholders see PARA 624 note 6.

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(1).

7 Ie appointed under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(1).

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(a).

9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(b).

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(c)(i).

11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(c)(ii).

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(d)(i).

13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(d)(ii).

14 As to the meaning of 'collective investment scheme' see PARA 603.

15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(e).

16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(f)(i).

17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(f)(ii).

18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(g)(i).

19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(g)(ii).

20 Ie an investigation under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30.

21 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(3)(a).

22 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(3)(b).

23 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(3)(c).

24 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(3).

25 The provisions of the Financial Services and Markets Act 2000 s 170(5)–(9) (general provisions relating to investigations) (see PARA 451) apply if the Authority appoints a person under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30 to conduct an investigation on its behalf (reg 30(4)(a)) or the Secretary of State appoints a person under reg 30

to conduct an investigation on his behalf (reg 30(4)(b)), as they apply in the cases mentioned in the Financial Services and Markets Act 2000 s 170(1) (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(4)).

The Financial Services and Markets Act 2000 s 174 (admissibility of statements made to investigators) (see PARA 452) applies to a statement made by a person in compliance with a requirement imposed on him under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30 as it applies to a statement mentioned in the Financial Services and Markets Act 2000 s 174: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(5).

The Financial Services and Markets Act 2000 s 175(2)–(4), (6) (supplemental provisions relating to information and documents) (see PARA 453) and s 177 (offences) (see PARAS 451, 455) have effect as if the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30 were contained in the Financial Services and Markets Act 2000 Pt XI (ss 165–177) (information gathering and investigations) (see PARA 447 et seq): Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(6).

The provisions of the Financial Services and Markets Act 2000 s 176(1)–(9) (entry of premises under warrant) (see PARA 454) apply in relation to a person appointed under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(1) as if references to an investigator were references to a person so appointed (reg 30(7)(a)), references to an information requirement were references to a requirement imposed under reg 30 by a person so appointed (reg 30(7)(b)), and the premises mentioned in the Financial Services and Markets Act 2000 s 176(3)(a) were the premises of a person whose affairs are the subject of an investigation under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30 or of an appointed representative of such a person (reg 30(7)(b)). As to the meaning of 'appointed representative' see PARA 346.

26 Ie required under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30.

27 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(8)(a).

28 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(8)(b).

683. Power to investigate in relation to other collective investment schemes. If it appears to an investigating authority[1] that it is in the interests of the participants[2] or potential participants to do so or that the matter is of public concern, the investigating authority may appoint one or more competent persons to investigate on its behalf[3]:

(1) the affairs of, or of the manager or trustee[4] of, any authorised unit trust scheme[5];

(2) the affairs of, or of the operator[6], trustee or depositary[7] of, any recognised scheme[8] so far as relating to activities carried on in the United Kingdom[9]; or

(3) the affairs of, or of the operator, trustee or depositary of, any other collective investment scheme[10] except a body incorporated by virtue of regulations made in relation to open-ended investment companies[11].

A person appointed[12] to investigate the affairs of, or of the manager, trustee, operator or depositary of, any scheme (scheme 'A'), may also, if he thinks it necessary for the purposes of that investigation, investigate: (a) the affairs of, or of the manager, trustee, operator or depositary of, any other such scheme[13] whose manager, trustee, operator or depositary is the same person as the manager, trustee, operator or depositary of scheme A; (b) the affairs of such other schemes and persons (including open-ended investment companies[14] and the directors[15] and depositaries of such bodies) as may be prescribed[16].

If the person appointed to conduct an investigation under these provisions ('B') considers that a person ('C') is or may be able to give information which is relevant to the investigation, B may require C: (i) to produce to B any documents[17] in C's possession or under his control which appear to B to be relevant to the investigation; (ii) to attend before B; and (iii) otherwise to give B

all assistance in connection with the investigation which C is reasonably able to give, and it is C's duty to comply with that requirement[18].

1 'Investigating authority' means the Financial Services Authority or the Secretary of State: Financial Services and Markets Act 2000 s 284(11). As to the Financial Services Authority see PARAS 4, 6 et seq. As to the Secretary of State see PARA 3.
2 As to the meaning of 'participants' see PARA 603.
3 Financial Services and Markets Act 2000 s 284(1). Section 170(5)–(9) (investigations) (see PARA 451) applies if an investigating authority appoints a person under s 284 to conduct an investigation on its behalf as it applies in the case mentioned in s 170(1) (see PARA 451): s 284(4). Section 174 (admissibility of statements made to investigators) (see PARA 452) applies to a statement made by a person in compliance with a requirement imposed under s 284 as it applies to a statement mentioned in s 174: s 284(5). Section 175(2)–(4), (6) (supplemental provisions relating to information and documents) (see PARA 453) and s 177 (offences) (see PARA 455) have effect as if s 284 were contained in Pt XI (ss 165–177): s 284(6).

Section 176(1)–(9) (entry of premises under warrant) (see PARA 454) applies in relation to a person appointed under s 284(1) as if: (1) references to an investigator were references to a person so appointed; (2) references to an information requirement were references to a requirement imposed under s 175 or under s 284(3) by a person so appointed; (3) the premises mentioned in s 176(3)(a) were the premises of a person whose affairs are the subject of an investigation under s 284 or of an appointed representative of such a person: s 284(7). As to the meaning of 'appointed representative' see PARA 346.
4 As to the meaning of 'trustee' see PARA 606 note 16.
5 Financial Services and Markets Act 2000 s 284(1)(a). As to the meaning of 'authorised unit trust scheme' see PARA 603.
6 As to the meaning of 'operator' see PARA 606 note 16.
7 As to the meaning of 'depositary' see PARA 606 note 18.
8 As to the meaning of 'recognised scheme' see PARA 603.
9 Financial Services and Markets Act 2000 s 284(1)(b). As to the meaning of 'United Kingdom' see PARA 2 note 3.
10 As to the meaning of 'collective investment scheme' see PARA 603.
11 Financial Services and Markets Act 2000 s 284(1)(c). The regulations referred to in the text are regulations made under s 262: see PARA 621 et seq.
12 Ie under the Financial Services and Markets Act 2000 s 284(1): see the text to notes 1–11.
13 Ie any such scheme as is mentioned in the Financial Services and Markets Act 2000 s 284(1): see the text to notes 1–11.
14 Ie a body incorporated by virtue of regulations under the Financial Services and Markets Act 2000 s 262: see PARA 621 et seq.
15 As to the meaning of 'director' see PARA 86 note 11.
16 Financial Services and Markets Act 2000 s 284(2). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). At the date at which this volume states the law no such regulations had been made. As to regulations made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
17 As to the meaning of 'document' see PARA 10 note 10.
18 Financial Services and Markets Act 2000 s 284(3). No person may be required under s 284 to disclose information or produce a document in respect of which he owes an obligation of confidence by virtue of carrying on the business of banking unless: (1) the person to whom the obligation of confidence is owed consents to the disclosure or production, or the imposing on the person concerned of a requirement with respect to information or such a document has been specifically authorised by the investigating authority; or (2) the person owing the obligation of confidence or the person to whom it is owed is: (a) the manager, trustee, operator or depositary of any collective investment scheme which is under investigation; (b) the director of on open-ended investment company which is under investigation; (c) any other person whose own affairs are under investigation: s 284(8)–(10).

(iii) Recognised Investment Exchanges and Clearing Houses

A. EXEMPTION

684. Exemption from the general prohibition. A recognised investment exchange[1] is exempt from the general prohibition[2] as respects any regulated

activity[3] which is carried on as part of the exchange's business as an investment exchange[4] or which is carried on for the purposes of, or in connection with, the provision of clearing services by the exchange[5].

A recognised clearing house[6] is exempt from the general prohibition as respects any regulated activity which is carried on for the purposes of, or in connection with, the provision of clearing services by the clearing house[7].

1 For the purposes of the Financial Services and Markets Act 2000, 'recognised investment exchange' means an investment exchange in relation to which a recognition order is in force: ss 285(1)(a), 417(1). For the purposes of Pt XVIII (ss 285–313), 'recognition order' means an order made under s 290 (see PARA 709) or s 292 (see PARA 710): s 313(1).
2 As to the general prohibition see PARA 80.
3 As to regulated activities see PARA 84 et seq.
4 Financial Services and Markets Act 2000 s 285(2)(a).
5 Financial Services and Markets Act 2000 s 285(2)(b).
6 For the purposes of the Financial Services and Markets Act 2000, 'recognised clearing house' means a clearing house in relation to which a recognition order is in force: ss 285(1)(b), 417(1).
7 Financial Services and Markets Act 2000 s 285(3).

B. RECOGNITION

(A) In general

685. Qualification for recognition. The Treasury[1] may make regulations[2] setting out the requirements: (1) which must be satisfied by an investment exchange or clearing house if it is to qualify as a body in respect of which the Financial Services Authority[3] may make a recognition order[4] under Part XVIII of the Financial Services and Markets Act 2000[5]; and (2) which, if a recognition order is made, it must continue to satisfy if it is to remain a recognised body[6].

However, if regulations contain provision as to the default rules[7] of an investment exchange or clearing house, or as to proceedings taken under such rules by such a body, they require the approval of the Secretary of State[8].

In the case of an investment exchange, the above requirements[9] are in addition to requirements which must be satisfied by the exchange[10] before the Authority may make a recognition order declaring the exchange to be a recognised investment exchange[11].

Requirements resulting from the provisions described above[12] are referred to in Part XVIII of the Financial Services and Markets Act 2000 as 'recognition requirements'[13].

1 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
2 In exercise of this power the Treasury has made the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995: see also PARA 686 et seq. As to regulations made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

Nothing in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, is to be construed as requiring a recognised investment exchange to limit dealings on the exchange to dealings in investments, or as requiring a recognised investment exchange or recognised clearing house to limit the provision of its clearing services to clearing services in respect of transactions in investments: reg 7. As to the meaning of 'recognised investment exchange' see PARA 684 note 1. As to references to dealings on an exchange see PARA 687 note 11. As to the meaning of 'investments' see PARA 688 note 6. As to the meaning of 'recognised clearing house' see PARA 684 note 6. See note 5.
3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

4 As to the meaning of 'recognition order' see PARA 684 note 1.

5 Financial Services and Markets Act 2000 s 286(1)(a). The reference in the text is a reference to Pt XVIII (ss 285–313).

If regulations under the Financial Services and Markets Act 2000 s 286(1) require an investment exchange to make information available to the public in accordance with (1) the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 29.1 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1); or (2) the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 44.1 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1), the regulations may authorise the Authority to waive the requirement in the circumstances specified in the relevant provisions: Financial Services and Markets Act 2000 s 286(4A), (4E) (s 286(4A)–(4E) added by SI 2006/2975). For these purposes, the 'relevant provisions' are in a case falling within head (1) above, the Markets in Financial Instruments Directive art 29.2 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1); and in a case falling within head (2) above, the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 44.2 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1): Financial Services and Markets Act 2000 s 286(4B) (as so added).

If regulations under s 286(1) require an investment exchange to make information available to the public in accordance with (a) the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 30.1 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1); or (b) the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 45.1 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1), the regulations may authorise the Authority to defer the requirement in the circumstances specified, and subject to the requirements contained, in the relevant provisions: Financial Services and Markets Act 2000 s 286(4A), (4E) (as so added). For these purposes the 'relevant provisions' are in a case falling within head (a) above, the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 30.2 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1); and in a case falling within head (b) above, the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 45.2 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1): Financial Services and Markets Act 2000 s 286(4E) (as so added).

6 Financial Services and Markets Act 2000 s 286(1)(b). See note 5. For the purposes of Pt XVIII, 'recognised body' means a recognised investment exchange or a recognised clearing house: s 313(1).

7 'Default rules' means rules of an investment exchange or clearing house which provide for the taking of action in the event of a person's appearing to be unable, or likely to become unable, to meet his obligations in respect of one or more market contracts connected with the exchange or clearing house: Financial Services and Markets Act 2000 s 286(3).

References in Pt XVIII to rules of an investment exchange (or a clearing house) are to rules made, or conditions imposed, by the investment exchange (or the clearing house) with respect to: (1) recognition requirements (see the text to notes 12–13); (2) admission of persons to, or their exclusion from the use of, its facilities; or (3) matters relating to its constitution: s 313(2). 'Market contract' means: (a) a contract to which the Companies Act 1989 Pt VII (ss 154–191) (see PARA 509 et seq) applies as a result of s 155 or a contract to which the Companies (No 2) (Northern Ireland) Order 1990, SI 1990/1504 (NI 10) Pt V (arts 90–126) applies as a result of art 80; and (b) such other kind of contract as may be prescribed: Financial Services and Markets Act 2000 s 286(4).

8 Financial Services and Markets Act 2000 s 286(2). As to the Secretary of State see PARA 3.

9 Ie the requirements resulting from the Financial Services and Markets Act 2000 s 286.

10 Ie as a result of the Financial Services and Markets Act 2000 s 290(1A): see PARA 709.

11 Financial Services and Markets Act 2000 s 286(6) (added by SI 2007/126).

12 Ie Financial Services and Markets Act 2000 s 286.

13 Financial Services and Markets Act 2000 s 286(5). See PARA 686 et seq.

(B) Recognition Requirements

(a) Requirements for Investment Exchanges

686. Application for or by an investment exchange. There are specific recognition requirements[1] for investment exchanges for or by whom applications have been made for recognition orders[2].

1 As to recognition requirements generally see PARA 685.
2 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 4. The provisions of the Schedule Pt I (see PARAS 687–690) and Pt II (see PARAS 693–695) set out the requirements applying to bodies in respect of which a recognition order has been made under the Financial Services and Markets Act 2000 s 290(1)(a) (see PARA 709) or which have applied for such an order under s 287 (see PARA 706). As to the meaning of 'recognition order' see PARA 684 note 1.
As to the method of satisfying recognition requirements see PARA 705.

687. Financial resources, suitability, systems and controls. In order to qualify for recognition, an exchange must have financial resources sufficient for the proper performance of its functions as a recognised investment exchange[1]. In considering whether this requirement is satisfied, the Financial Services Authority[2] must[3] take into account all the circumstances, including the exchange's connection with any person, and any activity carried on by the exchange, whether or not it is an exempt activity[4].

The exchange must be a fit and proper person to perform the functions of a recognised investment exchange[5]. In considering whether this requirement is satisfied, the Authority may[6] take into account all the circumstances, including the exchange's connection with any person[7].

The exchange must ensure that the systems and controls used in the performance of its functions are adequate, and appropriate for the scale and nature of its business[8]. This applies in particular to systems and controls concerning:

(1) the transmission of information[9];
(2) the assessment, mitigation and management of risks to the performance of the exchange's functions[10];
(3) the effecting and monitoring of transactions on the exchange[11];
(4) the technical operation of the exchange, including contingency arrangements for disruption to its facilities[12];
(5) the operation of arrangements for the timely discharge of the rights and liabilities of the parties to the transactions effected on the exchange[13]; and
(6) (where relevant) the safeguarding and administration of assets belonging to users of the exchange's facilities[14].

1 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 1(1). References in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, to the performance of the functions of a recognised body are references to the carrying on by it of exempt activities together with the performance of its regulatory functions: reg 3(3). As to the meaning of 'recognised body' see PARA 685 note 6.
2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.
As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

3 Ie without prejudice to the generality of the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 6(1) (see PARA 705) in regard to the method of satisfying recognition requirements.

4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 1(2) (amended by SI 2006/3386). 'Exempt activities', in relation to a recognised body, means the regulated activities in respect of which the body is exempt as a result of the Financial Services and Markets Act 2000 s 285(2) or (3) (see PARA 684): Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1).

5 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 2(1).

6 See note 3.

7 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 2(2). The persons who effectively direct the business and operations of the exchange must be of sufficiently good repute and sufficiently experienced to ensure the sound and prudent management and operation of the financial markets operated by it: Schedule para 2(3) (Schedule para 2(3), (4) added by SI 2006/338). The persons who are in a position to exercise significant influence over the management of the exchange, whether directly or indirectly, must be suitable: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 2(4) (as so added).

8 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 3(1).

9 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 3(2)(a).

10 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 3(2)(b).

11 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 3(2)(c). References in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, to dealings on an exchange, or transactions effected on an exchange, are references to dealings or transactions which are effected by means of the exchange's facilities or which are governed by the rules of the exchange; and references to the use of the facilities of an exchange include use which consists of any such dealings or entering into any such transactions: reg 3(2).

12 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 3(2)(ca) (added by SI 2006/3386).

13 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 3(2)(d). The arrangements referred to in the text are those mentioned in Schedule para 4(2)(d): see PARA 688.

14 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 3(2)(e).

688. Safeguards for investors. In order to qualify for recognition, an exchange must ensure that business conducted by means of its facilities[1] is conducted in an orderly manner and so as to afford proper protection to investors[2]. Without prejudice to the generality of this, the exchange must ensure that:

(1) access to the exchange's facilities is subject to criteria designed to protect the orderly functioning of the market and the interests of investors[3];

(2) it has transparent and non-discretionary rules and procedures (a) to provide for fair and orderly trading; and (b) to establish objective criteria for the efficient execution of orders[4];

(3) appropriate arrangements are made for relevant information[5] to be

made available (whether by the exchange or, where appropriate, by issuers of the investments) to persons engaged in dealing in investments on the exchange[6];

(4) satisfactory arrangements[7] are made for securing the timely discharge (whether by performance, compromise or otherwise) of the rights and liabilities of the parties to transactions effected on the exchange (being rights and liabilities in relation to those transactions)[8];

(5) satisfactory arrangements are made for recording transactions effected on the exchange, and transactions (whether or not effected on the exchange) which are cleared or to be cleared by means of its facilities[9];

(6) appropriate arrangements are made to (a) identify conflicts between the interests of the exchange, its owners and operators and the interests of the persons who make use of its facilities or the interests of the financial markets operated by it; and (b) manage such conflicts so as to avoid adverse consequences for the operation of the financial markets operated by the exchange and for the persons who make use of its facilities[10];

(7) appropriate measures (including the monitoring of transactions effected on the exchange) are adopted to reduce the extent to which the exchange's facilities can be used for a purpose connected with market abuse[11] or financial crime[12], and to facilitate their detection and monitor their incidence[13]; and

(8) where the exchange's facilities include making provision for the safeguarding and administration of assets belonging to users of those facilities, satisfactory arrangements are made for that purpose[14].

The exchange must make arrangements for (i) current bid and offer prices for shares[15]; and (ii) the depth of trading interest in shares at the prices which are advertised through its systems, to be made available to the public on reasonable commercial terms and on a continuous basis during normal trading hours, subject to certain requirements[16].

The exchange must make arrangements for the price, volume and time of transactions executed in shares[17] to be made available to the public as soon as possible after the time of the transaction on reasonable commercial terms, subject to certain requirements[18].

1 For the purposes of the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, 'facilities', in relation to a recognised body, means the facilities and services it provides in the course of carrying on exempt activities; and references to the use of the facilities of an exchange are to be construed in accordance with reg 3(2) (see PARA 687): reg 3(1).

2 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4(1).

3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4(2)(a) (amended by SI 2006/3386). Such access must be in accordance with the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7B: see PARA 690.

4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4(2)(aa) (added by SI 2006/3386).

5 For the purposes of the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4(2)(c), 'relevant information' means information which is relevant in determining the current value of the investments: Schedule para 4(3).

6 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4(2)(c). For the purposes of

the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, 'investments' means investments of a kind specified for the purposes of the Financial Services and Markets Act 2000 s 22 (see PARA 85): Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1).

7 Ie which comply with the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7D: see PARA 690.

8 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4(2)(d) (amended by SI 2006/3386).

9 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4(2)(e).

10 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4(2)(ea) (added by SI 2006/3386).

11 As to market abuse see PARA 437 et seq.

12 For the purposes of the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, 'financial crime' is to be construed in accordance with the Financial Services and Markets Act 2000 s 6(3), (4) (see PARA 8): Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1).

13 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4(2)(f) (amended by SI 2006/3386).

14 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4(2)(g).

15 For these purposes, 'shares' means shares admitted to trading on a regulated market: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4A(4) (Schedule para 4A added by SI 2006/3386). 'Regulated market' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4.1.18: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1) (definition added by SI 2006/3386).

16 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4A(1) (as added: see note 15). The requirements referred to are those contained in EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) Ch IV.

If an exchange decides to give investment firms and credit institutions required to publish their quotes in shares (1) in accordance with the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 27, or (2) by the Financial Services Authority, access to the arrangements referred to in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4A(1), it must do so on reasonable commercial terms and on a non-discriminatory basis: Schedule para 4A(2) (as so added). As to the meaning of 'investment firm' see PARA 21 note 5. 'Credit institution' means (a) a credit institution authorised under the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions); or (b) an institution which would satisfy the requirements for authorisation as a credit institution under that directive if it had its registered office (or if it does not have a registered office, its head office) in an EEA state: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1) (definition added by SI 2006/3386). As to the meaning of EEA state see PARA 315 note 1. As to the Financial Services Authority see PARAS 4, 6 et seq.

The Authority may waive the requirements of Schedule para 4A(1) in the circumstances specified: (i) in the case of shares to be traded on a multilateral trading facility operated by the exchange, in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 29.2 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) Ch IV; or (ii) in the case of shares to be traded on a regulated market operated by the exchange, in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 44.2 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) Ch IV:

Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4A(3) (as so added). 'Multilateral trading facility has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 4.1.15: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1) (definition added by SI 2006/3386).

17 For these purposes, 'shares' means shares admitted to trading on a regulated market: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4B(5) (Schedule para 4B added by SI 2006/3386).

18 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4B(1) (as added: see note 17). The requirements referred to are those contained in EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) Ch IV.

If an exchange decides to give investment firms and credit institutions required to make public details of their transactions in shares (1) in accordance with the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 28; or (2) by the Authority, access to the arrangements referred to in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4B(1), it must do so on reasonable commercial terms and on a non-discriminatory basis: Schedule para 4B(2) (as so added).

The Authority may permit exchanges to defer the publication required by Schedule para 4B(1) in the circumstances specified, and subject to the requirements contained: (a) in the case of shares traded on a multilateral trading facility operated by an exchange, in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 30.2 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) Ch IV; or (b) in the case of shares traded on a regulated market operated by an exchange, in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 45.2 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) Ch IV: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4B(3) (as so added).

If the Authority permits exchanges to defer the publication required by Schedule para 4B(1), those exchanges must ensure that the existence of and the terms of the permission are disclosed to users and members of their facilities and to investors: Schedule para 4B(4) (as so added).

689. Promotion and maintenance of standards. In order to qualify for recognition, an exchange must be able and willing to promote and maintain high standards of integrity and fair dealing in the carrying on of regulated activities[1] by persons in the course of using the facilities[2] provided by the exchange[3].

The exchange must be able and willing to co-operate, by the sharing of information or otherwise, with the Financial Services Authority[4], with any other authority, body or person having responsibility in the United Kingdom[5] for the supervision or regulation of any regulated activity or other financial service, or with an overseas regulator[6].

1 As to regulated activities see PARA 84 et seq.

2 As to the meaning of 'facilities' see PARA 688 note 1.

3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 6(1).

4 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

5 As to the meaning of 'United Kingdom' see PARA 2 note 3.

6 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 6(2). The reference in the

text to an overseas regulator is a reference to an overseas regulator within the meaning of the Financial Services and Markets Act 2000 s 195: see PARA 457.

690. Rules. In order to qualify for recognition, an exchange must ensure that appropriate procedures are adopted for it to make rules, for keeping its rules under review and for amending them[1]. The procedures must include procedures for consulting users of the exchange's facilities in appropriate cases[2]. The exchange must consult users of its facilities on any arrangements it proposes to make for dealing with penalty income[3] (or on any changes which it proposes to make to those arrangements)[4].

The exchange must make clear and transparent rules concerning the admission of financial instruments[5] to trading on any financial market operated by it[6].

The exchange must make transparent and non-discriminatory rules, based on objective criteria, governing access to, or membership of, its facilities[7].

Where an exchange provides central counterparty, clearing or settlement facilities[8], it must make transparent and non-discriminatory rules, based on objective criteria, governing access to those facilities[9]. The exchange may refuse access to those facilities on legitimate commercial grounds[10].

The rules of the exchange must permit a user or member of a regulated market operated by it to use whatever settlement facility he chooses for a transaction[11].

The rules of the exchange must provide that the exchange must not exercise its power to suspend or remove from trading on a regulated market operated by it any financial instrument which no longer complies with its rules, where such step would be likely to cause significant damage to the interests of investors or the orderly functioning of the financial markets[12].

1 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7(1).

2 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7(2).

3 Ie in accordance with the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 8(3): see PARA 691.

4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7(3).

5 'Financial instrument' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4.1.17: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1) (definition added by SI 2006/3386).

6 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7A(1) (Schedule para 7A added by SI 2006/3386). The Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7A is without prejudice to the generality of Schedule para 4 (see PARA 688): Schedule para 7A(11) (as so added).

The rules must ensure that all financial instruments admitted to trading on a regulated market operated by the exchange are capable of being traded in a fair, orderly and efficient manner (in accordance with EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) Ch V, where applicable): Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7A(2) (as so added). As to the meaning of 'regulated market' see PARA 688 note 15.

The rules must ensure that (1) all transferable securities admitted to trading on a regulated market operated by the exchange are freely negotiable (in accordance with EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) Ch V, where applicable); and (2) all contracts for derivatives admitted to trading on a regulated market operated by the exchange are designed so as to allow for their orderly pricing as well as for the existence of effective settlement

conditions: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7A(3) (as so added). 'Transferable securities' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 4.1.18: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1) (definition added by SI 2006/3386). 'Derivatives' has the same meaning as in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)): Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7A(10) (as so added).

The exchange must maintain arrangements to provide sufficient publicly available information (or satisfy itself that sufficient information is publicly available) to enable the users of a multilateral trading facility operated by it to form investment judgments, taking into account both the nature of the users and the types of instrument traded: Schedule para 7A(4) (as so added). As to the meaning of 'multilateral trading facility' see PARA 688 note 16.

The exchange must maintain effective arrangements to verify that issuers of transferable securities admitted to trading on a regulated market operated by it comply with the disclosure obligations: Schedule para 7A(5) (as so added). 'Issuer' has the same meaning as in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)): Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7A(10) (as so added). The 'disclosure obligations' are the initial, ongoing and ad hoc disclosure requirements contained in the relevant articles and given effect (a) in the UK by the Financial Services and Markets Act 2000 Pt VI (ss 72–103) (see PARA 385 et seq) and Part VI rules (within the meaning of s 73A: see PARA 385); or (b) in another EEA state by legislation transposing the relevant articles in that state: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7A(10) (as so added). 'Relevant articles' means (i) European Parliament and EC Council Directive 2003/6 (OJ L96, 12.4.2003, p 16) on insider dealing and market manipulation arts 6.1–6.4; (ii) European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) on the prospectuses to be published when securities are offered to the public or admitted to trading arts 3, 5, 7, 8, 10, 14, 16; (iii) European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38) relating to the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market arts 4–6, 14, 16–19, 30; and (iv) Community legislation made under the provisions mentioned in heads (i)–(iii) above: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7A(10) (as so added). As to the meaning of 'EEA state' see PARA 315 note 1.

The exchange must maintain arrangements to assist users of a regulated market operated by it to obtain access to information made public under the disclosure obligations: Schedule para 7A(6) (as so added). The exchange must maintain arrangements regularly to review whether the financial instruments admitted to trading on a regulated market operated by it comply with the admission requirements for those instruments: Schedule para 7A(7) (as so added).

The rules must provide that where an exchange, without obtaining the consent of the issuer, admits to trading on a regulated market operated by it a transferable security which has been admitted to trading on another regulated market, the exchange (A) must inform the issuer of that security as soon as is reasonably practicable: and (B) may not require the issuer of that security to demonstrate compliance with the disclosure obligations: Schedule para 7A(8) (as so added).

The rules must provide that where an exchange, without obtaining the consent of the issuer, admits to trading on a multilateral trading facility operated by it a transferable security which has been admitted to trading on a regulated market, it may not require the issuer of that security to demonstrate compliance with the disclosure obligations: Schedule para 7A(9) (as so added).

7 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7B(1) (Schedule para 7B added by SI 2006/3386). As to the meaning of 'facilities' see PARA 688 note 1. The Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7B is without prejudice to the generality of Schedule para 4 (see PARA 688): Schedule para 7B(6) (as so added).

In particular those rules must specify the obligations for users or members of its facilities arising from: (1) the constitution and administration of the exchange; (2) rules relating to transactions on the market; (3) its professional standards for staff of any investment firm or credit institution having access to or membership of a financial market operated by the exchange; (4) conditions established under head (c) below for access to or membership of a financial market operated by the exchange by persons other than investment firms or credit institutions; and (5) the rules and procedures for clearing and settlement of transactions concluded on a financial market operated by the exchange: Schedule para 7B(2) (as so added). As to the meaning of 'investment firm' see PARA 21 note 5. As to the meaning of 'credit institution' see PARA 688 note 16.

Rules of the exchange about access to, or membership of, a financial market operated by it must permit the exchange to give access to or admit to membership (as the case may be) only: (a) an investment firm; (b) a credit institution; or (c) a person who (i) is fit and proper; (ii) has a sufficient level of trading ability and competence; (iii) where applicable, has adequate organisational arrangements; and (iv) has sufficient resources for the role he is to perform, taking account of the exchange's arrangements under Schedule para 4(2)(d) (see PARA 688 head (4)): Schedule para 7B(3) (as so added).

Rules under Schedule para 7B must enable (A) an investment firm authorised under the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 5; or (B) a credit institution authorised under the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions), by the competent authority of another EEA state (including a branch established in the United Kingdom of such a firm or institution) to have direct or remote access to, or membership of, any financial market operated by the exchange on the same terms as a UK firm: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7B(4) (as so added). 'Competent authority', in relation to an investment firm or credit institution, means the competent authority in relation to that firm or institution for the purposes of the Markets in Financial Instruments Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1)): Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1) (definition added by SI 2006/3386). 'Branch' in relation to an investment firm has the meaning given in the Markets in Financial Instruments Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1)) art 4.1.26 and in relation to a credit institution has the meaning given in the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1)) art 4.3: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1) (definition added by SI 2006/3386).

The exchange must make arrangements regularly to provide the Financial Services Authority with a list of the users or members of its facilities: Schedule para 7B(5) (as so added).

8 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7C(1) (Schedule para 7C added by SI 2006/3386). 'Central counterparty', 'clearing' and 'settlement' have the same meanings as in the Markets in Financial Instruments Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1)): Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1) (definitions added by SI 2006/3386).

9 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7C(2) (as added: see note 8). The rules under Schedule para 7C para 3(2) must enable an investment firm or a credit institution authorised by the competent authority of another EEA state (including a branch established in the United Kingdom of such a firm or institution) to have access to those facilities on the same terms as a UK firm for the purposes of finalising or arranging the finalisation of transactions in financial instruments: Schedule para 7C(3) (as so added). 'UK firm' means an investment firm or credit institution which has a Part IV permission (see PARA 348) to carry on one or more regulated activities: reg 3(1) (definition added by SI 2006/3386). As to regulated activities see PARA 84 et seq.

10 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7C(4) (as added: see note 8).

11 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7D(1) (Schedule para 7D added by SI 2006/3386). The Financial Services and Markets Act 2000 (Recognition

Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7D(1) only applies where (1) such links and arrangements exist between the chosen settlement facility and any other settlement facility as are necessary to ensure the efficient and economic settlement of the transaction; and (2) the exchange is satisfied that the smooth and orderly functioning of the financial markets will be maintained: Schedule para 7D(2) (as so added).

12 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7E (added by SI 2006/3386).

691. Discipline and complaints. In order to qualify for recognition, the exchange must have (1) effective arrangements (which include the monitoring of transactions effected on the exchange) for monitoring and enforcing compliance with its rules, including rules in relation to the provision of clearing services in respect of transactions[1] other than transactions effected on the exchange;[2] (2) effective arrangements for monitoring and enforcing compliance with arrangements made by it in regard to the timely discharge of the rights and liabilities of the parties to transactions effected on the exchange[3]; and (3) effective arrangements for monitoring transactions effected on the exchange in order to identify disorderly trading conditions[4].

The arrangements mentioned above[5] must include procedures for investigating complaints made to the exchange about the conduct of persons in the course of using the exchange's facilities[6] and the fair, independent and impartial resolution of appeals against decisions of the exchange[7].

Where the arrangements mentioned above include provision for requiring the payment of financial penalties, they must include arrangements for ensuring that any amount so paid is applied only in one or more of the following ways:

(a) towards meeting expenses incurred by the exchange in the course of the investigation of the breach in respect of which the penalty is paid, or in the course of any appeal against the decision of the exchange in relation to that breach[8];

(b) for the benefit of users of the exchange's facilities[9];

(c) for charitable purposes[10].

The exchange must have effective arrangements for the investigation and resolution of complaints arising in connection with the performance of, or failure to perform, any of its regulatory functions[11]. The arrangements must include arrangements for a complaint to be fairly and impartially investigated by a person independent of the exchange, and for him to report on the result of his investigation to the exchange and to the complainant[12].

The arrangements must also confer on the independent person mentioned above[13] the power to recommend, if he thinks it appropriate, that the exchange makes a compensatory payment to the complainant[14], remedies the matter complained of[15] or takes both of those steps[16].

1 As to references to dealings and transactions effected on the exchange see PARA 687 note 11.

2 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 8(1)(a) (Schedule para 8(1) substituted by SI 2006/3386). As to rules generally see PARA 690.

3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 8(1)(b) (as substituted: see note 2). The arrangements referred to in the text are those mentioned in Schedule para 4(2)(d): see PARA 688 head (4).

4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 8(1)(c) (as substituted: see note 2).

5 Ie arrangements made pursuant to the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 8(1).

6 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 8(2)(a). As to the meaning of 'facilities' see PARA 688 note 1.

7 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 8(2)(b).

8 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 8(3)(a).

9 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 8(3)(b).

10 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 8(3)(c).

11 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 9(1). As to the meaning of 'regulatory functions', in relation to a recognised body, see PARA 719 note 2; definition applied by reg 3(1). As to the meaning of 'recognised body' see PARA 685 note 6.

However, Schedule para 9(1) does not extend to complaints about the content of rules made by the exchange; or complaints about a decision against which the complainant has the right to appeal under procedures of the kind mentioned in Schedule para 8(2)(b) (see the text to note 7): Schedule para 9(2).

12 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 9(3). Schedule para 9(3) is not to be taken as preventing the exchange from making arrangements for the initial investigation of a complaint to be conducted by the exchange: Schedule para 9(5).

13 Ie the person mentioned in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 9(3).

14 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 9(4)(a).

15 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 9(4)(b).

16 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 9(4).

692. Operation of a multilateral trading facility. An exchange operating a multilateral trading facility[1] must also operate a regulated market[2].

An exchange operating a multilateral trading facility must comply with those requirements[3] which are applicable to a market operator[4] operating such a facility[5].

1 As to the meaning of 'multilateral trading facility' see PARA 688 note 16.

2 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 9A(1) (Schedule para 9A added by SI 2006/3386). As to the meaning of 'regulated market' see PARA 688 note 15.

The requirements of the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 9A do not apply for the purposes of the Financial Services and Markets Act 2000 s 292(3)(a) (requirements for overseas investment exchanges and overseas clearing houses) (see PARA 710): Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 9A(3) (as so added).

3 Ie those requirements of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) Title II Ch I, and European Commission Directive 2006/73 (OJ L241, 2.9.2006, p 26) implementing European Parliament and EC Council Directive 2004/39 as regards organisation requirements and operating conditions for investment firms and defined terms.

4 Ie within the meaning of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)).

5 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 9A(2) (as added: see note 2). See note 2.

693. Default rules in respect of market contracts. The exchange must have default rules[1] which, in the event of a member of the exchange being or appearing to be unable to meet his obligations in respect of one or more market contracts[2], enable action to be taken in respect of unsettled market contracts to which he is a party[3].

The rules may authorise the taking of the same or similar action in relation to a member who appears to be likely to become unable to meet his obligations in respect of one or more market contracts[4]. The rules must enable action to be taken in respect of all unsettled market contracts, other than those entered into for the purposes of or in connection with the provision of clearing services for the exchange[5].

1 As to the meaning of 'default rules' see PARA 685 note 7. 'Defaulter' and 'default' are to be construed in accordance with the Companies Act 1989 s 188(2); and references to action taken under the default rules of an exchange or clearing house are to be construed in accordance with s 188(4) (see PARA 510): Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1).

2 'Market contract' has the meaning given in the Financial Services and Markets Act 2000 s 286(4) (see PARA 685 note 7) (with reference, in the case of a recognised investment exchange, to the Companies Act 1989 s 155(2) (see PARA 510) or the Companies (No 2) (Northern Ireland) Order 1990, SI 1990/1504 (NI 10) art 80(2) or, in the case of a recognised clearing house, to the Companies Act 1989 s 155(3) (see PARA 510) or the Companies (No 2) (Northern Ireland) Order 1990, SI 1990/1504 (NI 10) art 80(3)); and references to a party to a market contract are to be construed in accordance with the Companies Act 1989 s 187 (see PARA 509): Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1).

3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 10(1). Nothing in the Schedule Pt II (paras 10–15) is to be taken as requiring a recognised investment exchange which does not enter into such contracts as are mentioned in the Companies Act 1989 s 155(2)(b) (see PARA 510) to have default rules, or to make any arrangements, relating to such contracts: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 8.

4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 10(2).

5 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 10(3) (amended by SI 2006/3386).

694. Content of default rules. In relation to certain contracts entered into by a member or designated non-member of the exchange with a person other than the exchange[1], the default rules[2] must provide:

(1) for all rights and liabilities between those party as principal to unsettled market contracts[3] to which the defaulter[4] is party as principal to be discharged and for there to be paid by one party to the other such sum of money (if any) as may be determined in accordance with the rules[5];

(2) for the sums so payable in respect of different contracts between the same parties to be aggregated or set off so as to produce a net sum[6]; and

(3) for the certification by or on behalf of the exchange of the net sum payable or, as the case may be, of the fact that no sum is payable[7].

The rules may make the same or similar provision, in relation to non-members designated in accordance with the relevant procedures[8], as in relation to members of the exchange[9].

The procedures must be designed to secure that: (a) a person is not, or does not remain, designated if failure by him to meet his obligations in respect of one or more market contracts would be unlikely adversely to affect the operation of the market[10]; and (b) a description of persons is not, or does not remain, designated if failure by a person of that description to meet his obligations in respect of one or more market contracts would be unlikely adversely to affect the operation of the market[11].

The exchange must have adequate arrangements for bringing a designation or withdrawal of designation to the attention of the person or description of persons concerned[12] and where a description of persons is designated, or the designation of a description of persons is withdrawn, for ascertaining which persons fall within that description[13].

In relation to contracts entered into by the exchange with its members for the purpose of enabling the rights and liabilities of that member under transactions in investments to be settled[14], the default rules[15] must provide:

(i) for all rights and liabilities of the defaulter under or in respect of unsettled market contracts[16] to be discharged and for there to be paid by or to the defaulter such sum of money (if any) as may be determined in accordance with the rules[17];

(ii) for the sums so payable by or to the defaulter in respect of different contracts to be aggregated or set off so as to produce a net sum[18];

(iii) for that sum, if payable by the defaulter to the exchange, to be set off against any property provided by or on behalf of the defaulter as cover for margin (or the proceeds of realisation of such property) so as to produce a further net sum; and if payable by the exchange to the defaulter, to be aggregated with any property provided by or on behalf of the defaulter as cover for margin (or the proceeds of realisation of such property)[19]; and

(iv) for the certification by or on behalf of the exchange of the sum finally payable or, as the case may be, of the fact that no sum is payable[20].

Where the exchange provides clearing services, the rules of the exchange must provide that in the event of a default, margin provided by the defaulter for his own account is not to be applied to meet a shortfall on a client account[21].

1 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(1). The contracts referred to are those falling within the Companies Act 1989 s 155(2)(a): see PARA 510.

2 Ie the rules mentioned in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 10: see PARA 693. As to the meaning of 'default rules' see PARA 685 note 7. As to the meanings of 'defaulter' and 'default' see PARA 693 note 1.

3 As to the meaning of 'market contract' see PARA 693 note 2. The reference in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(2) to rights and liabilities between those party as principal to unsettled market contracts does not include rights and liabilities in respect of margin (Schedule para 11(3)(a)) or arising out of a failure to perform a market contract (Schedule para 11(3)(b)).

4 See note 2.

5 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(2)(a).

6 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(2)(b).

7 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(2)(c).

8 Ie those procedures mentioned in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(5), which provides that, if such provision is made, the exchange must have adequate procedures:
   (1) for designating the persons, or descriptions of person, in respect of whom action may be taken (Schedule para 11(5)(a));
   (2) for keeping under review the question which persons or descriptions of person should be or remain so designated (Schedule para 11(5)(b)); and
   (3) for withdrawing such designation (Schedule para 11(5)(c)).

9 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(4).

10 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(6)(a).

11 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(6)(b).

12 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(7)(a).

13 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(7)(b).

14 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 12(1). The contracts referred to in the text are those falling within the Companies Act 1989 s 155(2)(b): see PARA 510.

15 See note 2.

16 The reference in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 12(2) to the rights and liabilities of a defaulter under or in respect of an unsettled market contract includes (without prejudice to the generality of that provision) rights and liabilities arising in consequence of action taken under provisions of the rules authorising:
   (1) the effecting by the exchange of corresponding contracts in relation to unsettled market contracts to which the defaulter is party (Schedule para 12(3)(a));
   (2) the transfer of the defaulter's position under an unsettled market contract to another member of the exchange (Schedule para 12(3)(b));
   (3) the exercise by the exchange of any option granted by an unsettled market contract (Schedule para 12(3)(c)).

   'Corresponding contract' means a contract on the same terms (except as to price or premium) as the market contract but under which the person who is the buyer under the market contract agrees to sell and the person who is the seller under the market contract agrees to buy: Schedule para 12(4). The provisions of Schedule para 12(4) apply with any necessary modifications in relation to a market contract which is not an agreement to sell: Schedule para 12(5). The reference in Schedule para 12(2) to the rights and liabilities of a defaulter under or in respect of an unsettled market contract does not include, where he acts as agent, rights or liabilities of his arising out of the relationship of principal and agent: Schedule para 12(6).

17 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 12(2)(a).

18 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 12(2)(b).

19 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 12(2)(c).

20 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 12(2)(d).

21 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 15(1). Schedule para 15(1) is without prejudice to the requirements of any rules relating to clients' money made by the Financial Services Authority under the Financial Services and Markets Act 2000 s 138 (see PARA 21) and s 139 (see PARA 25): Schedule para 15(2). As to the Financial Services Authority see PARAS 4, 6 et seq.

695. Default rules: notification and co-operation. The exchange must have adequate arrangements for ensuring that: (1) in the case of unsettled market contracts[1] with a defaulter[2] acting as principal, parties to the contract are notified as soon as reasonably practicable of the default and of any decision

taken under the rules in relation to contracts to which they are a party[3]; and (2) in the case of unsettled market contracts with a defaulter acting as agent, parties to the contract and the defaulter's principals are notified as soon as reasonably practicable of the default and of the identity of the other parties to the contract[4].

The exchange must be able and willing to co-operate, by the sharing of information and otherwise, with the Secretary of State[5], any relevant office-holder[6], and any other authority or body having responsibility for any matter arising out of, or connected with, the default of a member of the exchange or any designated non-member[7].

1 As to the meaning of 'market contract' see PARA 693 note 2.
2 As to the meanings of 'defaulter' and 'default' see PARA 693 note 1.
3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 13(a).
4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 13(b).
5 As to the Secretary of State see PARA 3.
6 Ie within the meaning of the Companies Act 1989 s 189: see PARA 513 note 7.
7 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 14. As to the procedures for designation see Schedule para 11(5); and PARA 694 note 8.

(b) Requirements for Clearing Houses

696. Application for or by a clearing house. In the same way as there are specific recognition requirements[1] for investment exchanges[2], there are also specific recognition requirements for clearing houses for or by whom applications have been made for recognition orders[3].

1 As to recognition requirements generally see PARA 685.
2 See PARA 686.
3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 5. The provisions of the Schedule Pt III (see PARAS 697–700) and Pt IV (see PARAS 702–704) set out the requirements applying to bodies in respect of which a recognition order has been made under the Financial Services and Markets Act 2000 s 290(1)(b) (see PARA 709) or which have applied for such an order under s 288 (see PARA 707). As to the meaning of 'recognition order' see PARA 684 note 1.
As to the method of satisfying recognition requirements see PARA 705.

697. Financial resources, suitability, systems and controls. In order to qualify for recognition, a clearing house must have financial resources sufficient for the proper performance of its functions as a recognised clearing house[1]. In considering whether this requirement is satisfied, the Financial Services Authority[2] may[3] take into account all the circumstances, including the clearing house's connection with any person, and any activity carried on by the clearing house, whether or not it is an exempt activity[4].

The clearing house must be a fit and proper person to perform the functions of a recognised clearing house[5]. In considering whether this requirement is satisfied, the Authority may[6] take into account all the circumstances, including the clearing house's connection with any person[7].

The clearing house must ensure that the systems and controls used in the performance of its functions are adequate, and appropriate for the scale and nature of its business[8]. This requirement applies in particular to systems and controls concerning:

(1) the transmission of information[9];

(2) the assessment and management of risks to the performance of the clearing house's functions[10];

(3) the operation of its clearing services involving satisfactory arrangements for securing the timely discharge of the rights and liabilities of the parties to transactions in respect of which it provides such services[11]; and

(4) (where relevant) the safeguarding and administration of assets belonging to users of the clearing house's facilities[12].

1 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 16(1). As to references to the performance of the functions of a recognised body see PARA 687 note 1.

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

3 Ie without prejudice to the generality of the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 6(1): see PARA 705.

4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 16(2). As to the meaning of 'exempt activities' see PARA 687 note 4.

5 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 17(1). As to the meaning of 'recognised clearing house' see PARA 684 note 6.

6 See note 3.

7 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 17(2).

8 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 18(1).

9 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 18(2)(a).

10 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 18(2)(b).

11 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 18(2)(c). The matters referred to in the text are those mentioned in the Schedule para 19(2)(b): see PARA 698 head (2). As to the meaning of 'facilities' see PARA 688 note 1.

12 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 18(2)(d).

698. Safeguards for investors. In order to qualify for recognition, a clearing house must ensure that its facilities[1] are such as to afford proper protection to investors[2]. Without prejudice to the generality of this, the clearing house must ensure that:

(1) access to the clearing house's facilities is subject to criteria designed to protect the orderly functioning of those facilities and the interests of investors[3];

(2) its clearing services involve satisfactory arrangements for securing the timely discharge (whether by performance, compromise or otherwise) of the rights and liabilities of the parties to transactions in respect of which it provides such services (being rights and liabilities in relation to those transactions)[4];

(3) satisfactory arrangements are made for recording transactions which are cleared or to be cleared by means of its facilities[5];

(4) appropriate measures are adopted to reduce the extent to which the

clearing house's facilities can be used for a purpose connected with market abuse[6] or financial crime[7], and to facilitate their detection and monitor their incidence[8]; and

(5) where the clearing house's facilities include making provision for the safeguarding and administration of assets belonging to users of those facilities, satisfactory arrangements are made for that purpose[9].

1 As to the meaning of 'facilities' see PARA 688 note 1.
2 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 19(1).
3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 19(2)(a).
4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 19(2)(b).
5 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 19(2)(c).
6 As to market abuse see PARA 437 et seq.
7 As to the meaning of 'financial crime' see PARA 688 note 12.
8 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 19(2)(d).
9 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 19(2)(e).

699. Promotion and maintenance of standards. In order to qualify for recognition, a clearing house must be able and willing to promote and maintain high standards of integrity and fair dealing in the carrying on of regulated activities by persons in the course of using the facilities[1] provided by the clearing house[2].

The clearing house must be able and willing to co-operate, by the sharing of information or otherwise, with the Financial Services Authority[3], with any other authority, body or person having responsibility in the United Kingdom[4] for the supervision or regulation of any regulated activity or other financial service, or with an overseas regulator[5].

1 As to the meaning of 'facilities' see PARA 688 note 1.
2 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 20(1).
3 As to the Financial Services Authority see PARAS 4, 6 et seq.
As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.
4 As to the meaning of 'United Kingdom' see PARA 2 note 3.
5 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 20(2). The reference in the text to an overseas regulator is a reference to an overseas regulator within the meaning of the Financial Services and Markets Act 2000 s 195: see PARA 457.

700. Rules. In order to qualify for recognition, a clearing house must ensure that appropriate procedures are adopted for it to make rules, for keeping its rules under review and for amending them[1]. The procedures must include procedures for consulting users of the clearing house's facilities[2] in appropriate cases[3]. The clearing house must consult users of its facilities on any arrangements it proposes to make for dealing with penalty income[4] (or on any changes which it proposes to make to those arrangements)[5].

The clearing house must make transparent and non-discriminatory rules, based on objective criteria, governing access to central counterparty, clearing or settlement[6] facilities provided by it[7]. The clearing house may refuse access to those facilities on legitimate commercial grounds[8].

1 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 21(1).

2 As to the meaning of 'facilities' see PARA 688 note 1.

3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 21(2).

4 Ie in accordance with the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 22(3): see PARA 701.

5 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 21(3).

6 As to the meanings of 'central counterparty, 'clearing' and settlement' see PARA 690 note 8.

7 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 21A(1) (Schedule para 21A added by SI 2006/3386). The rules under the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 21A(1) must enable an investment firm or a credit institution authorised by the competent authority of another EEA state (including a branch established in the United Kingdom of such a firm or institution) to have access to those facilities on the same terms as a UK firm for the purposes of finalising or arranging the finalisation of transactions in financial instruments: Schedule para 21A(2) (as so added). As to the meaning of 'investment firm' see PARA 21 note 5. As to the meaning of 'credit institution' see PARA 688 note 16. As to the meaning of 'competent authority' see PARA 694 note 7. As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'branch' see PARA 690 note 7. As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the meaning of 'UK firm' see PARA 690 note 9. As to the meaning of 'financial instrument' see PARA 690 note 5.

8 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 21A(3) (as added: see note 7).

701. Discipline and complaints. In order to qualify for recognition, the clearing house must have effective arrangements for monitoring and enforcing compliance with its rules[1]. The arrangements must include procedures for: (1) investigating complaints made to the clearing house about the conduct of persons in the course of using the clearing house's facilities[2]; and (2) the fair, independent and impartial resolution of appeals against decisions of the clearing house[3].

Where the arrangements include provision for requiring the payment of financial penalties, they must include arrangements for ensuring that any amount so paid is applied only in one or more of the following ways:

(a) towards meeting expenses incurred by the clearing house in the course of the investigation of the breach in respect of which the penalty is paid, or in the course of any appeal against the decision of the clearing house in relation to that breach[4];

(b) for the benefit of users of the clearing house's facilities[5];

(c) for charitable purposes[6].

The clearing house must have effective arrangements for the investigation and resolution of complaints arising in connection with the performance of, or failure to perform, any of its regulatory functions[7]. The arrangements must include arrangements for a complaint to be fairly and impartially investigated by a person independent of the clearing house, and for him to report on the result of his investigation to the clearing house and to the complainant[8]. The arrangements must confer on that person[9] the power to recommend, if he thinks it appropriate, that the clearing house makes a compensatory payment to the complainant[10], remedies the matter complained of[11] or takes both of those steps[12].

1 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 22(1). As to rules generally se PARA 690.

2 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 22(2)(a). As to the meaning of 'facilities' see PARA 688 note 1.

3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 22(2)(b).

4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 22(3)(a).

5 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 22(3)(b).

6 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 22(3)(c).

7 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 23(1). However, this does not extend to complaints about the content of rules made by the clearing house (Schedule para 23(2)(a)) or complaints about a decision against which the complainant has the right to appeal under procedures of the kind mentioned in Schedule para 22(2)(b) (see head (2) in the text) (Schedule para 23(2)(b)).

8 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 23(3). The provisions of Schedule para 23(3) are not to be taken as preventing the clearing house from making arrangements for the initial investigation of a complaint to be conducted by the clearing house: Schedule para 23(5).

9 Ie the person mentioned in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 23(3).

10 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 23(4)(a).

11 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 23(4)(b).

12 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 23(4).

702. Default rules in respect of market contracts. The clearing house must have default rules[1] which, in the event of a member of the clearing house being or appearing to be unable to meet his obligations in respect of one or more market contracts[2], enable action to be taken to close out his position in relation to all unsettled market contracts to which he is a party[3].

The rules may authorise the taking of the same or similar action where a member appears to be likely to become unable to meet his obligations in respect of one or more market contracts[4].

1 As to the meaning of 'default rules' see PARA 685 note 7.

2 As to the meaning of 'market contract' see PARA 693 note 2.

3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 24(1). Nothing in the Schedule Pt IV (paras 24–28) is to be taken as requiring a recognised clearing house which does not enter into such contracts as are mentioned in the Companies Act 1989 s 155(3) (see PARA 510) to have default rules, or to make any arrangements, relating to such contracts: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 8.

4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 24(2).

703. Content of default rules. The default rules[1] must provide:

(1) for all rights and liabilities of the defaulter[2] under or in respect of

unsettled market contracts[3] to be discharged and for there to be paid by or to the defaulter such sum of money (if any) as may be determined in accordance with the rules[4];

(2) for the sums so payable by or to the defaulter in respect of different contracts to be aggregated or set off so as to produce a net sum[5];

(3) for that sum, if payable by the defaulter to the clearing house, to be set off against any property provided by or on behalf of the defaulter as cover for margin (or the proceeds of realisation of such property) so as to produce a further net sum[6] and, if payable by the clearing house to the defaulter, to be aggregated with any property provided by or on behalf of the defaulter as cover for margin (or the proceeds of realisation of such property)[7]; and

(4) for the certification by or on behalf of the clearing house of the sum finally payable or, as the case may be, of the fact that no sum is payable[8].

The rules of the clearing house must provide that in the event of a default, margin provided by the defaulter for his own account is not to be applied to meet a shortfall on a client account[9].

1 As to the meaning of 'default rules' see PARA 685 note 7.

2 As to the meanings of 'defaulter' and 'default' see PARA 693 note 1.

3 As to the meaning of 'market contract' see PARA 693 note 2. The reference in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 25(1) to the rights and liabilities of a defaulter under or in respect of an unsettled market contract includes (without prejudice to the generality of that provision) rights and liabilities arising in consequence of action taken under provisions of the rules authorising:

(1) the effecting by the clearing house of corresponding contracts in relation to unsettled market contracts to which the defaulter is party (Schedule para 25(2)(a));

(2) the transfer of the defaulter's position under an unsettled market contract to another member of the clearing house (Schedule para 25(2)(b));

(3) the exercise by the clearing house of any option granted by an unsettled market contract (Schedule para 25(2)(c)).

'Corresponding contract' means a contract on the same terms (except as to price or premium) as the market contract but under which the person who is the buyer under the market contract agrees to sell and the person who is the seller under the market contract agrees to buy: Schedule para 25(3). The provisions of Schedule para 25(3) apply with any necessary modifications in relation to a market contract which is not an agreement to sell: Schedule para 25(4). The reference in Schedule para 25(1) to the rights and liabilities of a defaulter under or in respect of an unsettled market contract does not include, where he acts as agent, rights or liabilities of his arising out of the relationship of principal and agent: Schedule para 25(5).

4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 25(1)(a).

5 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 25(1)(b).

6 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 25(1)(c)(i).

7 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 25(1)(c)(ii).

8 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 25(1)(d).

9 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 28(1). The provisions of Schedule para 28 are without prejudice to the requirements of any rules relating to clients' money made by the Financial Services Authority under the Financial Services and Markets Act 2000 s 138 (see PARA 21) and s 139 (see PARA 25): Schedule para 28(2). As to the Financial Services Authority see PARAS 4, 6 et seq.

704. Default rules: notification and co-operation. The clearing house must have adequate arrangements for ensuring that parties to unsettled market contracts[1] with a defaulter[2] are notified as soon as reasonably practicable of the default and of any decision taken under the rules in relation to contracts to which they are a party[3].

The clearing house must be able and willing to co-operate, by the sharing of information and otherwise, with the Secretary of State[4], any relevant office-holder[5], and any other authority or body having responsibility for any matter arising out of or connected with the default of a member of the clearing house[6].

1 As to the meaning of 'market contract' see PARA 693 note 2.
2 As to the meanings of 'defaulter' and 'default' see PARA 693 note 1.
3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 26.
4 As to the Secretary of State see PARA 3.
5 Ie any relevant office-holder within the meaning of the Companies Act 1989 s 189: see PARA 513 note 7.
6 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 27.

(c) Satisfying Recognition Requirements

705. Method of satisfying recognition requirements. In considering whether a recognised body[1] or applicant[2] satisfies recognition requirements[3] applying to it under the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001[4], the Financial Services Authority[5] may take into account all relevant circumstances including the constitution of the person concerned and its regulatory provisions and practices[6].

Without prejudice to the generality of the provisions described above[7], a recognised body or applicant may satisfy recognition requirements applying to it by making arrangements for functions to be performed on its behalf by any other person[8].

1 As to the meaning of 'recognised body' see PARA 685 note 6.
2 As to applicants and applications see PARAS 706–707.
3 As to recognition requirements generally see PARA 685.
4 Ie the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995.
5 As to the Financial Services Authority see PARAS 4, 6 et seq.
As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.
6 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 6(1). The reference to regulatory provisions and practices is a reference to those expressions within the meaning of the Financial Services and Markets Act 2000 s 302(1): see PARA 730 note 8.
7 Ie the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 6(1).
8 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 6(2). Where a recognised body or applicant makes arrangements of the kind mentioned in reg 6(2), the arrangements do not affect the responsibility imposed by the Financial Services and Markets Act 2000 on the recognised body or applicant to satisfy recognition requirements applying to it under the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, but it is in addition a recognition requirement applying to the recognised body or applicant that the person who performs (or is to perform) the functions is a fit and proper person who is able and willing to perform them: reg 6(3).

(C) Applications for Recognition

706. Application for recognition by an investment exchange. Any body corporate[1] or unincorporated association may apply to the Financial Services Authority[2] for an order declaring it to be a recognised investment exchange[3] for the purposes of the Financial Services and Markets Act 2000[4].

The application[5] must be made in such manner as the Authority may direct and must be accompanied by:

(1) a copy of the applicant's[6] rules[7];
(2) a copy of any guidance issued by the applicant[8];
(3) the required particulars[9]; and
(4) such other information as the Authority may reasonably require for the purpose of determining the application[10].

1 As to the meaning of 'body corporate' see PARA 86 note 11.
2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.
As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.
3 As to the meaning of 'recognised investment exchange' see PARA 684 note 1.
4 Financial Services and Markets Act 2000 s 287(1).
5 For the purposes of the Financial Services and Markets Act 2000 Pt XVIII (ss 285–313), 'application' means an application for a recognition order made under s 287 or under s 288 (see PARA 707): s 313(1). As to the meaning of 'recognition order' see PARA 684 note 1.
6 For the purposes of the Financial Services and Markets Act 2000 Pt XVIII, 'applicant' means a body corporate or unincorporated association which has applied for a recognition order: s 313(1).
7 Financial Services and Markets Act 2000 s 287(2)(a).
8 Financial Services and Markets Act 2000 s 287(2)(b).
9 Financial Services and Markets Act 2000 s 287(2)(c). The required particulars are:
(1) particulars of any arrangements which the applicant has made, or proposes to make, for the provision of clearing services in respect of transactions effected on the exchange (s 287(3)(a));
(2) if the applicant proposes to provide clearing services in respect of transactions other than those effected on the exchange, particulars of the criteria which the applicant will apply when determining to whom it will provide those services (s 287(3)(b));
(3) a programme of operations which includes the types of business the applicant proposes to undertake and the applicant's proposed organisational structure (s 287(3)(c) (s 287(3)(c)–(e), (4) added by SI 2007/126);
(4) such particulars of the persons who effectively direct the business and operations of the exchange as the Authority may reasonably require (Financial Services and Markets Act 2000 s 287(3)(d) (as so added));
(5) such particulars of the ownership of the exchange, and in particular of the identity and scale of interests of the persons who are in a position to exercise significant influence over the management of the exchange, whether directly or indirectly, as the Authority may reasonably require (s 287(3)(e) (as so added)).
Heads (3)–(5) above do not apply to an application by an overseas applicant: s 287(4) (as so added). For the purposes of Pt XVIII, 'overseas applicant' means a body corporate or association which has neither its head office nor registered office in the United Kingdom and in relation to which a recognition order is in force: s 313(1). As to the meaning of 'United Kingdom' see PARA 2 note 3.
10 Financial Services and Markets Act 2000 s 287(2)(d).

707. Application for recognition by a clearing house. Any body corporate[1] or unincorporated association may apply to the Financial Services Authority[2] for an order declaring it to be a recognised clearing house[3] for the purposes of the Financial Services and Markets Act 2000[4].

The application[5] must be made in such manner as the Authority may direct and must be accompanied by:

(1) a copy of the applicant's[6] rules[7];
(2) a copy of any guidance issued by the applicant[8];
(3) the required particulars[9]; and
(4) such other information as the Authority may reasonably require for the purpose of determining the application[10].

1 As to the meaning of 'body corporate' see PARA 86 note 11.
2 As to the Financial Services Authority see PARAS 4, 6 et seq.
As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.
3 As to the meaning of 'recognised clearing house' see PARA 684 note 6.
4 Financial Services and Markets Act 2000 s 288(1).
5 As to the meaning of 'application' see PARA 706 note 5.
6 As to the meaning of 'applicant' see PARA 706 note 6.
7 Financial Services and Markets Act 2000 s 288(2)(a).
8 Financial Services and Markets Act 2000 s 288(2)(b).
9 Financial Services and Markets Act 2000 s 288(2)(c). The required particulars are:
(1) if the applicant makes, or proposes to make, clearing arrangements with a recognised investment exchange, particulars of those arrangements (s 288(3)(a));
(2) if the applicant proposes to provide clearing services for persons other than recognised investment exchanges, particulars of the criteria which it will apply when determining to whom it will provide those services (s 288(3)(b)).
As to the meaning of 'recognised investment exchange' see PARA 684 note 1.
10 Financial Services and Markets Act 2000 s 288(2)(d).

708. Requirement for further information. At any time after receiving an application[1] and before determining it, the Financial Services Authority[2] may require the applicant[3] to provide such further information as it reasonably considers necessary to enable it to determine the application[4].

Information which the Authority requires in connection with an application must be provided in such form, or verified in such manner, as the Authority may direct[5]. Different directions may be given, or requirements imposed, by the Authority with respect to different applications[6].

1 As to the meaning of 'application' see PARA 706 note 5.
2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.
As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.
3 As to the meaning of 'applicant' see PARA 706 note 6.
4 Financial Services and Markets Act 2000 s 289(1).
5 Financial Services and Markets Act 2000 s 289(2).
6 Financial Services and Markets Act 2000 s 289(3).

709. Recognition orders. If it appears to the Financial Services Authority[1] that the applicant[2] satisfies the recognition requirements[3] applicable in its case, the Authority may make a recognition order[4] declaring the applicant to be: (1) a recognised investment exchange[5]; (2) a recognised clearing house[6].

The Treasury's[7] approval of the making of a recognition order is required[8]. In considering an application[9], the Authority may have regard to any information which it considers is relevant to the application[10]. A recognition order must specify a date on which it is to take effect[11].

The Authority must not make a recognition order if it appears to the Authority that an existing or proposed regulatory provision of the applicant in

connection with the applicant's business as an investment exchange or the provision by the applicant of clearing services, imposes or will impose an excessive requirement on the persons affected (directly or indirectly) by it[12].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

2 As to the meaning of 'applicant' see PARA 706 note 6.

3 As to recognition requirements generally see PARA 685. See also notes 5, 12.

4 As to the meaning of 'recognition order' see PARA 684 note 1.

5 Financial Services and Markets Act 2000 s 290(1)(a). The application is made under s 287: see PARA 706. As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

In the case of an application for an order declaring the applicant to be a recognised investment exchange, the reference in s 290(1) to the recognition requirements applicable in its case includes a reference to requirements contained in any directly applicable Community regulation made under the Markets in Financial Instruments Directive (i e European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments): Financial Services and Markets Act 2000 s 290(1A) (s 290(1A)–(1C) added by SI 2007/126). In the case mentioned in the Financial Services and Markets Act 2000 s 290(1A), the application must be determined by the Authority before the end of the period of six months beginning with the date on which it receives the completed application: s 290(1B) (as so added). Section 290(1B) does not apply in the case of an application by an overseas applicant: s 290(1C) (as so added). As to the meaning of 'overseas applicant' see PARA 706 note 9.

6 Financial Services and Markets Act 2000 s 290(1)(b). The application is made under s 288: see PARA 707. As to the meaning of 'recognised clearing house' see PARA 684 note 6. See note 5.

7 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

8 Financial Services and Markets Act 2000 s 290(2). As to the requirement for approval see s 307; and PARA 733.

9 As to the meaning of 'application' see PARA 706 note 5.

10 Financial Services and Markets Act 2000 s 290(3).

11 Financial Services and Markets Act 2000 s 290(4).

Section 298 (see PARA 716) has effect in relation to a decision to refuse to make a recognition order as it has effect in relation to a decision to revoke such an order (s 290(5)(a)) and as if references to a recognised body were references to the applicant (s 290(5)(b)). As to the meaning of 'recognised body' see PARA 685 note 6. Section 290(5) does not apply in a case in which the Treasury has failed to give its approval under s 307 (see PARA 733): s 290(6).

12 Financial Services and Markets Act 2000 s 290A(1) (s 290A added by the Investment Exchanges and Clearing Houses Act 2006 s 4).

The reference in the Financial Services and Markets Act 2000 s 290(1) (making of recognition order) (see the text to notes 1–6) to satisfying the applicable recognition requirements is read accordingly: s 290A(2) (as so added).

Expressions used in s 290A(1) that are defined for the purposes of s 300A (power of Authority to disallow excessive regulatory provision) (see PARA 721) have the same meaning as in that provision: s 290A(3) (as so added). The provisions of s 300A(3), (4) (determination whether regulatory provision excessive) (see PARA 721) apply for the purposes of s 290A as for the purposes of s 300A: s 290A(4) (as so added).

Section 298 (see PARA 716) has effect in relation to a decision under s 290A to refuse a recognition order (1) as it has effect in relation to a decision to revoke such an order; and (2) as if references to a recognised body were references to the applicant: s 290A(5) (as so added). Section 290A does not apply to an application for recognition as an overseas investment exchange or overseas clearing house: s 290A(6) (as so added). For the purposes of Pt XVIII (ss 285–313), 'overseas investment exchange' means a body corporate or association which has neither its head office nor its registered office in the United Kingdom and in relation to which a recognition order is in force: s 313(1). As to the meaning of 'body corporate' see PARA 86 note 11. As to the meaning of 'United Kingdom' see PARA 2 note 3. 'Overseas clearing house' means a body corporate or association which has neither its head office nor its registered office in the United Kingdom and in relation to which a recognition order is in force: s 313(1).

710. Overseas investment exchanges and overseas clearing houses. An application[1] by an overseas applicant[2] must contain the address of a place in the United Kingdom[3] for the service on the applicant[4] of notices or other documents[5] required or authorised to be served on it under the Financial Services and Markets Act 2000[6].

If it appears to the Financial Services Authority[7] that an overseas applicant satisfies the requirements mentioned below[8], it may make a recognition order declaring the applicant to be: (1) a recognised investment exchange[9]; (2) a recognised clearing house[10].

The requirements are that:

(a) investors are afforded protection equivalent to that which they would be afforded if the body concerned were required to comply with certain recognition requirements[11];

(b) there are adequate procedures for dealing with a person who is unable, or likely to become unable, to meet his obligations in respect of one or more market contracts[12] connected with the investment exchange or clearing house[13];

(c) the applicant is able and willing to co-operate with the Authority by the sharing of information and in other ways[14];

(d) adequate arrangements exist for co-operation between the Authority and those responsible for the supervision of the applicant in the country or territory in which the applicant's head office is situated[15].

1 Ie under the Financial Services and Markets Act 2000 s 287 (see PARA 706) or s 288 (see PARA 707).

2 As to the meaning of 'overseas applicant' see PARA 706 note 9.

3 As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 As to the meaning of 'applicant' see PARA 706 note 6.

5 As to the meaning of 'document' see PARA 10 note 10.

6 Financial Services and Markets Act 2000 s 292(1).

7 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

8 Ie the requirements of the Financial Services and Markets Act 2000 s 292(3): see heads (a)–(d) in the text.

9 Financial Services and Markets Act 2000 s 292(2)(a). As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

In relation to an overseas applicant and a body or association declared to be a recognised investment exchange or recognised clearing house by a recognition order made by virtue of s 292(2):

(1) the reference in s 313(2) (see PARA 685) to recognition requirements is to be read as a reference to matters corresponding to the matters in respect of which provision is made in the recognition requirements (s 292(5)(a));

(2) s 296(1) (see PARA 714) and s 297(2) (see PARA 715) have effect as if the requirements mentioned in s 296(1)(a) and s 297(2)(a) were those of heads (a), (b), and (c) in the text (s 292(5)(b));

(3) s 297(2) has effect as if the grounds on which a recognition order may be revoked under that provision included the ground that in the opinion of the Authority arrangements of the kind mentioned in head (d) in the text no longer exist (s 292(5)(c)).

As to recognition requirements generally see PARA 685.

10 Financial Services and Markets Act 2000 s 292(2)(b). As to the meaning of 'recognised clearing house' see PARA 684 note 6. See note 9.

11 Financial Services and Markets Act 2000 s 292(3)(a) (amended by SI 2006/2975). The reference is to recognition requirements, other than any such requirements which are expressed in regulations under the Financial Services and Markets Act 2000 s 286 (see PARA 685) not to apply for the purposes of s 292(3)(a).

12 As to the meaning of 'market contract' see PARA 693 note 2.
13 Financial Services and Markets Act 2000 s 292(3)(b).
14 Financial Services and Markets Act 2000 s 292(3)(c).
15 Financial Services and Markets Act 2000 s 292(3)(d). In considering whether it is satisfied as to the requirements mentioned in heads (a) and (b) in the text, the Authority must have regard to the relevant law and practice of the country or territory in which the applicant's head office is situated (s 292(4)(a)) and the rules and practices of the applicant (s 292(4)(b)).

C. SUPERVISION

711. Notification requirements. The Financial Services Authority[1] may make rules[2] requiring a recognised body[3] to give it: (1) notice of such events relating to the body as may be specified[4]; and (2) such information in respect of those events as may be specified[5].

The rules may also require a recognised body to give the Authority, at such times or in respect of such periods as may be specified, such information relating to the body as may be specified[6]. An obligation imposed by the rules extends only to a notice or information which the Authority may reasonably require for the exercise of its functions under the Financial Services and Markets Act 2000[7]. The rules may require information to be given in a specified form and to be verified in a specified manner[8].

If a recognised body alters or revokes any of its rules or guidance[9] or makes new rules or issues new guidance[10], it must give written notice to the Authority without delay[11].

If a recognised investment exchange[12] makes a change in the arrangements it makes for the provision of clearing services in respect of transactions effected on the exchange[13] or in the criteria which it applies when determining to whom it will provide clearing services[14], it must give written notice to the Authority without delay[15]. If a recognised clearing house[16] makes a change in the recognised investment exchanges for whom it provides clearing services[17] or in the criteria which it applies when determining to whom (other than recognised investment exchanges) it will provide clearing services[18], it must give written notice to the Authority without delay[19].

A recognised investment exchange must as soon as practicable after a recognition order[20] is made in respect of it publish such particulars of the ownership of the exchange as the Authority may reasonably require[21]. If an ownership transfer[22] takes place in relation to a recognised investment exchange, the exchange must as soon as practicable after becoming aware of the transfer publish such particulars relating to the transfer as the Authority may reasonably require[23]. A recognised investment exchange must publish such particulars of any decision it makes to suspend or remove a financial instrument from trading on a regulated market[24] operated by it as the Authority may reasonably require[25]. The Authority may determine the manner of publication under the above provisions[26] and the timing of such publication[27].

The Authority may require a recognised investment exchange to give the Authority such information as it reasonably requires in order to satisfy itself that the exchange is complying with any directly applicable Community regulation made under the Markets in Financial Instruments Directive[28].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

2 As to the meaning of 'rule' see PARA 23 note 2.
3 As to the meaning of 'recognised body' see PARA 685 note 6.
4 Financial Services and Markets Act 2000 s 293(1)(a). 'Specified' means specified in the Authority's rules: s 293(9).
5 Financial Services and Markets Act 2000 s 293(1)(b).
6 Financial Services and Markets Act 2000 s 293(2).
7 Financial Services and Markets Act 2000 s 293(3).
8 Financial Services and Markets Act 2000 s 293(4).
9 Financial Services and Markets Act 2000 s 293(5)(a). As to rules of a clearing house and rules of an investment exchange see PARA 685. As to guidance issued by an investment exchange and by a clearing house see PARA 730.

Section 293(5)–(7) does not apply to an overseas investment exchange or an overseas clearing house: s 293(8). As to the meanings of 'overseas investment exchange' and 'overseas clearing house' see PARA 709 note 12.

10 Financial Services and Markets Act 2000 s 293(5)(b). See note 9.
11 Financial Services and Markets Act 2000 s 293(5). See note 9.
12 As to the meaning of 'recognised investment exchange' see PARA 684 note 1.
13 Financial Services and Markets Act 2000 s 293(6)(a). See note 9.
14 Financial Services and Markets Act 2000 s 293(6)(b). See note 9.
15 Financial Services and Markets Act 2000 s 293(6). See note 9.
16 As to the meaning of 'recognised clearing house' see PARA 684 note 6.
17 Financial Services and Markets Act 2000 s 293(7)(a). See note 9.
18 Financial Services and Markets Act 2000 s 293(7)(b). See note 9.
19 Financial Services and Markets Act 2000 s 293(7). See note 9.
20 As to the meaning of 'recognition order' see PARA 684 note 1.
21 Financial Services and Markets Act 2000 s 292A(1) (s 292A added by SI 2007/126). The particulars published under the Financial Services and Markets Act 2000 s 292A(1) must include particulars of the identity and scale of interests of the persons who are in a position to exercise significant influence over the management of the exchange, whether directly or indirectly: s 292A(2) (as so added). Section 292A does not apply to an overseas investment exchange: s 292A(7) (as so added).
22 'Ownership transfer', in relation to an exchange, means a transfer of ownership which gives rise to a change in the persons who are in a position to exercise significant influence over the management of the exchange, whether directly or indirectly: Financial Services and Markets Act 2000 s 292A(3) (as added: see note 21). See note 21.
23 Financial Services and Markets Act 2000 s 292A(4) (as added: see note 21). See note 21.
24 For the purposes of the Financial Services and Markets Act 2000 Pt XVIII (ss 285–313), 'regulated market' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4.1.14: Financial Services and Markets Act 2000 s 313(1) (definition added by SI 2007/126).
25 Financial Services and Markets Act 2000 s 292A(5) (as added: see note 21). See note 21.
26 Ie under the Financial Services and Markets Act 2000 s 292A(1), (3), (5).
27 Financial Services and Markets Act 2000 s 292A(6) (as added: see note 21). The reference is to the timing of publication under s 292A(5). See note 21.
28 Financial Services and Markets Act 2000 s 293A (added by SI 2007/126). The reference is to European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1).

712. Reports by overseas investment exchanges and overseas clearing houses.

At least once a year, every overseas investment exchange[1] and overseas clearing house[2] must provide the Financial Services Authority[3] with a report[4]. The report must contain a statement as to whether any events have occurred which are likely to affect the Authority's assessment of whether it is satisfied as to certain requirements[5] or to have any effect on competition[6].

The report must also contain such information as may be specified in rules made by the Authority[7]. The investment exchange or clearing house must provide the Treasury[8] and the Office of Fair Trading[9] with a copy of the report[10].

1 As to the meaning of 'overseas investment exchange' see PARA 709 note 12.
2 As to the meaning of 'overseas clearing house' see PARA 709 note 12.

3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

4 Financial Services and Markets Act 2000 s 295(1).

5 Ie set out in the Financial Services and Markets Act 2000 s 292(3): see PARA 710 heads (a)–d).

6 Financial Services and Markets Act 2000 s 295(2).

7 Financial Services and Markets Act 2000 s 295(3). As to the meaning of 'rule' see PARA 23 note 2.

8 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

9 As to the Office of Fair Trading see TRADE, INDUSTRY AND INDUSTRIAL RELATIONS vol 47 (2001 Reissue) PARA 504 et seq.

10 Financial Services and Markets Act 2000 s 295(4) (amended by the Enterprise Act 2002 Sch 25 para 40(1), (9)).

713. Modification or waiver of rules relating to notification and reports. The Financial Services Authority[1] may, on the application or with the consent of a recognised body[2], direct that certain rules[3] are not to apply to the body[4] or are to apply to the body with such modifications as may be specified in the direction[5].

An application must be made in such manner as the Authority may direct[6].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

2 As to the meaning of 'recognised body' see PARA 685 note 6.

3 Ie rules made under the Financial Services and Markets Act 2000 s 293 (see PARA 711) or s 295 (see PARA 712).

4 Financial Services and Markets Act 2000 s 294(1)(a).

5 Financial Services and Markets Act 2000 s 294(1)(b). Section 294(4)–(6) applies to a direction given under s 294(1): s 294(3).

The Authority may not give a direction unless it is satisfied that: (1) compliance by the recognised body with the rules, or with the rules as unmodified, would be unduly burdensome or would not achieve the purpose for which the rules were made (s 294(4)(a)); and (2) the direction would not result in undue risk to persons whose interests the rules are intended to protect (s 294(4)(b)). A direction may be given subject to conditions: s 294(5). The Authority may revoke a direction (s 294(6)(a)) or vary it on the application, or with the consent, of the recognised body to which it relates (s 294(6)(b)).

6 Financial Services and Markets Act 2000 s 294(2).

714. The Financial Services Authority's power to give directions. If it appears to the Financial Services Authority[1] that a recognised body[2] has failed, or is likely to fail, to satisfy the recognition requirements[3] or has failed to comply with any other obligation imposed on it by or under the Financial Services and Markets Act 2000[4], it may direct the body to take specified steps for the purpose of securing the body's compliance with (1) the recognition requirements[5]; or (2) any obligation of the kind in question[6].

The above[7] also applies in the case of a recognised body which is a recognised investment exchange[8] if it appears to the Authority that the body has failed, or is likely to fail, to comply with any obligation imposed on it by any directly applicable Community regulation made under the Markets in Financial Instruments Directive[9]. In the case of a recognised investment exchange other than an overseas investment exchange[10], the steps referred to above may include: (a) the granting to the Authority of access to the premises of the exchange for the purpose of inspecting those premises; or any documents on the premises which

appear to the Authority to be relevant for the purpose[11]; (b) the suspension of the carrying on of any regulated activity[12] by the exchange for the period specified in the direction[13].

A direction under these provisions is enforceable, on the application of the Authority, by an injunction[14]. The fact that a rule made by a recognised body has been altered in response to a direction given by the Authority does not prevent it from being subsequently altered or revoked by the recognised body[15].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

2 As to the meaning of 'recognised body' see PARA 685 note 6.

3 Financial Services and Markets Act 2000 s 296(1)(a). As to recognition requirements see PARA 685.

4 Financial Services and Markets Act 2000 s 296(1)(b).

5 Financial Services and Markets Act 2000 s 296(2)(a).

6 Financial Services and Markets Act 2000 s 296(2)(b).

7 Ie the Financial Services and Markets Act 2000 s 296.

8 As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

9 Financial Services and Markets Act 2000 s 296(1A) (added by SI 2007/126). The reference is to European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments.

10 As to the meaning of 'overseas investment exchange' see PARA 709 note 12.

11 Financial Services and Markets Act 2000 s 296(2A)(a) (s 296(2A) added by SI 2007/126). The reference is to documents relevant for the purpose of the Financial Services and Markets Act 2000 s 296(2): see heads (1) and (2) in the text.

12 As to regulated activities see PARA 84 et seq.

13 Financial Services and Markets Act 2000 s 296(2A)(b) (as added: see note 11).

14 Financial Services and Markets Act 2000 s 296(3). As to injunctions generally see INJUNCTIONS.

15 Financial Services and Markets Act 2000 s 296(4). As to rules of a clearing house and rules of an investment exchange see PARA 685 note 7.

715. Power of the Financial Services Authority to revoke recognition. A recognition order[1] may be revoked by an order made by the Financial Services Authority[2] at the request, or with the consent, of the recognised body[3] concerned[4].

If it appears to the Authority that a recognised body (1) is failing, or has failed, to satisfy the recognition requirements[5]; or (2) is failing, or has failed, to comply with any other obligation imposed on it by or under the Financial Services and Markets Act 2000[6], it may make an order revoking the recognition order for that body even though the body does not wish the order to be made[7].

If it appears to the Authority that a recognised body which is a recognised investment exchange[8] (a) has not carried on the business of an investment exchange during the period of 12 months beginning with the day on which the recognition order took effect in relation to it[9]; (b) has not carried on the business of an investment exchange at any time during the period of six months ending with the relevant day[10]; or (c) has failed, or is likely to fail, to comply with any obligation imposed on it by a directly applicable Community regulation made under the Markets in Financial Instruments Directive[11], it may make an order revoking the recognition order for that body even though the body does not wish the order to be made[12].

Such an order (a 'revocation order') must specify the date on which it is to take effect[13]. A revocation order may contain such transitional provisions as the Authority thinks necessary or expedient[14].

1 As to the meaning of 'recognition order' see PARA 684 note 1.
2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.
As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.
3 As to the meaning of 'recognised body' see PARA 685 note 6.
4 Financial Services and Markets Act 2000 s 297(1).
5 Financial Services and Markets Act 2000 s 297(2)(a).
6 Financial Services and Markets Act 2000 s 297(2)(b).
7 Financial Services and Markets Act 2000 s 297(2).
8 As to the meaning of 'recognised investment exchange' see PARA 684 note 1.
9 Financial Services and Markets Act 2000 s 297(2A)(a) (s 297(2A)–(2C) added by SI 2007/126). The Financial Services and Markets Act 2000 s 297(2A) does not apply to an overseas investment exchange: s 297(2C) (as so added). As to the meaning of 'overseas investment exchange' see PARA 709 note 12.
10 Financial Services and Markets Act 2000 s 297(2A)(b) (as added: see note 9). The 'relevant day', for the purposes of s 297(2A)(b), is the day on which the power to make an order under s 297(2A) is exercised: s 297(2B) (as so added). See note 9.
11 Financial Services and Markets Act 2000 s 297(2A)(c) (as added: see note 9). The reference is to European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments. See note 9.
12 Financial Services and Markets Act 2000 s 297(2A) (as added: see note 9). See note 9.
13 Financial Services and Markets Act 2000 s 297(3). 'Revocation order' has the meaning described in the text: ss 297, 313(1). In the case of a revocation order made under s 297(2) or (2A), the specified date must not be earlier than the end of the period of three months beginning with the day on which the order is made: s 297(4) (amended by SI 2007/126).
14 Financial Services and Markets Act 2000 s 297(5).

716. Procedure for directions and revocation orders. Before giving a direction[1] or making a revocation order[2], the Financial Services Authority[3] must:

(1) give written notice of its intention to do so to the recognised body[4] concerned[5];
(2) take such steps as it considers reasonably practicable to bring the notice to the attention of members (if any) of that body[6]; and
(3) publish the notice in such manner as it thinks appropriate for bringing it to the attention of other persons who are, in its opinion, likely to be affected[7].

A notice[8] must state why the Authority intends to give the direction or make the order; and draw attention to the right to make representations[9]. Before the end of the period for making representations[10] the recognised body[11], any member of that body[12], and any other person who is likely to be affected by the proposed direction or revocation order[13], may make representations to the Authority[14].

When the Authority has decided whether to give a direction[15] or to make the proposed revocation order, it must: (a) give the recognised body written notice of its decision[16]; and (b) if it has decided to give a direction or make an order, take such steps as it considers reasonably practicable for bringing its decision to the attention of members of the body or of other persons who are, in the Authority's opinion, likely to be affected[17].

If the Authority considers it essential to do so, it may give a direction[18] without following the procedure described above[19] or, if the Authority has begun to follow that procedure, regardless of whether the period for making representations has expired[20].

1 Ie under the Financial Services and Markets Act 2000 s 296: see PARA 714.
2 Ie under the Financial Services and Markets Act 2000 s 297(2) or (2A): see PARA 715.

3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

4 As to the meaning of 'recognised body' see PARA 685 note 6.

5 Financial Services and Markets Act 2000 s 298(1)(a) (s 298(1) amended by SI 2007/126).

6 Financial Services and Markets Act 2000 s 298(1)(b).

7 Financial Services and Markets Act 2000 s 298(1)(c).

8 Ie under the Financial Services and Markets Act 2000 s 298(1).

9 Financial Services and Markets Act 2000 s 298(2). As to the right to make representations see s 298(3); and the text and notes 10–14.

10 The period for making representations is: (1) two months beginning with the date on which the notice is served on the recognised body (Financial Services and Markets Act 2000 s 298(4)(a)(i)) or, if later, with the date on which the notice is published (s 298(4)(a)(ii)); or (2) such longer period as the Authority may allow in the particular case (s 298(4)(b)).

11 Financial Services and Markets Act 2000 s 298(3)(a).

12 Financial Services and Markets Act 2000 s 298(3)(b).

13 Financial Services and Markets Act 2000 s 298(3)(c).

14 Financial Services and Markets Act 2000 s 298(3). In deciding whether to give a direction or make a revocation order, the Authority must have regard to any representations made in accordance with s 298(3): s 298(5).

15 Ie under the Financial Services and Markets Act 2000 s 296: see PARA 714.

16 Financial Services and Markets Act 2000 s 298(6)(a).

17 Financial Services and Markets Act 2000 s 298(6)(b).

18 Ie under the Financial Services and Markets Act 2000 s 296: see PARA 714.

19 Financial Services and Markets Act 2000 s 298(7)(a).

20 Financial Services and Markets Act 2000 s 298(7)(b). If the Authority has, in relation to a particular matter, followed the procedure set out in s 298(1)–(5), it need not follow it again if, in relation to that matter, it decides to take action other than that specified in its notice under s 298(1) (see the text and notes 1–7): s 298(8).

717. Complaints about recognised bodies. The Financial Services Authority[1] must make arrangements for the investigation of any relevant complaint[2] about a recognised body[3].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

2 'Relevant complaint' means a complaint which the Authority considers is relevant to the question of whether the body concerned should remain a recognised body: Financial Services and Markets Act 2000 s 299(2). As to the meaning of 'recognised body' see PARA 685 note 6.

3 Financial Services and Markets Act 2000 s 299(1).

718. Disciplinary proceedings before the Financial Services and Markets Tribunal. The Treasury[1] has power, if it is satisfied that the condition mentioned below[2] is satisfied, to make an order conferring functions on the Financial Services and Markets Tribunal[3] with respect to disciplinary proceedings[4] of one or more investment exchanges in relation to which a recognition order[5] is in force or of such investment exchanges generally[6] or of one or more clearing houses in relation to which a recognition order[7] is in force or of such clearing houses generally[8].

The condition is that it is desirable to exercise the power described above[9] with a view to ensuring that: (1) decisions taken in disciplinary proceedings with respect to which functions are to be conferred on the Tribunal are consistent with decisions of the Tribunal in cases arising under Part VIII of the Financial Services and Markets Act 2000[10] and decisions taken in other disciplinary

proceedings with respect to which the Tribunal has functions as a result of an order made by the Treasury[11]; or (2) the disciplinary proceedings are in accordance with the Convention rights[12].

An order may modify or exclude any provision made by or under the Financial Services and Markets Act 2000 with respect to proceedings before the Tribunal[13].

1 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
2 Ie mentioned in the Financial Services and Markets Act 2000 s 300(2).
3 As to the Financial Services and Markets Tribunal see PARA 43 et seq.
4 'Disciplinary proceedings' means proceedings under the rules of an investment exchange or clearing house in relation to market abuse by persons subject to the rules: Financial Services and Markets Act 2000 s 300(4). As to rules of an investment exchange and rules of a clearing house see PARA 685 note 7. As to the meaning of 'market abuse' see PARA 437.
5 Ie under the Financial Services and Markets Act 2000 s 290: see PARA 709. As to the meaning of 'recognition order' generally see PARA 684 note 1.
6 Financial Services and Markets Act 2000 s 300(1)(a). At the date at which this volume states the law no such order had been made. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1.
7 Ie under the Financial Services and Markets Act 2000 s 290: see PARA 709.
8 Financial Services and Markets Act 2000 s 300(1)(b). See note 6.
9 Ie the power conferred by the Financial Services and Markets Act 2000 s 300(1).
10 Financial Services and Markets Act 2000 s 300(2)(a)(i). As to Pt VIII (ss 118–131A) see PARA 437 et seq.
11 Financial Services and Markets Act 2000 s 300(2)(a)(ii). The order referred to in the text is an order made under s 300.
12 Financial Services and Markets Act 2000 s 300(2)(b). 'Convention rights' has the meaning given in the Human Rights Act 1998 s 1 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS): Financial Services and Markets Act 2000 s 300(5).
13 Financial Services and Markets Act 2000 s 300(3).

719. Liability in relation to recognised body's regulatory functions. A recognised body[1] and its officers and staff are not liable in damages for anything done or omitted in the discharge of the recognised body's regulatory functions[2] unless it is shown that the act or omission was in bad faith[3].

1 As to the meaning of 'recognised body' see PARA 685 note 6.
2 'Regulatory functions' means the functions of the recognised body so far as relating to, or to matters arising out of, the obligations to which the body is subject under or by virtue of the Financial Services and Markets Act 2000: s 291(3).
3 Financial Services and Markets Act 2000 s 291(1). However, s 291(1) does not prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of the Human Rights Act 1998 s 6(1) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS): Financial Services and Markets Act 2000 s 291(2).

720. Supervision of certain contracts. The Secretary of State[1] and the Treasury[2], acting jointly, may by regulations provide for certain provisions relating to safeguarding financial markets on an insolvency[3] to apply to relevant contracts as they apply to contracts connected with a recognised body[4]. 'Relevant contracts' means contracts of a prescribed[5] description in relation to which settlement arrangements are provided by a person for the time being included in a list (the 'list') maintained by the Financial Services Authority for these purposes[6].

The approval of the Treasury is required for the conditions set by the Authority for admission to the list[7] and the arrangements for admission to, and removal from, the list[8].

The Authority must publish the list as for the time being in force[9] and provide a certified copy of it to any person who wishes to refer to it in legal proceedings[10]. A certified copy of the list is evidence of the contents of the list[11]. A copy of the list which purports to be certified by or on behalf of the Authority is to be taken to have been duly certified unless the contrary is shown[12].

1 As to the Secretary of State see PARA 3.
2 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
3 Ie the Companies Act 1989 Pt VII (ss 154–191) (financial markets and insolvency) (see PARA 509 et seq) and the Companies (No 2) (Northern Ireland) Order 1990, SI 1990/1504 (NI 10) Pt V.
4 Financial Services and Markets Act 2000 s 301(1). As to the meaning of 'recognised body' see PARA 685 note 6. Regulations may be made under s 301 only if the Secretary of State and the Treasury are satisfied, having regard to the extent to which the relevant contracts concerned are contracts of a kind dealt in by persons supervised by the Financial Services Authority, that it is appropriate for the arrangements mentioned in s 301(2) to be supervised by the Authority: s 301(3). At the date at which this volume states the law no such regulations had been made. As to regulations made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.
5 'Prescribed' means prescribed in regulations made by the Treasury: Financial Services and Markets Act 2000 s 417(1). See note 4.
6 Financial Services and Markets Act 2000 s 301(2).
7 Financial Services and Markets Act 2000 s 301(4)(a).
8 Financial Services and Markets Act 2000 s 301(4)(b). If the Treasury withdraws an approval given by it under s 301(4), all regulations made under s 301 and then in force are to be treated as suspended: s 301(5). However, if the Authority changes the conditions or arrangements (or both) (s 301(6)(a)) and the Treasury give a fresh approval under s 301(4) (s 301(6)(b)), the suspension of the regulations ends on such date as the Treasury may, in giving the fresh approval, specify (s 301(6)).
9 Financial Services and Markets Act 2000 s 301(7)(a).
10 Financial Services and Markets Act 2000 s 301(7)(b).
11 Financial Services and Markets Act 2000 s 301(8).
12 Financial Services and Markets Act 2000 s 301(9). Regulations under s 301 may, in relation to a person included in the list: (1) apply (with such exceptions, additions and modifications as appear to the Secretary of State and the Treasury to be necessary or expedient) such provisions of, or made under, the Financial Services and Markets Act 2000 as they consider appropriate (s 301(10)(a)); (2) provide for the provisions of the Companies Act 1989 Pt VII (see PARA 509 et seq) and the Companies (No 2) (Northern Ireland) Order 1990 Pt V to apply (with such exceptions, additions or modifications as appear to the Secretary of State and the Treasury to be necessary or expedient) (Financial Services and Markets Act 2000 s 301(10)(b)). See note 4.

D. DISALLOWANCE OF EXCESSIVE REGULATORY PROVISION

721. Power of the Financial Services Authority to disallow excessive regulatory provision. Where a recognised body[1] proposes to make any regulatory provision[2] in connection with its business as an investment exchange or the provision by it of clearing services[3], if it appears to the Financial Services Authority[4] (1) that the proposed provision will impose a requirement[5] on persons affected (directly or indirectly) by it[6]; and (2) that the requirement is excessive[7], the Authority may direct that the proposed provision must not be made[8]. A requirement is excessive if (a) it is not required under Community law or any enactment or rule of law in the United Kingdom[9]; and (b) either it is not justified as pursuing a reasonable regulatory objective, or it is disproportionate to the end to be achieved[10]. In considering whether a requirement is excessive the

Authority must have regard to all the relevant circumstances, including: (i) the effect of existing legal and other requirements[11]; (ii) the global character of financial services and markets and the international mobility of activity[12]; (iii) the desirability of facilitating innovation[13]; and (iv) the impact of the proposed provision on market confidence[14]. Any provision made in contravention of a direction under the above provisions is of no effect[15].

For the purposes of the above provisions a variation of a proposal is treated as a new proposal[16].

1 As to the meaning of 'recognised body' see PARA 685 note 6.
2 'Regulatory provision' means any rule, guidance, arrangements, policy or practice, and references to making provision must be read accordingly as including, as the case may require, issuing guidance, entering into arrangements or adopting a policy or practice: Financial Services and Markets Act 2000 s 300E(1) (s 300E added by Investment Exchanges and Clearing Houses Act 2006 s 2).
3 Financial Services and Markets Act 2000 s 300A(1) (s 300A added by the Investment Exchanges and Clearing Houses Act 2006 s 1). The Financial Services and Markets Act 2000 ss 300A–300D do not apply to an overseas investment exchange or overseas clearing house: s 300E(3) (as added: see note 2). As to the meanings of 'overseas investment exchange' and 'overseas clearing house' see PARA 709 note 12.
4 As to the Financial Services Authority see PARAS 4, 6 et seq.
5 For these purposes, 'requirement' includes any obligation or burden: Financial Services and Markets Act 2000 s 300A(5) (as added: see note 3).
6 Financial Services and Markets Act 2000 s 300A(2)(a) (as added: see note 3).
7 Financial Services and Markets Act 2000 s 300A(2)(b) (as added: see note 3).
8 Financial Services and Markets Act 2000 s 300A(2) (as added: see note 3).
9 Financial Services and Markets Act 2000 s 300A(3)(a) (as added: see note 3). As to the meaning of 'United Kingdom' se PARA 2 note 3.
10 Financial Services and Markets Act 2000 s 300A(3)(b) (as added: see note 3).
11 Financial Services and Markets Act 2000 s 300A(4)(a) (as added: see note 3).
12 Financial Services and Markets Act 2000 s 300A(4)(b) (as added: see note 3).
13 Financial Services and Markets Act 2000 s 300A(4)(c) (as added: see note 3).
14 Financial Services and Markets Act 2000 s 300A(4)(d) (as added: see note 3).
15 Financial Services and Markets Act 2000 s 300A(6).
16 Financial Services and Markets Act 2000 s 300E(2) (as added: see note 2).

722. Duty to notify proposal to make regulatory provision. A recognised body[1] that proposes to make any regulatory provision[2] must give written notice of the proposal to the Financial Services Authority[3] without delay[4]. The Authority may by rules[5] (1) specify descriptions of regulatory provision in relation to which, or circumstances in which, the above duty[6] does not apply[7]; or (2) provide that the duty applies only to specified descriptions of regulatory provision or in specified circumstances[8]. The Authority may also by rules[9] (a) make provision as to the form and contents of the notice required[10]; and (b) require the body to provide such information relating to the proposal as may be specified in the rules or as the Authority may reasonably require[11].

For the purposes of the above provisions a variation of a proposal is treated as a new proposal[12].

1 As to the meaning of 'recognised body' see PARA 685 note 6.
2 As to the meaning of 'regulatory provision' see PARA 721 note 2.
3 As to the Financial Services Authority see PARAS 4, 6 et seq.
4 Financial Services and Markets Act 2000 s 300B(1) (s 300B added by the Investment Exchanges and Clearing Houses Act 2006 s 2). The Financial Services and Markets Act 2000 ss 300A–300D do not apply to an overseas investment exchange or overseas clearing house: s 300E(3) (s 300E added by the Investment Exchanges and Clearing Houses Act 2006 s 2). As to the meanings of 'overseas investment exchange' and 'overseas clearing house' see PARA 709 note 12.

5 Ie under the Financial Services and Markets Act 2000 s 293 (notification requirements): see PARA 711.
6 Ie the duty under the Financial Services and Markets Act 2000 s 300B(1).
7 Financial Services and Markets Act 2000 s 300B(2)(a) (as added: see note 4).
8 Financial Services and Markets Act 2000 s 300B(2)(b) (as added: see note 4).
9 Ie under the Financial Services and Markets Act 2000 s 293.
10 Financial Services and Markets Act 2000 s 300B(3)(a) (as added: see note 4).
11 Financial Services and Markets Act 2000 s 300B(3)(b) (as added: see note 4).
12 Financial Services and Markets Act 2000 s 300E(2) (as added: see note 4).

723. Restriction on making provision before the Financial Services Authority decides whether to act. Where notice of a proposal to make regulatory provision[1] is required to be given to the Financial Services Authority[2], the provision must not be made (1) before that notice is given[3]; or (2) subject to the following provisions[4], before the end of the initial period[5]. If before the end of the initial period the Authority notifies the body that it is calling in the proposal, specified provisions[6] apply as to when the provision may be made[7]. If (a) before the end of the initial period the Authority notifies the body that it is not calling in the proposal[8]; or (b) the initial period ends without the Authority having notified the body that it is calling in the proposal[9], the body may then make the proposed provision[10]. Any provision made in contravention of the above provisions is of no effect[11].

For the purposes of the above provisions a variation of a proposal is treated as a new proposal[12].

1 As to the meaning of 'regulatory provision' see PARA 723 note 2.
2 Ie under the Financial Services and Markets Act 2000 s 300B: see PARA 722. As to the Financial Services Authority see PARAS 4, 6 et seq.
3 Financial Services and Markets Act 2000 s 300C(1)(a) (s 300C added by the Investment Exchanges and Clearing Houses Act 2006 s 2). The Financial Services and Markets Act 2000 ss 300A–300D do not apply to an overseas investment exchange or overseas clearing house: s 300E(3) (s 300E added by the Investment Exchanges and Clearing Houses Act 2006 s 2). As to the meanings of 'overseas investment exchange' and 'overseas clearing house' see PARA 709 note 12.
4 Ie the following provisions of the Financial Services and Markets Act 2000 s 300C.
5 Financial Services and Markets Act 2000 s 300C(1)(b) (as added: see note 3). The initial period is (1) the period of 30 days beginning with the day on which the Authority receives notice of the proposal; or (2) if any consultation period announced by the body in relation to the proposal ends after that 30-day period, the end of the consultation period: s 300C(2) (as so added).
6 Ie the provisions of the Financial Services and Markets Act 2000 s 300D: see PARA 724.
7 Financial Services and Markets Act 2000 s 300C(3) (as added: see note 3).
8 Financial Services and Markets Act 2000 s 300C(4)(a) (as added: see note 3).
9 Financial Services and Markets Act 2000 s 300C(4)(b) (as added: see note 3).
10 Financial Services and Markets Act 2000 s 300C(4) (as added: see note 3).
11 Financial Services and Markets Act 2000 s 300C(5) (as added: see note 3).
12 Financial Services and Markets Act 2000 s 300E(2) (as added: see note 3).

724. Consideration by the Financial Services Authority whether to disallow proposed provision. Where the Financial Services Authority[1] notifies a recognised body[2] that it is calling in a proposal to make regulatory provision[3], the Authority must publish a notice (1) giving details of the proposed provision[4]; (2) stating that it has called in the proposal in order to consider whether to disallow it[5]; and (3) specifying a period during which representations with respect to that question may be made to it[6]. The Authority may extend the period for making representations[7].

The Authority must notify the body of its decision whether to disallow the provision not later than 30 days after the end of the period for making

representations, and must publish the decision and the reasons for it[8]. The body must not make the provision unless and until (a) the Authority notifies it of its decision not to disallow it[9]; or (b) the 30-day period[10] ends without the Authority having notified any decision[11].

If the Authority notifies the body of its decision to disallow the provision and that decision is questioned in legal proceedings (i) the body must not make the provision until those proceedings, and any proceedings on appeal, are finally determined[12]; (ii) if the Authority's decision is quashed and the matter is remitted to it for reconsideration, the court may give directions as to the period within which the Authority is to complete its reconsideration[13]; and (iii) the body must not make the provision until (A) the Authority notifies it of its decision on reconsideration not to disallow the provision[14]; or (B) the period specified by the court ends without the Authority having notified any decision[15].

For the purposes of the above provisions a variation of a proposal is treated as a new proposal[16].

1 As to the Financial Services Authority see PARAS 4, 6 et seq.
2 As to the meaning of 'recognised body' see PARA 685 note 6.
3 Financial Services and Markets Act 2000 s 300D(1) (s 300D added by the Investment Exchanges and Clearing Houses Act 2006 s 2). As to the meaning of 'regulatory provision' see PARA 721 note 2. The Financial Services and Markets Act 2000 ss 300A–300D do not apply to an overseas investment exchange or overseas clearing house: s 300E(3) (s 300E added by the Investment Exchanges and Clearing Houses Act 2006 s 2). As to the meanings of 'overseas investment exchange' and 'overseas clearing house' see PARA 709 note 12.
4 Financial Services and Markets Act 2000 s 300D(2)(a) (as added: see note 3).
5 Financial Services and Markets Act 2000 s 300D(2)(b) (as added: see note 3).
6 Financial Services and Markets Act 2000 s 300D(2)(c) (as added: see note 3).
7 Financial Services and Markets Act 2000 s 300D(3) (as added: see note 3).
8 Financial Services and Markets Act 2000 s 300D(4) (as added: see note 3).
9 Financial Services and Markets Act 2000 s 300D(5)(a) (as added: see note 3). Any provision made in contravention of s 300D(5) or (6) is of no effect: s 300D(7) (as so added).
10 Specified in the Financial Services and Markets Act 2000 s 300D(4).
11 Financial Services and Markets Act 2000 s 300D(5)(b) (as added: see note 3). See note 9.
12 Financial Services and Markets Act 2000 s 300D(6)(a) (as added: see note 3). See note 9.
13 Financial Services and Markets Act 2000 s 300D(6)(b) (as added: see note 3). See note 9.
14 Financial Services and Markets Act 2000 s 300D(6)(c)(i) (as added: see note 3). See note 9.
15 Financial Services and Markets Act 2000 s 300D(6)(c)(ii) (as added: see note 3). See note 9.
16 Financial Services and Markets Act 2000 s 300E(2) (as added: see note 3).

E. CONTROL OVER RECOGNISED INVESTMENT EXCHANGES

725. Acquiring or increasing control. If a step which a person proposes to take would result in his acquiring[1] (1) control over a recognised investment exchange[2]; (2) an additional[3] kind of control[4] over an exchange; or (3) an increase[5] in a relevant kind of control which he already has[6] over an exchange, he must notify the Financial Services Authority[7] of his proposal[8].

A person who, without himself taking any such step, acquires any such control or additional or increased control must notify the Authority before the end of the period of 14 days beginning with the day on which he first becomes aware that he has acquired it[9]. A person who is under the duty to notify the Authority imposed by heads (1) to (3) above[10] must also give notice to the Authority on acquiring, or increasing, the control in question[11].

Such a notice[12] is referred to[13] as a 'notice of control'[14].

1 For the purposes of the Financial Services and Markets Act 2000 Pt XVIII Ch IA (ss 301A–301G), a person (the 'acquirer') acquires control over a recognised investment

exchange ('E') on first falling within any of the cases set out below: s 301B(1) (ss 301A, 301B, 301G added by SI 2007/126). As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

The cases referred to above are where the acquirer:

(1) holds 20% or more of the shares in E (Financial Services and Markets Act 2000 s 301B(2)(a) (as so added));
(2) is able to exercise significant influence over the management of E by virtue of his shareholding in E (s 301B(2)(b) (as so added));
(3) holds 20% or more shares in a parent undertaking ('P') of E (s 301B(2)(c) (as so added));
(4) is able to exercise significant influence over the management of P by virtue of his shareholding in P (s 301B(2)(d) (as so added));
(5) is entitled to exercise, or control the exercise of, 20% or more of the voting power in E (s 301B(2)(e) (as so added));
(6) is able to exercise significant influence over the management of E by virtue of his voting power in E (s 301B(2)(f) (as so added));
(7) is entitled to exercise, or to control the exercise of, 20% or more of the voting power in P (s 301B(2)(g) (as so added)); or
(8) is able to exercise significant influence over the management of P by virtue of his voting power in P (s 301B(2)(h) (as so added)).

In s 301B(2) 'acquirer' means (a) the acquirer; (b) any of his associates; or (c) the acquirer and any of his associates: s 301B(3) (as so added). As to the meanings of 'associate', 'shares' and 'voting power' see PARA 591 note 16; definitions applied by s 310G (as so added). 'Controller', in relation to a recognised investment exchange, means a person who falls within any of the cases in the Financial Services and Markets Act 2000 s 301B(2) (see heads (1)–(8) above): s 301G (as so added). As to the meaning of 'parent undertaking' see PARA 351 note 32.

In Pt XVIII Ch IA (other than s 301B) 'acquiring control' or 'having control' includes: (i) acquiring or having an additional kind of control; or (ii) acquiring an increase in a relevant kind of control, or having increased control of a relevant kind: s 301B(7) (as so added). See also notes 4, 5.

2 See note 1.

3 As to additional control see note 1.

4 For the purposes of the Financial Services and Markets Act 2000 Pt XVIII Ch IA, each of the following is to be regarded as a kind of control:

(1) control arising as a result of the holding of shares in E (s 301B(4)(a) (as added: see note 1));
(2) control arising as a result of the holding of shares in P (s 301B(4)(b) (as so added));
(3) control arising as a result of the entitlement to exercise, or control the exercise of, voting power in E (s 301B(4)(c) (as so added));
(4) control arising as a result of the entitlement to exercise, or control the exercise of, voting power in P (s 301B(4)(d) (as so added)).

5 For the purposes of the Financial Services and Markets Act 2000 Pt XVIII Ch IA, a controller of E increases his control over E if:

(1) the percentage of shares held by the controller in E increases by the step mentioned in s 301B(6) (see below) (s 301B(5)(a) (as added: see note 1));
(2) the percentage of shares held by the controller in P increases by the step mentioned in s 301B(6) (see below) (s 301(5)(b) (as so added));
(3) the percentage of voting power which the controller is entitled to exercise, or control the exercise of, in E increases by the step mentioned in s 301B(6) (see below) (s 301(5)(c) (as so added));
(4) the percentage of voting power which the controller is entitled to exercise, or control the exercise of, in P increases by the step mentioned in s 301B(6) (see below) (s 301(5)(d) (as so added)); or
(5) the controller becomes a parent undertaking of E (s 301(5)(e) (as so added)).

The step referred to above is from 20% or more (but less than 50%) to 50% or more: s 301B(6) (as so added).

6 As to having control see note 1.

7 As to the Financial Services Authority see PARAS 4, 6 et seq.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

8 Financial Services and Markets Act 2000 s 301A(1) (as added: see note 1). Nothing in Pt XVIII Ch IA applies to an overseas investment exchange: s 301A(6) (as so added). As to the meaning of 'overseas investment exchange' see PARA 709 note 12.

9 Financial Services and Markets Act 2000 s 301A(2) (as added: see note 1).
10 Ie under the Financial Services and Markets Act 2000 s 301A(1).
11 Financial Services and Markets Act 2000 s 301A(3) (as added: see note 1).
12 Ie under the Financial Services and Markets Act 2000 s 301A(1) or (2).
13 Ie in the Financial Services and Markets Act 2000 Pt XVIII Ch IA.
14 Financial Services and Markets Act 2000 ss 301A(4), 310G (as added: see note 1). Section 182 (see PARA 377) applies to a notice of control under Pt XVIII Ch IA as it applies to a notice of control under Pt XII (ss 178–192) (see PARA 377 et seq): s 301A(5) (as so added).

726. Duty of the Financial Services Authority in relation to notice of control. The Financial Services Authority[1] must, before the end of the period of three months beginning with the date on which it receives a notice of control[2], determine whether (1) to approve of the person concerned having the control[3] to which the notice relates[4]; or (2) to give a warning notice[5]. If the Authority decides to approve of the person concerned having the control to which the notice relates it must notify that person of its approval in writing without delay[6].

If the Authority fails to comply with making the above determination within the three month period[7] it is to be treated as having given its approval and notified the person concerned at the end of the period so fixed[8].

The Authority's approval remains effective only if the person to whom it relates acquires the control[9] in question:

(a) before the end of such period as may be specified in the notice of approval[10]; or

(b) if no period is specified, before the end of the period of one year beginning with the date (i) of the notice of approval[11]; (ii) on which the Authority is treated as having given approval[12]; or (iii) of a decision on a reference to the Financial Services and Markets Tribunal[13] which results in the person concerned receiving approval[14].

The Authority may give a decision notice[15] unless it is satisfied that the approval requirement[16] is met[17]. If the Authority proposes to give the person concerned a decision notice[18], it must give him a warning notice[19]. A person to whom a decision notice is given[20] may refer the matter to the Tribunal[21].

1 As to the Financial Services Authority see PARAS 4, 6 et seq.
As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.
2 As to the meaning of 'notice of control' see PARA 725.
3 As to having control see PARA 725 note 1.
4 Financial Services and Markets Act 2000 s 301C(1)(a) (s 301C added by SI 2007/126).
5 Financial Services and Markets Act 2000 s 301C(1)(b) (as added: see note 4). The notice referred to is the notice under s 301C(7): see the text and note 21.
6 Financial Services and Markets Act 2000 s 301C(2) (as added: see note 4).
7 Ie fails to comply with the Financial Services and Markets Act 2000 s 301C(1).
8 Financial Services and Markets Act 2000 s 301C(3) (as added: see note 4). The period referred to is fixed by s 301C(1).
9 As to acquiring control see PARA 725 note 1.
10 Financial Services and Markets Act 2000 s 301C(4)(a) (as added: see note 4). The reference is to the notice of approval under s 301C(2).
11 Financial Services and Markets Act 2000 s 301C(4)(b)(i) (as added: see note 4). See note 8.
12 Financial Services and Markets Act 2000 s 301C(4)(b)(ii) (as added: see note 4). Approval is given under s 301C(3).
13 As to the Financial Services and Markets Tribunal see PARA 43 et seq.
14 Financial Services and Markets Act 2000 s 301C(4)(b)(iii) (as added: see note 4).
15 Ie under the Financial Services and Markets Act 2000 s 301C(5). As to decision notices see PARA 770.
16 The approval requirement is that the acquisition of control by the person who gave the notice of control does not pose a threat to the sound and prudent management of any financial market

operated by the recognised investment exchange: Financial Services and Markets Act 2000 s 301C(6) (as added: see note 4). As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

17 Financial Services and Markets Act 2000 s 301C(5) (as added: see note 4).

18 Ie under the Financial Services and Markets Act 2000 s 301C(5).

19 Financial Services and Markets Act 2000 s 301C(6) (as added: see note 4). As to warning notices see PARA 769.

20 Ie under the Financial Services and Markets Act 2000 s 301C(5).

21 Financial Services and Markets Act 2000 s 301C(7) (as added: see note 4).

727. Objection to existing control. If the Financial Services Authority[1] is not satisfied that the approval requirement[2] is met, it may give a decision notice[3] to a person if he has failed to comply with a duty to notify[4]. In regard to certain such failures[5], the Authority may (instead of giving such a notice[6]) approve the acquisition of control[7] in question by the person concerned as if he had given it a notice of control[8].

The Authority may also give a decision notice[9] to a person who is a controller[10] of a recognised investment exchange[11] if the Authority becomes aware of matters as a result of which it is satisfied that the approval requirement is not met with respect to the controller[12].

If the Authority proposes to give a decision notice in the above two cases[13] to a person, it must give him a warning notice[14] before the end of the period of three months beginning (1) in the first case[15], with the date on which it became aware of the failure to comply with the duty in question[16]; (2) in the second case[17], with the date on which it became aware of the matters in question[18].

A person to whom a decision notice is given[19] may refer the matter to the Financial Services and Markets Tribunal[20].

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

2 'Approval requirement' has the same meaning as in the Financial Services and Markets Act 2000 s 301C (see PARA 726): s 301D(6) (s 301D added by SI 2007/126).

3 Ie under the Financial Services and Markets Act 2000 s 301D. As to decision notices see PARA 770.

4 Financial Services and Markets Act 2000 s 301D(1) (as added: see note 2). The reference is to a duty to notify imposed under s 301A: see PARA 725.

5 Ie if the failure relates to the Financial Services and Markets Act 2000 s 301A(1) or (2): see PARA 725.

6 Ie a notice under the Financial Services and Markets Act 2000 s 301D(1).

7 As to acquiring control see PARA 725 note 1.

8 Financial Services and Markets Act 2000 s 301D(2) (as added: see note 2). As to the meaning of 'notice of control' see PARA 725.

9 Ie under the Financial Services and Markets Act 2000 s 301D.

10 As to the meaning of 'controller' see PARA 725 note 1.

11 As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

12 Financial Services and Markets Act 2000 s 301D(3) (as added: see note 2).

13 Ie under the Financial Services and Markets Act 2000 s 301D(1) or (3).

14 As to warning notices see PARA 769.

15 Ie in the case of a notice to be given under the Financial Services and Markets Act 2000 s 301D(1): see the text and notes 1–4.

16 Financial Services and Markets Act 2000 s 301D(4)(a) (as added: see note 2).

17 Ie in the case of a notice to be given under the Financial Services and Markets Act 2000 s 301D(3): see the text and notes 9–12.

18 Financial Services and Markets Act 2000 s 301D(4)(b) (as added: see note 2).

19 Ie under the Financial Services and Markets Act 2000 s 301D.

20 Financial Services and Markets Act 2000 s 301D(5) (as added: see note 2). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

728. Improperly acquired shares. The powers[1] considered below are exercisable if a person has acquired, or has continued to hold, any shares in contravention of a decision notice[2].

The Financial Services Authority[3] may by notice in writing given to the person concerned (a 'restriction notice') direct that any such shares which are specified in the notice are, until further notice, subject to one or more of the following restrictions:

(1) a transfer of (or agreement to transfer) those shares, or in the case of unissued shares any transfer of (or agreement to transfer) the right to be issued with them, is void[4];

(2) no voting rights are to be exercisable in respect of the shares[5];

(3) no further shares are to be issued in right of them or in pursuance of any offer made to their holder[6];

(4) except in a liquidation, no payment is to be made of any sums due from the body corporate[7] on the shares, whether in respect of capital or otherwise[8].

The High Court may, on the application of the Authority, order the sale of any shares[9] and, if they are for the time being subject to any such restriction[10], that they are to cease to be subject to that restriction[11].

No such order may be made[12] (a) until the end of the period within which a reference may be made to the Financial Services and Markets Tribunal[13] in respect of the decision notice in question[14]; and (b) if a reference is made, until the matter has been determined or the reference withdrawn[15]. If such an order has been made[16], the court may, on the application of the Authority, make such further order relating to the sale or transfer of the shares as it thinks fit[17].

If shares are sold in pursuance of such an order[18], the proceeds of sale, less the costs of the sale, must be paid into court for the benefit of the persons beneficially interested in them; and any such person may apply to the court for the whole or part of the proceeds to be paid to him[19].

A copy of the restriction notice must be given to (i) the recognised investment exchange to whose shares it relates[20]; and (ii) if it relates to shares held by an associate of that exchange, that associate[21].

1 Ie the powers conferred by the Financial Services and Markets Act 2000 s 301E.
Section 301E applies:
(1) in the case of an acquirer falling within s 301A(1) (see PARA 725), to all the shares (a) in the recognised investment exchange which the acquirer has acquired; (b) which are held by him or an associate of his; and (c) which were not so held immediately before he became a person having control over the exchange (s 301E(7)(a) (s 301E added by SI 2007/126));
(2) in the case of an acquirer falling within the Financial Services and Markets Act 2000 s 301A(2) (see PARA 725 note 1), to all the shares held by him or an associate of his at the time when he first became aware that he had acquired control over the exchange (s 301E(7)(b) (as so added)); and
(3) to all the shares in an undertaking ('C') (a) which are held by the acquirer or an associate of his; and (b) which were not so held before he became a person with control in relation to the exchange, where C is the undertaking in which shares were acquired by the acquirer (or an associate of his) and, as a result, he became a person with control in relation to that exchange (s 301E(7)(c) (as so added)).
As to the meanings of 'associate' and 'shares' see PARA 725 note 1. As to the meaning of 'recognised investment exchange' see PARA 684 note 1. As to acquiring control see PARA 725 note 1.

2 Financial Services and Markets Act 2000 s 301E(1) (as added: see note 1). The reference is to a decision notice under s 301C(5) (see PARA 726) or s 301D(1) or (3) (see PARA 727).

3 As to the Financial Services Authority see PARAS 4, 6 et seq.

4 Financial Services and Markets Act 2000 s 301E(2)(a) (as added: see note 1).

5 Financial Services and Markets Act 2000 s 301E(2)(b) (as added: see note 1).
6 Financial Services and Markets Act 2000 s 301E(2)(c) (as added: see note 1).
7 As to the meaning of 'body corporate' see PARA 86 note 11.
8 Financial Services and Markets Act 2000 s 301E(2)(d) (as added: see note 1).
9 Ie to which the Financial Services and Markets Act 2000 s 301E applies.
10 Ie to any restriction under the Financial Services and Markets Act 2000 s 301(2).
11 Financial Services and Markets Act 2000 s 301E(3), (9) (as added: see note 1).
12 Ie under the Financial Services and Markets Act 2000 s 301E(3).
13 As to the Financial Services and Markets Tribunal see PARA 43 et seq.
14 Financial Services and Markets Act 2000 s 301E(4)(a) (as added: see note 1).
15 Financial Services and Markets Act 2000 s 301E(4)(b) (as added: see note 1).
16 Ie under the Financial Services and Markets Act 2000 s 301E(3).
17 Financial Services and Markets Act 2000 s 301E(5) (as added: see note 1).
18 Ie under the Financial Services and Markets Act 2000 s 301E.
19 Financial Services and Markets Act 2000 s 301E(6) (as added: see note 1).
20 Financial Services and Markets Act 2000 s 301E(8)(a) (as added: see note 1).
21 Financial Services and Markets Act 2000 s 301E(8)(b) (as added: see note 1).

729. Offences in regard to acquisition of control. A person who fails to comply with certain duties to notify the Financial Services Authority[1] imposed on him[2] is in each case guilty of an offence[3].

If a person who has given a notice of control[4] to the Authority carries out the proposal to which the notice relates, he is guilty of an offence if (1) the period of three months beginning with the date on which the Authority received the notice is still running[5]; and (2) the Authority has not responded to the notice by either giving its approval or giving him a warning notice[6].

A person to whom the Authority has given a warning notice[7] is guilty of an offence if he carries out the proposal to which the notice relates before the Authority has decided whether to give him a decision notice[8].

A person guilty of the above offences[9] is liable on summary conviction to a fine[10].

A person to whom a decision notice[11] has been given is guilty of an offence if he acquires[12] or retains the control to which the notice applies at a time when the notice is still in force[13]. A person guilty of such an offence[14] is liable on summary conviction to a fine, and on conviction on indictment to imprisonment or a fine or both[15].

It is a defence for a person charged with the first of the offences in regard to failure to notify the Authority[16] to show that he had, at the time of the alleged offence, no knowledge of the act or circumstances by virtue of which the duty to notify the Authority arose[17].

If a person (a) was under such a duty to notify the Authority[18] but had no knowledge of the act or circumstances by virtue of which that duty arose[19]; but (b) subsequently becomes aware of that act or those circumstances[20], he must notify the Authority before the end of the period of 14 days beginning with the day on which he first became so aware[21]. Such a person[22] is guilty of an offence and liable, on summary conviction, to a fine[23].

1 As to the Financial Services Authority see PARAS 4, 6 et seq.
As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.
2 Ie imposed on him by the Financial Services and Markets Act 2000 s 301A(1) or by s 301A(2): see PARA 725.
3 Financial Services and Markets Act 2000 s 301F(1), (2) (s 301F added by SI 2007/126).
4 As to the meaning of 'notice of control' see PARA 725.
5 Financial Services and Markets Act 2000 s 301F(3)(a) (as added: see note 3).
6 Financial Services and Markets Act 2000 s 301F(3)(b) (as added: see note 3). The reference is to a warning notice under s 301C(7): see PARA 726. As to warning notices see PARA 769.

7 Ie under the Financial Services and Markets Act 2000 s 301C(7): see PARA 726.
8 Financial Services and Markets Act 2000 s 301F(4) (as added: see note 3). Such decision notice is under s 301C(5): see PARA 726. As to decision notices see PARA 770.
9 Ie of an offence under the Financial Services and Markets Act 2000 s 301F(1), (2), (3) or (4).
10 Financial Services and Markets Act 2000 s 301F(6) (as added: see note 3). The reference is to a fine not exceeding level 5 on the standard scale: see s 301F(6) (as so added). As to the standard scale see PARA 27 note 21.
11 Ie under the Financial Services and Markets Act 2000 s 301C(5) (see PARA 726) or s 301D(1) or (3) (see PARA 727).
12 As to acquiring control see PARA 725 note 1.
13 Financial Services and Markets Act 2000 s 301F(5) (as added: see note 3).
14 Ie an offence under the Financial Services and Markets Act 2000 s 301F(5).
15 Financial Services and Markets Act 2000 s 301F(7) (as added: see note 3). Such a person is liable (1) on summary conviction, to a fine not exceeding the statutory maximum; and (2) on conviction on indictment, to imprisonment for a term not exceeding two years, or to a fine, or both: see s 301F(7) (as so added). As to the statutory maximum see PARA 56 note 24.
16 Ie an offence under the Financial Services and Markets Act 2000 s 301F(1): see the text to notes 1–3.
17 Financial Services and Markets Act 2000 s 301F(8) (as added: see note 3).
18 Ie a duty to notify the Authority imposed by the Financial Services and Markets Act 2000 s 301A(1): see PARA 725.
19 Financial Services and Markets Act 2000 s 301F(9)(a) (as added: see note 3).
20 Financial Services and Markets Act 2000 s 301F(9)(b) (as added: see note 3).
21 Financial Services and Markets Act 2000 s 301F(9) (as added: see note 3).
22 Ie a person who fails to comply with the duty to notify the Authority under the Financial Services and Markets Act 2000 s 301F(9).
23 Financial Services and Markets Act 2000 s 301F(10) (as added: see note 3). The reference is to a fine not exceeding level 5 on the standard scale: see s 301F(10) (as so added).

F. COMPETITION SCRUTINY

(A) Fair Trading

730. Reports. The Financial Services Authority[1] must send to the Treasury[2] and to the Office of Fair Trading[3] a copy of any regulatory provisions[4] with which it is provided on an application for recognition[5]. The Authority must send to the Office of Fair Trading such information in its possession as a result of the application for recognition as it considers will assist it in discharging its functions in connection with the application[6].

The Office of Fair Trading must issue a report as to whether: (1) a regulatory provision of which a copy has been sent to it[7] has a significantly adverse effect on competition[8]; or (2) a combination of regulatory provisions so copied to it have such an effect[9]. If the Office of Fair Trading's conclusion is that one or more provisions have a significantly adverse effect on competition, it must state its reasons for that conclusion[10]. The Office of Fair Trading must keep under review the regulatory provisions and practices of recognised bodies[11].

If at any time the Office of Fair Trading considers that a regulatory provision or practice has a significantly adverse effect on competition[12] or regulatory provisions or practices, or a combination of regulating provisions and practices have such an effect[13], it must make a report[14]. If at any time the Office of Fair Trading considers that a regulatory provision or practice does not have a significantly adverse effect on competition[15] or regulatory provisions or practices, or a combination of regulatory provisions and practices do not have any such effect[16], it may make a report to that effect[17].

For the purposes of the law of defamation, absolute privilege attaches to any such report of the Office of Fair Trading[18].

1 As to the Financial Services and Markets Tribunal see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

2 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

3 As to the Office of Fair Trading see TRADE, INDUSTRY AND INDUSTRIAL RELATIONS vol 47 (2001 Reissue) PARA 504 et seq.

4 For the purposes of the Financial Services and Markets Act 2000 Pt XVIII Ch II (ss 302–310) and Ch III (ss 311, 312), 'regulatory provisions' means: (1) the rules of an investment exchange or a clearing house; (2) any guidance issued by an investment exchange or clearing house; (3) in the case of an investment exchange, the arrangements and criteria mentioned in s 287(3)(a), (b) (see PARA 706); (4) in the case of a clearing house, the arrangements and criteria mentioned in s 288(3) (see PARA 707): s 302(1) (definition amended by SI 2007/126). As to rules of a clearing house and rules of an investment exchange see PARA 685 note 7.

References in the Financial Services and Markets Act 2000 Pt XVIII (ss 285–313) to guidance issued by an investment exchange are references to guidance issued, or any recommendation made, in writing or other legible form and intended to have continuing effect, by the investment exchange to all or any class of its members or users (s 313(3)(a)) or persons seeking to become members of the investment exchange or to use its facilities (s 313(3)(b)), with respect to any of the matters mentioned in s 313(2)(a)–(c) (see PARA 685) (s 313(3)).

References in Pt XVIII to guidance issued by a clearing house are to guidance issued, or any recommendation made, in writing or other legible form and intended to have continuing effect, by the clearing house to all or any class of its members (s 313(4)(a)) or persons using or seeking to use its services (s 313(4)(b)), with respect to the provision by it or its members of clearing services (s 313(4)).

5 Financial Services and Markets Act 2000 s 303(1) (s 303(1)–(5) amended by the Enterprise Act 2002 Sch 25 para 40(1), (10)). As to the application for recognition see the Financial Services and Markets Act 2000 s 287 (see PARA 706) or s 288 (see PARA 707).

6 Financial Services and Markets Act 2000 s 303(2) (as amended: see note 5).

7 Ie under the Financial Services and Markets Act 2000 s 303(1).

8 Financial Services and Markets Act 2000 s 303(3)(a) (as amended: see note 5). For the purposes of Pt XVIII Ch II, regulatory provisions or practices have a significantly adverse effect on competition if: (1) they have, or are intended or likely to have, that effect (s 302(2)(a)); or (2) the effect that they have, or are intended or likely to have, is to require or encourage behaviour which has, or is intended or likely to have, a significantly adverse effect on competition (s 302(2)(b)).

'Practices' means: (a) in relation to a recognised investment exchange, the practices of the exchange in its capacity as such; and (b) in relation to a recognised clearing house, the practices of the clearing house in respect of its clearing arrangements: s 302(1). As to the meaning of 'recognised investment exchange' see PARA 684 note 1; and as to the meaning of 'recognised clearing house' see PARA 684 note 6.

If regulatory provisions or practices have, or are intended or likely to have, the effect of requiring or encouraging exploitation of the strength of a market position they are to be taken, for the purposes of Pt XVIII Ch II, to have an adverse effect on competition: s 302(3). In determining under Pt XVIII Ch II whether any regulatory provisions have, or are intended or likely to have, a particular effect, it may be assumed that persons to whom the provisions concerned are addressed will act in accordance with them: s 302(4).

In the case of an application for recognition under s 287 (see PARA 706), the Office of Fair Trading must issue its report under s 303(3) before the end of the period of 12 weeks beginning with the date on which it receives the copy sent to it under s 303(1): s 303(6) (s 303(6), (7) added by SI 2007/126). The Financial Services and Markets Act 2000 s 303(6) does not apply if the application is made by an overseas investment exchange: s 303(7) (as so added). As to the meaning of 'overseas investment exchange' see PARA 709 note 12.

9 Financial Services and Markets Act 2000 s 303(3)(b) (as amended: see note 5). See note 8. When the Office of Fair Trading issues a report under s 303(3), it must send a copy of it to the Authority, the Competition Commission and the Treasury: s 303(5) (as so amended). As to the Competition Commission see TRADE, INDUSTRY AND INDUSTRIAL RELATIONS vol 47 (2001 Reissue) PARA 111.

10 Financial Services and Markets Act 2000 s 303(4) (as amended: see note 5).

11 Financial Services and Markets Act 2000 s 304(1) (s 304(1)–(10) amended by the Enterprise Act 2002 Sch 25 para 40(1), (11)). As to the meaning of 'recognised body' see PARA 685 note 6.

12 Financial Services and Markets Act 2000 s 304(2)(a) (as amended: see note 11).

13 Financial Services and Markets Act 2000 s 304(2)(b) (as amended: see note 11).

14 Financial Services and Markets Act 2000 s 304(2) (as amended: see note 11). A report under s 304(2) must contain details of the adverse effect on competition: s 304(4). If the Office of Fair Trading makes a report under s 304(2), it must send a copy of it to the Treasury, to the Competition Commission and to the Authority (s 304(5)(a) (as so amended)) and publish it in the way appearing to it to be best calculated to bring it to the attention of the public (s 304(5)(b) (as so amended)). See further note 17.

15 Financial Services and Markets Act 2000 s 304(3)(a) (as amended: see note 11).

16 Financial Services and Markets Act 2000 s 304(3)(b) (as amended: see note 11).

17 Financial Services and Markets Act 2000 s 304(3) (as amended: see note 11). Before publishing a report under s 304, the Office of Fair Trading must, so far as practicable, exclude any matter which relates to the private affairs of a particular individual the publication of which, in the opinion of the Office, would or might seriously and prejudicially affect its interests: s 304(7) (as so amended). Before publishing such a report, the Office of Fair Trading must exclude any matter which relates to the affairs of a particular body the publication of which, in the opinion of the Office, would or might seriously and prejudicially affect its interests: s 304(8) (as so amended). The provisions of s 304(7), (8) do not apply to the copy of a report which the Office of Fair Trading is required to send to the Treasury, the Competition Commission and the Authority under s 304(5)(a) (see note 14) or s 304(6)(a) (see below): s 304(9) (as so amended).

If the Office of Fair Trading makes a report under s 304(3), it must send a copy of it to the Treasury, to the Competition Commission and to the Authority (s 304(6)(a) (as so amended)) and the Office may publish it (s 304(6)(b) (as so amended)).

18 Financial Services and Markets Act 2000 s 304(10) (as amended: see note 11).

731. Investigations. For the purpose of investigating any matter[1], the Office of Fair Trading[2] may exercise the powers conferred on it, which are described below[3].

The Office of Fair Trading may by notice in writing require any person to produce to it or to a person appointed by it for the purpose, at a time and place specified in the notice, any document[4] which is specified or described in the notice[5] and is a document in that person's custody or under his control[6].

The Office of Fair Trading may by notice in writing: (1) require any person carrying on any business to provide it with such information as may be specified or described in the notice[7]; and (2) specify the time within which, and the manner and form in which, any such information is to be provided[8].

If a person (the 'defaulter') refuses, or otherwise fails, to comply with a notice under these provisions, the Office of Fair Trading may certify that fact in writing to the High Court and the court may inquire into the case[9]. If, after hearing any witness who may be produced against or on behalf of the defaulter and any statement which may be offered in defence, the court is satisfied that the defaulter did not have a reasonable excuse for refusing or otherwise failing to comply with the notice, the court may deal with the defaulter as if he were in contempt[10].

1 Ie with a view to its consideration under the Financial Services and Markets Act 2000 s 303 or s 304: see PARA 730.

2 As to the Office of Fair Trading see TRADE, INDUSTRY AND INDUSTRIAL RELATIONS vol 47 (2001 Reissue) PARA 504 et seq.

3 Financial Services and Markets Act 2000 s 305(1) (s 305(1)–(3), (5) amended by the Enterprise Act 2002 Sch 25 para 40(1), (12)).

4 As to the meaning of 'documents' see PARA 10 note 10.

5 Financial Services and Markets Act 2000 s 305(2)(a) (as amended: see note 3).

6 Financial Services and Markets Act 2000 s 305(2)(b) (as amended: see note 3). A requirement may be imposed under s 305(2) or s 305(3)(a) only in respect of documents or information which relate to any matter relevant to the investigation: s 305(4).

7 Financial Services and Markets Act 2000 s 305(3)(a) (as amended: see note 3). See note 6.

8 Financial Services and Markets Act 2000 s 305(3)(b) (as amended: see note 3).

9 Financial Services and Markets Act 2000 s 305(5) (as amended: see note 3), s 305(7).

10 Financial Services and Markets Act 2000 s 305(6).

(B) The Competition Commission

732. Investigation and reports by the Competition Commission. The Competition Commission[1] must investigate the matter which is the subject of the report by the Office of Fair Trading[2] if the Office sends to the Competition Commission a report[3] or if the Office asks the Commission to consider a report[4]. The Commission must then make its own report on the matter unless it considers that, as a result of a change of circumstances, no useful purpose would be served by a report[5].

Such a report must state the Commission's conclusion as to whether: (1) the regulatory provision or practice[6] which is the subject of the report has a significantly adverse effect on competition[7]; or (2) the regulatory provisions or practices or combination of regulatory provisions and practices which are the subject of the report have such an effect[8].

A report stating the Commission's conclusion that there is a significantly adverse effect on competition must also state whether the Commission considers that that effect is justified[9] and, if it states that the Commission considers that it is not justified, state its conclusion as to what action, if any, the Treasury ought to direct the Financial Services Authority to take[10].

Whenever the Commission is considering, for these purposes, whether a particular adverse effect on competition is justified, the Commission must ensure, so far as that is reasonably possible, that the conclusion it reaches is compatible with the obligations imposed on the recognised body[11] concerned by or under the Financial Services and Markets Act 2000[12]. Such a report must contain such an account of the Commission's reasons for its conclusions as is expedient, in the opinion of the Commission, for facilitating proper understanding of them[13]. If the Commission makes such a report it must send a copy to the Treasury, the Authority and the Office of Fair Trading[14].

1 As to the Competition Commission see TRADE, INDUSTRY AND INDUSTRIAL RELATIONS vol 47 (2001 Reissue) PARA 111.

2 As to the Office of Fair Trading see TRADE, INDUSTRY AND INDUSTRIAL RELATIONS vol 47 (2001 Reissue) PARA 504 et seq.

3 Ie issued by him under the Financial Services and Markets Act 2000 s 303(3) (see PARA 730) which concludes that one or more regulatory provisions have a significantly adverse effect on competition, or made by him under s 304(2) (see PARA 730). As to the meaning of 'regulatory provisions', and as to regulatory provisions having a significantly adverse effect on competition, see PARA 730.

4 Financial Services and Markets Act 2000 s 306(1)–(3) (s 306(1)–(3), (12) amended by the Enterprise Act 2002 Sch 25 para 40(1), (13)). The report last referred to in the text is to one issued by the Office of Fair Trading under the Financial Services and Markets Act 2000 s 303(3) (see PARA 730) which concludes that one or more regulatory provisions do not have a significantly adverse effect on competition, or made by it under s 304(3) (see PARA 730).

If the case relates to an application for recognition under s 287 (see PARA 706), other than an application by an overseas applicant and s 306(2)(a) or 306(3)(a) applies (i e if the Office of Fair Trading has asked the Commission to consider such a report under s 303(3)), the Commission must (1) make a report under the Financial Services and Markets Act 2000 s 306, or a statement under s 306(5) (see note 5), before the end of the period of 12 weeks beginning with the date on which it receives a copy of the Office's report under s 303(3); and (2) if it makes a statement under s 306(5), send a copy to the Financial Services Authority and the Treasury: s 306(13), (14) (added by SI 2007/126). As to the Financial Services Authority see PARAS 4, 6 et seq. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

The provisions of Sch 14 (except Sch 14 para 2(b)) (see PARA 40) apply for the purposes of s 306 as they apply for the purposes of s 162 (see PARA 40): s 306(11).

5 Financial Services and Markets Act 2000 s 306(4). If the Commission decides in accordance with s 306(4) not to make a report, it must make a statement setting out the change of circumstances which resulted in that decision: s 306(5). See also note 4.
6 As to the meaning of 'practices' see PARA 730 note 8.
7 Financial Services and Markets Act 2000 s 306(6)(a). See note 4.
8 Financial Services and Markets Act 2000 s 306(6)(b). See note 4.
9 Financial Services and Markets Act 2000 s 306(7)(a). See note 4.
10 Financial Services and Markets Act 2000 s 306(7)(b). See note 4.
11 As to the meaning of 'recognised body' see PARA 685 note 6.
12 Financial Services and Markets Act 2000 s 306(8), (9). See note 4.
13 Financial Services and Markets Act 2000 s 306(10). See note 4.
14 Financial Services and Markets Act 2000 s 306(12) (as amended: see note 4). See note 4.

(C) The Treasury

733. Power of the Treasury to refuse approval. If, on an application[1] for a recognition order[2]: (1) the Office of Fair Trading[3] makes a report[4] but does not ask the Competition Commission[5] to consider it[6]; (2) the Competition Commission concludes that the applicant's[7] regulatory provisions[8] do not have a significantly adverse effect on competition[9] or, that if those provisions do have that effect, the effect is justified[10], the Treasury[11] may refuse to approve the making of the recognition order only if it considers that the exceptional circumstances of the case make it inappropriate for it to give its approval[12].

If, on an application for a recognition order, the Competition Commission concludes: (a) that the applicant's regulatory provisions have a significantly adverse effect on competition[13]; and (b) that that effect is not justified[14], the Treasury must refuse to approve the making of the recognition order unless it considers that the exceptional circumstances of the case make it inappropriate for it to refuse its approval[15].

1 As to the meaning of 'application' see PARA 706 note 5.
2 As to the meaning of 'recognition order' see PARA 684 note 1.
3 As to the Office of Fair Trading see TRADE, INDUSTRY AND INDUSTRIAL RELATIONS vol 47 (2001 Reissue) PARA 504 et seq.
4 Ie under the Financial Services and Markets Act 2000 s 303: see PARA 730.
5 As to the Competition Commission see TRADE, INDUSTRY AND INDUSTRIAL RELATIONS vol 47 (2001 Reissue) PARA 111.
6 Financial Services and Markets Act 2000 s 307(1)(a) (amended by the Enterprise Act 2002 Sch 25 para 40(1), (14)(a)). The consideration referred to in the text is consideration under the Financial Services and Markets Act 2000 s 306: see PARA 732.
7 As to the meaning of 'applicant' see PARA 706 note 6.
8 As to the meaning of 'regulatory provisions' see PARA 730 note 4.
9 Financial Services and Markets Act 2000 s 307(1)(b)(i). As to regulatory provisions having a significantly adverse effect on competition see PARA 730.
10 Financial Services and Markets Act 2000 s 307(1)(b)(ii).
11 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
12 Financial Services and Markets Act 2000 s 307(2). See note 15.
13 Financial Services and Markets Act 2000 s 307(3)(a).
14 Financial Services and Markets Act 2000 s 307(3)(b).
15 Financial Services and Markets Act 2000 s 307(4). In the case of an application for recognition under s 287 (see PARA 706), other than an application by an overseas applicant, the Treasury must decide whether to approve the application before the end of the period of ten days beginning with (1) in a case falling within s 306(2)(a) or (3)(a) (see PARA 732), the date on which they receive a copy of the report under s 306, if no such report was made, of the statement under s 306(5) (see PARA 732 note 5); (2) in any other case, the date on which they receive a copy of the report from the Office of Fair Trading under s 303 (see PARA 730): s 307(5), (6) (added by SI 2007/126).

734. Power of the Treasury to give directions. The provisions described below[1] apply if the Competition Commission[2] makes a report[3] (other than a report on an application for a recognition order[4]) which states the Commission's conclusion that there is a significantly adverse effect on competition[5].

If the Commission's conclusion, as stated in the report, is that the adverse effect on competition is not justified, the Treasury[6] must give a remedial direction[7] to the Financial Services Authority[8]. If the Commission's conclusion, as stated in its report, is that the adverse effect on competition is justified[9] but the Treasury considers that the exceptional circumstances of the case require it to act[10], the Treasury may give a direction to the Authority requiring it to take such action as it considers to be necessary in the light of the exceptional circumstances of the case[11] and as may be specified in the direction[12].

If[13] the Treasury declines to act[14], it must make a statement to that effect, giving its reasons[15]. If the Treasury gives a direction[16], it must make a statement giving details of the direction[17].

The Treasury must: (1) publish any statement made in the way appearing to it best calculated to bring it to the attention of the public[18]; and (2) lay a copy of it before Parliament[19].

1 Ie the Financial Services and Markets Act 2000 s 308.
2 As to the Competition Commission see TRADE, INDUSTRY AND INDUSTRIAL RELATIONS vol 47 (2001 Reissue) PARA 111.
3 Ie under the Financial Services and Markets Act 2000 s 306(4): see PARA 732.
4 As to the meaning of 'recognition order' see PARA 684 note 1.
5 Financial Services and Markets Act 2000 s 308(1). As to regulatory provisions having a significantly adverse effect on competition see PARA 730. As to the meaning of 'regulatory provisions' see PARA 730 note 4.
6 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
7 'Remedial direction' means a direction requiring the Financial Services Authority: (1) to revoke the recognition order for the body concerned; or (2) to give such directions to the body concerned as may be specified in it: Financial Services and Markets Act 2000 s 308(8). In considering the action to be specified in a remedial direction, the Treasury must have regard to any conclusion of the Commission included in the report because of s 306(7)(b) (see PARA 732): s 308(4).
8 Financial Services and Markets Act 2000 s 308(2). As to the Financial Services and Markets Tribunal see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

The Financial Services and Markets Act 2000 s 308(2) does not apply if the Treasury considers that, as a result of action taken by the Authority or the recognised body concerned in response to the Commission's report, it is unnecessary for it to give a direction (s 308(3)(a)) or that the exceptional circumstances of the case make it inappropriate or unnecessary for it to do so (s 308(3)(b)).
9 Financial Services and Markets Act 2000 s 308(5)(a).
10 Financial Services and Markets Act 2000 s 308(5)(b).
11 Financial Services and Markets Act 2000 s 308(6)(a).
12 Financial Services and Markets Act 2000 s 308(6)(b). If the action specified in a remedial direction is the giving by the Authority of a direction, the direction to be given must be compatible with the recognition requirements applicable to the recognised body in relation to which it is given (s 308(7)(a)), and s 296(3), (4) applies to it as if it were a direction given under s 296 (see PARA 714) (s 308(7)(b)).
13 Ie in reliance on the Financial Services and Markets Act 2000 s 308(3)(a) or (b): see note 8.
14 Ie under the Financial Services and Markets Act 2000 s 308(2).
15 Financial Services and Markets Act 2000 s 309(1).
16 Ie under the Financial Services and Markets Act 2000 s 308.
17 Financial Services and Markets Act 2000 s 309(2)(a). If the direction is given under s 308(6), the Treasury must give its reasons for giving it: s 309(2)(b).

18 Financial Services and Markets Act 2000 s 309(3)(a).
19 Financial Services and Markets Act 2000 s 309(3)(b).

735. Procedure on exercise of powers by the Treasury. If the Treasury[1] is considering the exercise of certain of its powers[2], the Treasury must: (1) take such steps as it considers appropriate to allow the exchange or clearing house concerned, and any other person appearing to the Treasury to be affected, an opportunity to make representations about any report made by the Office of Fair Trading[3] or by the Competition Commission[4] as to whether, and if so how, the Treasury should exercise its powers[5]; and (2) have regard to any such representations[6].

1 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
2 Ie: (1) whether to refuse its approval under the Financial Services and Markets Act 2000 s 307 (see PARA 733); (2) whether s 308(2) (see PARA 734) applies; or (3) whether to give a direction under s 308(6) (see PARA 734): s 310(1).
3 Ie under the Financial Services and Markets Act 2000 s 303 or s 304: see PARA 730. As to the Office of Fair Trading see TRADE, INDUSTRY AND INDUSTRIAL RELATIONS vol 47 (2001 Reissue) PARA 504 et seq.
4 Financial Services and Markets Act 2000 s 310(2)(a)(i) (amended by the Enterprise Act 2002 Sch 25 para 40(1), (14)(b)). The reference in the text to a report by the Competition Commission is to one under the Financial Services and Markets Act 2000 s 306: see PARA 732. As to the Competition Commission see TRADE, INDUSTRY AND INDUSTRIAL RELATIONS vol 47 (2001 Reissue) PARA 111.
5 Financial Services and Markets Act 2000 s 310(2)(a)(ii). The Treasury's powers referred to in the text are those under s 307 (see PARA 733) or s 308 (see PARA 734).
6 Financial Services and Markets Act 2000 s 310(2)(b).

(D) Disapplication of Provisions of the Competition Act 1998

736. Disapplication of the Chapter I prohibition. The Financial Services and Markets Act 2000 Pt XVIII Ch III[1] disapplies the general domestic competition law as it affects matters covered by the Act.

The prohibition on the restriction of competition affecting trade in the United Kingdom[2] imposed by the Competition Act 1998 (referred to as the 'Chapter I prohibition'[3]) does not apply to an agreement for the constitution of a recognised body[4] to the extent to which the agreement relates to the regulatory provisions[5] of that body[6].

If the conditions below[7] are satisfied, the Chapter I prohibition does not apply to an agreement for the constitution of an investment exchange which is not a recognised investment exchange[8] or a clearing house which is not a recognised clearing house[9], to the extent to which the agreement relates to the regulatory provisions of that body[10]. The conditions are that: (1) the body has applied for a recognition order[11] in accordance with the provisions of the Financial Services and Markets Act 2000[12]; and (2) the application has not been determined[13].

The Chapter I prohibition does not apply to a recognised body's regulatory provisions[14], nor does it apply to a decision made by a recognised body to the extent to which the decision relates to any of that body's regulatory provisions or practices[15]. The prohibition does not apply to practices of a recognised body[16]. The Chapter I prohibition does not apply to an agreement the parties to which consist of or include a recognised body[17] or a person who is subject to the rules of a recognised body[18], to the extent to which the agreement consists of provisions the inclusion of which is required or encouraged by any of the body's regulatory provisions or practices[19].

If a recognised body's recognition order is revoked, the provisions described above[20] have effect as if that body had continued to be recognised until the end of the period of six months beginning with the day on which the revocation took effect[21].

1 Ie the Financial Services and Markets Act 2000 Pt XVIII Ch III (ss 311, 312).
2 As to the meaning of 'United Kingdom' see PARA 2 note 3.
3 'Chapter I prohibition' means the prohibition imposed by the Competition Act 1998 s 2(1) (see TRADE, INDUSTRY AND INDUSTRIAL RELATIONS vol 47 (2001 Reissue) PARA 202 et seq): Financial Services and Markets Act 2000 s 311(9). Expressions used in s 311 which are also used in the Competition Act 1998 Pt I (ss 1–60) are to be interpreted in the same way as for the purposes of the Competition Act 1998 Pt I: Financial Services and Markets Act 2000 s 311(10).
4 As to the meaning of 'recognised body' see PARA 685 note 6.
5 As to the meaning of 'regulatory provisions' see PARA 730 note 4.
6 Financial Services and Markets Act 2000 s 311(1).
7 Ie the conditions in the Financial Services and Markets Act 2000 s 311(3).
8 Financial Services and Markets Act 2000 s 311(2)(a). As to the meaning of 'recognised investment exchange' see PARA 684 note 1.
9 Financial Services and Markets Act 2000 s 311(2)(b). As to the meaning of 'recognised clearing house' see PARA 684 note 6.
10 Financial Services and Markets Act 2000 s 311(2).
11 As to the meaning of 'recognition order' see PARA 684 note 1.
12 Financial Services and Markets Act 2000 s 311(3)(a).
13 Financial Services and Markets Act 2000 s 311(3)(b).
14 Financial Services and Markets Act 2000 s 311(4).
15 Financial Services and Markets Act 2000 s 311(5). As to the meaning of 'practices' see PARA 730 note 8.
16 Financial Services and Markets Act 2000 s 311(6).
17 Financial Services and Markets Act 2000 s 311(7)(a).
18 Financial Services and Markets Act 2000 s 311(7)(b).
19 Financial Services and Markets Act 2000 s 311(7). As to rules of a clearing house and rules of an investment exchange see PARA 685 note 7.
20 Ie the Financial Services and Markets Act 2000 s 311.
21 Financial Services and Markets Act 2000 s 311(8).

737. Disapplication of the Chapter II prohibition. The prohibition on the abuse of a dominant position affecting trade in the United Kingdom[1] imposed by the Competition Act 1998 (referred to as the 'Chapter II prohibition'[2]) does not apply to:

(1) practices[3] of a recognised body[4];
(2) the adoption or enforcement of such a body's regulatory provisions[5];
(3) any conduct which is engaged in by such a body or by a person who is subject to the rules of such a body to the extent to which it is encouraged or required by the regulatory provisions of the body[6].

1 As to the meaning of 'United Kingdom' see PARA 2 note 3.
2 'Chapter II prohibition' means the prohibition imposed by the Competition Act 1998 s 18(1) (see TRADE, INDUSTRY AND INDUSTRIAL RELATIONS vol 47 (2001 Reissue) PARA 218 et seq): Financial Services and Markets Act 2000 s 312(2).
3 As to the meaning of 'practices' see PARA 730 note 8.
4 Financial Services and Markets Act 2000 s 312(1)(a). As to the meaning of 'recognised body' see PARA 685 note 6.
5 Financial Services and Markets Act 2000 s 312(1)(b). As to the meaning of 'regulatory provisions' see PARA 730 note 4.
6 Financial Services and Markets Act 2000 s 312(1)(c). As to rules of a clearing house and rules of an investment exchange see PARA 685 note 7.

G. PASSPORT RIGHTS

(A) EEA Market Operators in the United Kingdom

738. Exercise of passport rights by EEA market operator. An EEA market operator[1] may, in pursuance of the right under the applicable provision[2], make arrangements in the United Kingdom to facilitate access to, or use of, a specified[3] regulated market or specified multilateral trading facility operated by it if (1) the operator has given its home state regulator[4] notice of its intention to make such arrangements[5]; and (2) the home state regulator has given the Financial Services Authority[6] notice of the operator's intention[7].

In making such arrangements[8], the operator is exempt from the general prohibition[9] as respects any regulated activity[10] which is carried on as a part of its business of operating the market or facility in question, or in connection with, or for the purposes of, that business[11].

1 'EEA market operator' means a person who is a market operator (within the meaning of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4.1.13) whose home state is an EEA state other than the United Kingdom: Financial Services and Markets Act 2000 s 312D (ss 312A, 312D added by SI 2007/126). 'Home state', in relation to an EEA market operator, means the EEA state in which it has its registered office, or if it has no registered office, its head office: Financial Services and Markets Act 2000 s 312D (as so added). As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 'Applicable provision' means (1) in the case of arrangements relating to a multilateral trading facility, the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 31.5; and (2) in the case of arrangements relating to a regulated market, the first sub-paragraph of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 42.6: Financial Services and Markets Act 2000 s 312D (as added: see note 1). 'Multilateral trading facility' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 4.1.15: Financial Services and Markets Act 2000 s 313(1) (definition added by SI 2007/126). As to the meaning of 'regulated market' see PARA 711 note 24. The exercise of EEA rights is known as 'passporting' or the exercise of 'passport' rights. As to the meaning of 'EEA right' see PARA 315 note 3.

3 'Specified' means specified in the notice referred to in the Financial Services and Markets Act 2000 s 312A(1)(a) (see head (1) in the text): s 312A(3) (as added: see note 1).

4 'Home state regulator' means the competent authority (within the meaning of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 4.1.22) of the EEA state which is the home state in relation to the EEA market operator concerned: Financial Services and Markets Act 2000 s 312D (as added: see note 1).

5 Financial Services and Markets Act 2000 s 312A(1)(a) (as added: see note 1). Section 312A does not apply to an overseas investment exchange: s 312A(4) (as so added). As to the meaning of 'overseas investment exchange' see PARA 709 note 12.

6 As to the Financial Services Authority see PARAS 4, 6 et seq.

7 Financial Services and Markets Act 2000 s 312A(1)(b) (as added: see note 1). See note 5.

8 Ie arrangements under the Financial Services and Markets Act 2000 s 312A(1).

9 As to the general prohibition see PARA 80. As to the general exemption of recognised investment exchanges and recognised clearing houses see PARA 684.

10 As to regulated activities see PARA 84 et seq.

11 Financial Services and Markets Act 2000 s 312A(2) (as added: see note 1). See note 5.

739. Removal of passport rights from EEA market operator. The Financial Services Authority[1] may prohibit an EEA market operator[2] from making or, as the case may be, continuing arrangements in the United Kingdom[3], in pursuance of the applicable provision[4], to facilitate access to, or use of, a regulated market[5]

or multilateral trading facility[6] operated by the operator if (1) the Authority has clear and demonstrable grounds for believing that the operator has contravened a relevant requirement[7]; and (2) the Authority has first complied with the requirements set out below[8] in subsections (3) to (9).

The first requirement is that the Authority must notify the operator and its home state regulator of its finding under head (1) above[9].

The second requirements is that the Authority may not exercise the power under heads (1) and (2) above[10] unless satisfied (a) either that the home state regulator has failed or refused to take measures for the purpose[11]; or that the measures taken by the home state regulator have proved inadequate for that purpose[12]; and (b) that the operator is acting in a manner which is clearly prejudicial to the interests of investors in the United Kingdom or the orderly functioning of the financial markets[13]. If the Authority is so satisfied[14], it must give written notice to the operator, and the home state regulator, of its intention to exercise the power[15].

The third requirement is that if, having considered any representations[16] made by the operator, the Authority decides to exercise the power[17], it must (i) notify the operator in writing that it will be prohibited from making or, as the case may be, continuing the arrangements[18] from the date specified in the notice[19]; and (ii) notify the home state regulator of the action to be taken in relation to the operator[20].

If the Authority exercises the power under heads (1) and (2) above[21] it must at the earliest opportunity notify the European Commission of the action taken in relation to the operator[22]. The exemption from the general prohibition conferred on an operator[23] ceases to apply if the Authority exercises the power[24] in relation to the operator[25].

The right to make the above arrangements[26] may be reinstated in relation to the operator (together with the above exemption[27]) if the Authority is satisfied that the contravention which led to the Authority exercising the power under heads (1) and (2) above has been remedied[28].

1 As to the Financial Services Authority see PARAS 4, 6 et seq.
2 As to the meaning of 'EEA market operator' see PARA 738 note 1.
3 As to the meaning of 'United Kingdom' see PARA 2 note 3.
4 As to the meaning of 'applicable provision' see PARA 738 note 2.
5 As to the meaning of 'regulated market' see PARA 711 note 24.
6 As to the meaning of 'multilateral trading facility' see PARA 738 note 2.

7 Financial Services and Markets Act 2000 s 312B(1)(a) (s 312B added by SI 2007/126). A requirement is relevant if it is imposed: (1) by the operator's home state regulator in the implementation of the Markets in Financial Instruments Directive (i e European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) or any Community legislation made under that directive; (2) by provision implementing that directive, or any Community legislation made under it, in the operator's home state; or (3) by any directly applicable Community regulation made under that directive: Financial Services and Markets Act 2000 s 312B(2) (as so added). As to the meaning of 'home state regulator' see PARA 738 note 4. As to the meaning of 'home state' see PARA 738 note 1.

8 Financial Services and Markets Act 2000 s 312B(1)(b) (as added: see note 7). The requirements referred to are those in s 312B(3)–(9).

9 Financial Services and Markets Act 2000 s 312B(3) (as added: see note 7). The notice to the home state regulator under s 312B(3) must: (1) request that the home state regulator take all appropriate measures for the purpose of ensuring that the operator puts an end to the contravention; and (2) state that the Authority proposes to exercise the power under s 312B(1) (see heads (1), (2) in the text) if the operator continues the contravention: s 312B(4) (as so added).

10 Ie the power under the Financial Services and Markets Act 2000 s 312B(1).

11 Financial Services and Markets Act 2000 s 312B(5)(a)(i) (as added: see note 7). The measures referred to are those mentioned in s 312B(4)(a): see note 9 head (2).
12 Financial Services and Markets Act 2000 s 312B(5)(a)(ii) (as added: see note 7).
13 Financial Services and Markets Act 2000 s 312B(5)(b) (as added: see note 7).
14 Ie as mentioned in the Financial Services and Markets Act 2000 s 312B(5).
15 Financial Services and Markets Act 2000 s 312B(6) (as added: see note 7). The power referred to is that under s 312B(1).

A notice under s 312B(6) must (1) state why the Authority intends to exercise its power under s 312B(1); and (2) in the case of the notice to the operator, inform the operator that it may make representations to the Authority before the end of the representation period: s 312B(7) (as so added). The representation period is (a) the period of two months beginning with the date on which the notice is given to the operator; or (b) such longer period as the Authority may allow in a particular case: s 312B(8) (as so added).

16 As to representations see note 15.
17 Ie the power under the Financial Services and Markets Act 2000 s 312B(1).
18 Ie the arrangements mentioned in the Financial Services and Markets Act 2000 s 312B(1).
19 Financial Services and Markets Act 2000 s 312B(9)(a) (as added: see note 7).
20 Financial Services and Markets Act 2000 s 312B(9)(b) (as added: see note 7).
21 Ie the power under the Financial Services and Markets Act 2000 s 312B(1).
22 Financial Services and Markets Act 2000 s 312B(10) (as added: see note 7).
23 Ie the exemption conferred on an operator by the Financial Services and Markets Act 2000 s 312A(2): see PARA 738.
24 Ie the power under the Financial Services and Markets Act 2000 s 312B(1).
25 Financial Services and Markets Act 2000 s 312B(11) (as added: see note 7).
26 Ie the arrangements mentioned in the Financial Services and Markets Act 2000 s 312B(1).
27 Ie the exemption mentioned in the Financial Services and Markets Act 2000 s 312B(11).
28 Financial Services and Markets Act 2000 s 312B(12) (as added: see note 7).

(B) Recognised Investment Exchanges operating in Other EEA States

740. Exercise of passport rights by recognised investment exchange. A recognised investment exchange[1] may, in pursuance of the right under the applicable provision[2], make arrangements in an EEA state[3] (other than the United Kingdom[4]) to facilitate access to, or use of, a regulated market[5] or multilateral trading facility[6] operated by the exchange (the 'relevant arrangements')[7].

The exchange must give the Authority written notice of its intention to make the relevant arrangements which (1) describes the arrangements[8]; and (2) identifies the EEA state in which it intends to make them[9]. The Authority must, within one month of receiving such a notice[10], send a copy of it to the host state regulator[11]. The exchange may not make the relevant arrangements until the Authority has complied with this obligation to send a copy of the notice to the host state regulator[12].

If the Authority receives a request for information[13] from the host state regulator[14], the Authority must, as soon as reasonably practicable, comply with the request[15].

1 As to the meaning of 'recognised investment exchange' see PARA 684 note 1.
2 As to the meaning of 'applicable provision' see PARA 738 note 2.
3 As to the meaning of 'EEA state' see PARA 315 note 1.
4 As to the meaning of 'United Kingdom' see PARA 2 note 3.
5 As to the meaning of 'regulated market' see PARA 711 note 24.
6 As to the meaning of 'multilateral trading facility' see PARA 738 note 2.
7 Financial Services and Markets Act 2000 s 312C(1) (s 312C added by SI 2007/126). The Financial Services and Markets Act 2000 s 312C(1) is subject to s 312C(4): see the text and note 12. Section 321C does not apply to an overseas investment exchange: s 312C(8) (as so added). As to the meaning of 'overseas investment exchange' see PARA 709 note 12.
8 Financial Services and Markets Act 2000 s 312C(2)(a) (as added: see note 7). See note 7.
9 Financial Services and Markets Act 2000 s 312C(2)(b) (as added: see note 7). See note 7.

10 Ie a notice under the Financial Services and Markets Act 2000 s 312C(2).
11 Financial Services and Markets Act 2000 s 312C(3) (as added: see note 7). 'Host state regulator' means the competent authority (within the meaning of the Markets in Financial Instruments Directive (i e European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4.1.22) of the EEA state in which the exchange intends to make, or has made, the relevant arrangements: Financial Services and Markets Act 2000 s 312C(7) (as so added). See note 7.
12 Financial Services and Markets Act 2000 s 312C(4) (as added: see note 7). The reference is to compliance with s 312C(3). See note 7.
13 Ie (1) under the second sub-paragraph of the Markets in Financial Instruments Directive (i e European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 31.6 (in the case of relevant arrangements relating to a multilateral trading facility); or (2) under the third sub-paragraph of the Markets in Financial Instruments Directive (i e European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 42.6 (in the case of relevant arrangements relating to a regulated market): see the Financial Services and Markets Act 2000 s 312C(5); and note 14.
14 Financial Services and Markets Act 2000 s 312C(5) (as added: see note 7). See note 7.
15 Financial Services and Markets Act 2000 s 312C(6) (as added: see note 7). See note 7.

(iv) Lloyd's

741. In general. Lloyd's is a society, incorporated by statute, which provides the facilities for the Lloyd's insurance underwriting market to carry on business[1]. Although supervised by the Financial Services Authority[2], the Council of Lloyd's retains the capacity to make byelaws regulating the market and has responsibility for its functioning[3].

1 As to Lloyd's generally see PARA 77; and INSURANCE.
2 As to the Financial Services Authority see PARAS 4, 6 et seq. As to the regulation of Lloyd's see PARA 742 et seq. In particular, the Financial Services Authority may make a direction applying certain provisions of the Financial Services and Markets Act 2000 to members of Lloyd's (see ss 316, 317; and PARA 743), and may give directions to the Council of Lloyd's, to the Society, or to both (see s 318; and PARA 745).
3 See the Lloyd's Act 1982; and INSURANCE. The Financial Services Authority must keep itself informed about the way in which the Council of Lloyd's supervises and regulates the Lloyd's market and the way in which regulated activities are being carried out: see the Financial Services and Markets Act 2000 s 314; and PARA 742.

742. The general duty of the Financial Services Authority. The Financial Services Authority[1] must keep itself informed about: (1) the way in which the Council of Lloyd's[2] supervises and regulates the market at Lloyd's; and (2) the way in which regulated activities[3] are being carried on in that market[4]. The Authority must keep under review the desirability of exercising: (a) any of its powers under Part XIX of the Financial Services and Markets Act 2000[5]; (b) any powers which it has in relation to the Society of Lloyd's[6].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance. As to the Handbook generally see PARA 22.
2 As to Lloyd's generally see PARA 77; and INSURANCE.
3 As to regulated activities see PARA 84 et seq.
4 Financial Services and Markets Act 2000 s 314(1).
5 Ie the Financial Services and Markets Act 2000 Pt XIX (ss 314–324).
6 Financial Services and Markets Act 2000 s 314(2). As to the powers referred to in the text see s 315; and PARA 744.

A term used in Pt XIX which is defined in the Lloyd's Act 1982 has the same meaning as in the Lloyd's Act 1982: Financial Services and Markets Act 2000 s 324(2).

743. Application of the Financial Services and Markets Act 2000. The general prohibition[1] or (if the general prohibition is not applied under these

provisions[2]) a core provision[3] applies to the carrying on of an insurance market activity[4] by: (1) a member of the Society of Lloyd's; or (2) the members of the Society taken together, only if the Financial Services Authority[5] so directs[6]. In deciding whether to give a direction[7], the Authority must have particular regard to: (a) the interests of policyholders[8] and potential policyholders; (b) any failure by the Society to satisfy an obligation to which it is subject as a result of a provision of the law of another EEA state[9] which gives effect to any of the Insurance Directives[10], and is applicable to an activity carried on in that state by a person to whom these provisions apply; (c) the need to ensure the effective exercise of the functions which the Authority has in relation to the Society[11]. A direction must be in writing[12]. A direction applying the general prohibition may apply it in relation to different classes of person[13]. An insurance market direction: (i) must specify each core provision, class of person and kind of activity to which it applies; (ii) may apply different provisions in relation to different classes of person and different kinds of activity[14]. A direction has effect from the date specified in it, which may not be earlier than the date on which it is made[15]. A direction must be published in the way appearing to the Authority to be best calculated to bring it to the attention of the public[16]. The Authority may charge a reasonable fee for providing a person with a copy of the direction[17]. The Authority must, without delay, give the Treasury[18] a copy of any direction which it gives[19].

1 As to the general prohibition see PARA 80.
2 Ie under the Financial Services and Markets Act 2000 s 316.
3 'Core provision' means a provision of the Financial Services and Markets Act 2000 mentioned in s 317: s 316(3). The core provisions are Pt V (ss 56–71) (see PARA 364 et seq), Pt X (ss 138–164) (see PARA 21 et seq), Pt XI (ss 165–177) (see PARA 447 et seq), Pt XII (ss 178–192) (see PARA 377 et seq), Pt XIV (ss 205–211) (see PARA 465), Pt XV (ss 212–224) (see PARA 575 et seq), Pt XVI (ss 225–234A) (see PARA 583 et seq), Pt XXII (ss 340–346) (see PARA 764 et seq), Pt XXIV (ss 355–379) (see PARA 490 et seq), ss 384–386 (see PARA 474), and Pt XXVI (ss 387–396) (see PARA 769 et seq): s 317(1). References in an applied core provision to an authorised person are (where necessary) to be read as references to a person in the class to which the insurance market direction (see note 6) applies: s 317(2). As to authorised persons see PARA 314. An insurance market direction may provide that a core provision is to have effect, in relation to persons to whom the provision is applied by the direction, with modifications: s 317(3).
4 'Insurance market activity' means a regulated activity relating to contracts of insurance written at Lloyd's: Financial Services and Markets Act 2000 s 316(3). As to regulated activities see PARA 84 et seq. As to the meaning of 'contracts of insurance' see PARA 351 note 13. As to Lloyd's generally see PARA 77; and INSURANCE.
5 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance. As to the Handbook generally see PARA 22.
6 Financial Services and Markets Act 2000 s 316(1). A direction given under s 316(1) which applies a core provision is referred to in Pt XIX (ss 314–324) as an 'insurance market direction': s 316(2).
7 Ie under the Financial Services and Markets Act 2000 s 316(1).
8 As to the meaning of 'policyholder' see PARA 591 note 15.
9 As to the meaning of 'EEA state' see PARA 315 note 1.
10 As to the meaning of 'Insurance Directives' see PARA 86 note 6.
11 Financial Services and Markets Act 2000 s 316(4). The Authority has functions in relation to the Society as a result of s 315: see PARA 744.
12 Financial Services and Markets Act 2000 s 316(5).
13 Financial Services and Markets Act 2000 s 316(6).
14 Financial Services and Markets Act 2000 s 316(7).
15 Financial Services and Markets Act 2000 s 316(8).
16 Financial Services and Markets Act 2000 s 316(9).
17 Financial Services and Markets Act 2000 s 316(10).

18 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
19 Financial Services and Markets Act 2000 s 316(11).

744. Authorisation and permission in relation to the Society of Lloyd's. The Society of Lloyd's[1] is an authorised person[2]. The Society has permission to carry on a regulated activity[3] of any of the following kinds: (1) arranging deals[4] in contracts of insurance[5] written at Lloyd's (the 'basic market activity'); (2) arranging deals in participation in Lloyd's syndicates[6] (the 'secondary market activity'); and (3) an activity carried on in connection with, or for the purposes of, the basic or secondary market activity[7]. The power conferred on the Financial Services Authority[8] to vary or cancel a permission[9] may be exercised at any time[10]. The Society is not subject to any requirement of the Financial Services and Markets Act 2000 concerning the registered office of a body corporate[11].

1 As to Lloyd's generally see PARA 77; and INSURANCE.
2 Financial Services and Markets Act 2000 s 315(1). As to authorised persons see PARA 314.
3 As to regulated activities see PARA 84 et seq.
4 'Arranging deals', in relation to the investments to which the Financial Services and Markets Act 2000 Pt XIX (ss 314–324) applies, means the investment described in Sch 2 para 3 (see PARA 84): s 324(1).
5 As to the meaning of 'contracts of insurance' see PARA 351 note 13.
6 'Participation in Lloyd's syndicates', in relation to the secondary market activity, means the investment described in the Financial Services and Markets Act 2000 Sch 2 para 21(1) (see PARA 85): s 324(1).
7 Financial Services and Markets Act 2000 s 315(2). For the purposes of Pt IV (ss 40–55) (permission to carry on regulated activities) (see PARA 348 et seq), the Society's permission is to be treated as if it had been given on an application for permission under Pt IV: s 315(3).
8 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance. As to the Handbook generally see PARA 22.
9 Ie the power given by the Financial Services and Markets Act 2000 s 45: see PARA 355.
10 See the Financial Services and Markets Act 2000 s 315(4).
11 Financial Services and Markets Act 2000 s 315(5). As to the meaning of 'body corporate' see PARA 86 note 11.

745. Exercise of powers through the Council of Lloyd's. The Financial Services Authority[1] may give a direction[2] to the Council of Lloyd's[3] or to the Society of Lloyd's (acting through the Council) or to both[4]. The direction is given to the body concerned: (1) in relation to the exercise of its powers generally with a view to achieving, or in support of, a specified[5] objective; or (2) in relation to the exercise of a specified power which it has, whether in a specified manner or with a view to achieving, or in support of, a specified objective[6]. A direction does not, at any time, prevent the exercise by the Authority of any of its powers[7]. A direction must be in writing[8], and must be published in the way appearing to the Authority to be best calculated to bring it to the attention of the public[9]. The Authority may charge a reasonable fee for providing a person with a copy of the direction[10]. The Authority must, without delay, give the Treasury[11] a copy of any direction which it gives[12].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance. As to the Handbook generally see PARA 22.
2 Ie under the Financial Services and Markets Act 2000 s 318(1).
3 As to Lloyd's generally see PARA 77; and INSURANCE.
4 Financial Services and Markets Act 2000 s 318(1). A direction under s 318(1) may be given: (1) instead of giving a direction under s 316(1) (see PARA 743); or (2) if the Authority considers it necessary or expedient to do so, at the same time as, or following, the giving of such a direction: s 318(4). A direction may also be given under s 318(1) in respect of underwriting agents as if they were among the persons mentioned in s 316(1) (see PARA 743): s 318(5).

5 'Specified' means specified in the direction: Financial Services and Markets Act 2000 s 318(3).
6 Financial Services and Markets Act 2000 s 318(2).
7 Financial Services and Markets Act 2000 s 318(6).
8 Financial Services and Markets Act 2000 s 318(6).
9 Financial Services and Markets Act 2000 s 318(7).
10 Financial Services and Markets Act 2000 s 318(8).
11 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
12 Financial Services and Markets Act 2000 s 318(9).

746. Consultation. Before giving a direction[1], the Financial Services Authority[2] must publish a draft of the proposed direction[3]. The draft must be accompanied by: (1) a cost benefit analysis[4]; and (2) notice that representations about the proposed direction may be made to the Authority within a specified time[5]. Before giving the proposed direction, the Authority must have regard to any representations made to it in accordance with head (2) above[6]. If the Authority gives the proposed direction it must publish an account, in general terms, of: (a) the representations made to it in accordance with head (2) above; and (b) its response to them[7]. If the direction differs from the published draft in a way which is, in the opinion of the Authority, significant: (i) the Authority must[8] publish details of the difference; and (ii) those details must be accompanied by a cost benefit analysis[9]. The provisions described above[10] do not apply if the Authority considers that the delay involved in complying with them would be prejudicial to the interests of consumers[11]. When the Authority is required to publish a document[12], it must do so in the way appearing to it to be best calculated to bring it to the attention of the public[13].

1 Ie under the Financial Services and Markets Act 2000 s 316 (see PARA 743) or s 318 (see PARA 745).
2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance. As to the Handbook generally see PARA 22.
3 Financial Services and Markets Act 2000 s 319(1). The Authority may charge a reasonable fee for providing a person with a copy of a draft published under s 319(1): s 319(8).
4 Financial Services and Markets Act 2000 s 319(2)(a). 'Cost benefit analysis' means an estimate of the costs together with an analysis of the benefits that will arise: (1) if the proposed direction is given; or (2) if s 319(5)(b) (see head (ii) in the text) applies, from the direction that has been given: s 319(10). Neither s 319(2)(a) (see head (1) in the text) nor s 319(5)(b) (see head (ii) in the text) applies if the Authority considers: (a) that, making the appropriate comparison, there will be no increase in costs; or (b) that, making that comparison, there will be an increase in costs but the increase will be of minimal significance: s 319(7). 'Appropriate comparison' means: (i) in relation to s 319(2)(a) (see head (1) in the text), a comparison between the overall position if the direction is given and the overall position if it is not given; (ii) in relation to s 319(5)(b) (see head (ii) in the text), a comparison between the overall position after the giving of the direction and the overall position before it was given: s 319(11).
5 Financial Services and Markets Act 2000 s 319(2).
6 Financial Services and Markets Act 2000 s 319(3).
7 Financial Services and Markets Act 2000 s 319(4).
8 Ie in addition to complying with the Financial Services and Markets Act 2000 s 319(4): see the text to note 7.
9 Financial Services and Markets Act 2000 s 319(5). See note 4.
10 Ie the Financial Services and Markets Act 2000 s 319(1)–(5): see the text and notes 1–9.
11 Financial Services and Markets Act 2000 s 319(6).
12 As to the meaning of 'document' see PARA 10 note 10.
13 Financial Services and Markets Act 2000 s 319(9).

747. Former underwriting members. A former underwriting member[1] may carry out each contract of insurance[2] that he has underwritten at Lloyd's whether or not he is an authorised person[3]. If he is an authorised person, any Part IV

permission[4] that he has does not extend to his activities in carrying out any of those contracts[5]. The Financial Services Authority[6] may impose on a former underwriting member such requirements as appear to it to be appropriate for the purpose of protecting policyholders[7] against the risk that he may not be able to meet his liabilities[8]. A person on whom a requirement is imposed may refer the matter to the Financial Services and Markets Tribunal[9].

A requirement[10] takes effect: (1) immediately, if the notice given by the Authority[11] states that that is the case; (2) in any other case, on such date as may be specified in that notice[12]. If the Authority proposes to impose a requirement on a former underwriting member ('A')[13], or imposes such a requirement on him which takes effect immediately, it must give him written notice[14]. The notice must: (a) give details of the requirement; (b) state the Authority's reasons for imposing it; (c) inform A that he may make representations to the Authority within such period as may be specified in the notice (whether or not he has referred the matter to the Tribunal); (d) inform him of the date on which the requirement took effect or will take effect; and (e) inform him of his right to refer the matter to the Tribunal[15]. If, having considered any representations made by A, the Authority decides to impose the proposed requirement, or if it decides, where the requirement has been imposed, not to revoke it, the Authority must give him written notice[16]. If the Authority decides not to impose a proposed requirement, or to revoke a requirement that has been imposed, it must give A written notice[17]. If the Authority decides to grant an application by A for the variation or revocation of a requirement, it must give him written notice of its decision[18]. If the Authority proposes to refuse an application by A for the variation or revocation of a requirement, it must give him a warning notice[19]. If the Authority, having considered any representations made in response to the warning notice, decides to refuse the application, it must give A a decision notice[20]. If the Authority decides to refuse an application for a variation or revocation of the requirement, the applicant may refer the matter to the Tribunal[21]. If a notice informs a person of his right to refer a matter to the Tribunal, it must give an indication of the procedure on such a reference[22].

The Authority may make rules imposing such requirements on persons to whom the rules apply as appear to it to be appropriate for protecting policyholders against the risk that those persons may not be able to meet their liabilities[23]. The rules may apply to former underwriting members generally or to a class of former underwriting member specified in them[24].

1 'Former underwriting member' means a person ceasing to be an underwriting member of the Society of Lloyd's on, or at any time after, 24 December 1996: Financial Services and Markets Act 2000 s 324(1). As to Lloyd's generally see PARA 77; and INSURANCE.
2 As to the meaning of 'contracts of insurance' see PARA 351 note 13.
3 Financial Services and Markets Act 2000 s 320(1). As to authorised persons see PARA 314.
4 As to the meaning of 'Part IV permission' see PARA 348.
5 Financial Services and Markets Act 2000 s 320(2).
6 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance. As to the Handbook generally see PARA 22.
7 As to the meaning of 'policyholder' see PARA 591 note 15.
8 Financial Services and Markets Act 2000 s 320(3).
9 Financial Services and Markets Act 2000 s 320(4). As to the Financial Services and Markets Tribunal see PARA 43 et seq.
10 Ie a requirement imposed under the Financial Services and Markets Act 2000 s 320: see the text to notes 1–9.
11 Ie the notice given under the Financial Services and Markets Act 2000 s 321(2): see the text to notes 13–14.
12 Financial Services and Markets Act 2000 s 321(1).

13 Ie under the Financial Services and Markets Act 2000 s 320: see the text to notes 1–9.
14 Financial Services and Markets Act 2000 s 321(2).
15 Financial Services and Markets Act 2000 s 321(3). The Authority may extend the period allowed under the notice for making representations: s 321(4).
16 Financial Services and Markets Act 2000 s 321(5). A notice given under s 321(5) must inform A of his right to refer the matter to the Tribunal: s 321(10).
17 Financial Services and Markets Act 2000 s 321(6).
18 Financial Services and Markets Act 2000 s 321(7).
19 Financial Services and Markets Act 2000 s 321(8). As to warning notices see PARA 769.
20 Financial Services and Markets Act 2000 s 321(9). As to decision notices see PARA 770. A notice given under s 321(9) in the case of a decision to refuse the application must inform A of his right to refer the matter to the Tribunal: s 321(10).
21 Financial Services and Markets Act 2000 s 321(11).
22 Financial Services and Markets Act 2000 s 321(12).
23 Financial Services and Markets Act 2000 s 322(1). Section 319 (see PARA 746) applies to the making of proposed rules under s 322 as it applies to the giving of a proposed direction under s 316 (see PARA 743): s 322(3). Part X (ss 138–164) (rules and guidance) (see PARA 21 et seq), except ss 152–154, does not apply to rules made under s 322: s 322(4).
24 Financial Services and Markets Act 2000 s 322(2).

748. Transfer schemes. The Treasury[1] may by order provide for the application of any provision of Part VII of the Financial Services and Markets Act 2000[2] (with or without modification) in relation to schemes for the transfer of the whole or any part of the business carried on by one or more members of the Society of Lloyd's[3] or former underwriting members[4].

1 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
2 Ie the Financial Services and Markets Act 2000 Pt VII (ss 104–117) (control of business transfers): see PARA 590 et seq.
3 As to Lloyd's generally see PARA 77; and INSURANCE.
4 Financial Services and Markets Act 2000 s 323. As to the meaning of 'former underwriting member' see PARA 747 note 1. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

The Treasury has ordered that the following provisions, that is to say: (1) s 104 (see PARA 591), ss 107–114 (see PARAS 593–599); (2) any regulations made under s 108 (see PARA 593); and (3) Sch 12 Pt I (see PARA 595), are to apply in relation to schemes for the transfer of the whole or any part of the business carried on by one or more members of the Society or former underwriting members (the 'members concerned') in the same way as they apply in relation to insurance business transfer schemes, but only if certain conditions are satisfied: Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) Order 2001, SI 2001/3626, art 3. The conditions are: (a) that the scheme results in the business transferred being carried on from an establishment of the transferee in an EEA state; (b) that the Council of Lloyd's has by resolution authorised one person to act, in connection with the transfer for the members concerned, as transferor; and (c) that a copy of the resolution has been given to the Authority: art 4.

The provisions which apply by virtue of heads (1) and (2) above do so as if: (i) any reference to the authorised person concerned were a reference to the members concerned; and (ii) anything done in connection with the transfer by the person authorised in accordance with head (a) above had been done by the members concerned for whom he acted: art 5(1). In the application of the Financial Services and Markets Act 2000 Sch 12 Pt I to the members concerned, the conditions in Sch 12 para 1(2)(a), (3)(a), (4)(a) (see PARA 595) are treated as satisfied: Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) Order 2001, SI 2001/3626, art 5(2).

(v) Provision of Financial Services by Members of the Professions

749. Designation of professional bodies. The Treasury[1] may by order designate professional bodies for the purposes of Part XX of the Financial

Services and Markets Act 2000[2]. The Treasury may designate a body only if it is satisfied that: (1) the basic condition; and (2) one or more of the additional conditions, are met in relation to it[3].

The basic condition is that the body has rules applicable to the carrying on by members[4] of the profession in relation to which it is established of regulated activities[5] which, if the body were to be designated, would be exempt regulated activities[6]. The additional conditions are that:

(a) the body has power under any enactment[7] to regulate the practice of the profession[8];

(b) being a member of the profession is a requirement under any enactment for the exercise of particular functions or the holding of a particular office[9];

(c) the body has been recognised[10] for the purpose of any enactment other than the Financial Services and Markets Act 2000 and the recognition has not been withdrawn[11];

(d) the body is established in an EEA state[12] other than the United Kingdom[13] and in that state: (i) the body has power corresponding to that mentioned in head (a) above; (ii) there is a requirement in relation to the body corresponding to that mentioned in head (b) above; or (iii) the body is recognised in a manner corresponding to that mentioned in head (c) above[14].

The following bodies have been designated for the purposes of Part XX of the Financial Services and Markets Act 2000:

(A) the Law Society[15];
(B) the Law Society of Scotland[16];
(C) the Law Society of Northern Ireland[17];
(D) the Institute of Chartered Accountants in England and Wales[18];
(E) the Institute of Chartered Accountants of Scotland[19];
(F) the Institute of Chartered Accountants in Ireland[20];
(G) the Association of Chartered Certified Accountants[21];
(H) the Institute of Actuaries[22];
(I) the Council for Licensed Conveyancers[23];
(J) the Royal Institution of Chartered Surveyors[24].

1 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

2 Financial Services and Markets Act 2000 s 326(1). A body designated under s 326(1) is referred to in Pt XX (ss 325–333) as a designated professional body: s 326(2). As to the bodies designated see the Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226; and heads (A)–(J) in the text. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

An order containing a provision to which, if the order is made, s 429(7) (see below) will apply is not to be made unless a draft of the order has been laid before Parliament and approved by a resolution of each House: s 429(6). Section 429(7) applies to a provision contained in an order if it is the first to be made in the exercise of the power conferred by s 326(1) or it removes a body from those for the time being designated under s 326(1): s 429(7)(a).

3 Financial Services and Markets Act 2000 s 326(3).

4 For the purposes of the Financial Services and Markets Act 2000 Pt XX (ss 325–333), 'members', in relation to a profession, means persons who are entitled to practise the profession in question and, in practising it, are subject to the rules of the body designated in relation to that profession, whether or not they are members of that body: s 325(2).

5 As to regulated activities see PARA 84 et seq.

6 Financial Services and Markets Act 2000 s 326(4). For the purposes of Pt XX, 'exempt regulated activities' means regulated activities which may, as a result of Pt XX, be carried on by members of a profession which is supervised and regulated by a designated professional body without breaching the general prohibition: s 325(2). As to the general prohibition see PARA 80.

7 'Enactment' includes an Act of the Scottish Parliament, Northern Ireland legislation, and subordinate legislation (whether made under an Act, an Act of the Scottish Parliament or Northern Ireland legislation): Financial Services and Markets Act 2000 s 326(6).
8 Financial Services and Markets Act 2000 s 326(5)(a).
9 Financial Services and Markets Act 2000 s 326(5)(b).
10 'Recognised' means recognised by: (1) a Minister of the Crown; (2) the Scottish Ministers; (3) a Northern Ireland Minister; (4) a Northern Ireland department or its head: Financial Services and Markets Act 2000 s 326(7). As to the meaning of 'Minister of the Crown' see PARA 67 note 1.
11 Financial Services and Markets Act 2000 s 326(5)(c).
12 As to the meaning of 'EEA state' see PARA 315 note 1.
13 As to the meaning of 'United Kingdom' see PARA 2 note 3.
14 Financial Services and Markets Act 2000 s 326(5).
15 Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226, art 2(a). As to the Law Society see SOLICITORS vol 44(1) (Reissue) PARA 8 et seq.
16 Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226, art 2(b).
17 Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226, art 2(c).
18 Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226, art 2(d).
19 Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226, art 2(e).
20 Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226, art 2(f).
21 Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226, art 2(g).
22 Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226, art 2(h).
23 Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226, art 2(i) (added by SI 2004/3352).
24 Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226, art 2(j) (added by SI 2006/58).

750. The general duty of the Financial Services Authority. The Financial Services Authority[1] must keep itself informed about: (1) the way in which designated professional bodies[2] supervise and regulate the carrying on of exempt regulated activities[3] by members of the professions in relation to which they are established; (2) the way in which such members are carrying on exempt regulated activities[4]. The Authority must keep under review the desirability of exercising any of its powers under Part XX of the Financial Services and Markets Act 2000[5]. Each designated professional body must co-operate with the Authority, by the sharing of information and in other ways, in order to enable the Authority to perform its functions under Part XX[6].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Professional Firms (PROF). As to the Handbook generally see PARA 22.
2 As to designated professional bodies see PARA 749.
3 As to the meaning of 'exempt regulated activities' see PARA 749 note 6.
4 Financial Services and Markets Act 2000 s 325(1).
5 Financial Services and Markets Act 2000 s 325(3). The reference is to Pt XX (ss 325–333).
6 Financial Services and Markets Act 2000 s 325(4).

751. Exemption from the general prohibition. The general prohibition[1] does not apply to the carrying on of a regulated activity[2] by a person ('P') if: (1) the following conditions[3] are satisfied; and (2) there is not in force a direction[4] or an order[5] which prevents this provision from applying to the carrying on of that activity by him[6]. The conditions are that:

(a) P must be a member[7] of a profession or must be controlled or managed by one or more such members[8];

(b) P must not receive from a person other than his client[9] any pecuniary reward or other advantage, for which he does not account to his client, arising out of his carrying on of any of the activities[10];

(c) the manner of the provision by P of any service in the course of carrying on the activities must be incidental to the provision by him of professional services[11];

(d) P must not carry on, or hold himself out as carrying on, a regulated activity[12] other than: (i) one which rules made by the professional body[13] allow him to carry on; or (ii) one in relation to which he is an exempt person[14];

(e) the activities must not be of a description, or relate to an investment of a description, specified in an order made by the Treasury[15] for these purposes[16];

(f) the activities must be the only regulated activities[17] carried on by P (other than regulated activities in relation to which he is an exempt person)[18].

1 As to the general prohibition see PARA 80.
2 As to regulated activities see PARA 84 et seq.
3 Ie the conditions set out in the Financial Services and Markets Act 2000 s 327(2)–(7): see the text and notes 7–16. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Professional Firms (PROF). As to the Handbook generally see PARA 22. As to the Financial Services Authority see PARAS 4, 6 et seq.
4 Ie a direction under the Financial Services and Markets Act 2000 s 328: see PARA 752.
5 Ie an order under the Financial Services and Markets Act 2000 s 329: see PARA 753.
6 Financial Services and Markets Act 2000 s 327(1).
7 As to the meaning of 'members' see PARA 749 note 4.
8 Financial Services and Markets Act 2000 s 327(2).
9 For the purposes of the Financial Services and Markets Act 2000 Pt XX (ss 325–333), 'clients' means: (1) persons who use, have used or are or may be contemplating using, any of the services provided by a member of a profession in the course of carrying on exempt regulated activities; (2) persons who have rights or interests which are derived from, or otherwise attributable to, the use of any such services by other persons; or (3) persons who have rights or interests which may be adversely affected by the use of any such services by persons acting on their behalf or in a fiduciary capacity in relation to them: s 328(8). As to the meaning of 'exempt regulated activities' see PARA 749 note 6.
10 Financial Services and Markets Act 2000 s 327(3).
11 Financial Services and Markets Act 2000 s 327(4). 'Professional services' means services: (1) which do not constitute carrying on a regulated activity; and (2) the provision of which is supervised and regulated by a designated professional body: s 327(8). As to the designated professional bodies see PARA 749.
12 For the purposes of the Financial Services and Markets Act 2000 s 327(5), (7), references to a 'regulated activity' and 'regulated activities' do not include:
   (1) any activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 10(1) or art 10(2) (see PARA 100), where P is a member of the Society (art 13(1)(a)(i)), and by virtue of the Financial Services and Markets Act 2000 s 316 (application of the Act to Lloyd's underwriting) (see PARA 743), the general prohibition does not apply to the carrying on by P of that activity (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 13(1)(a)(ii)); or
   (2) any activity of the kind specified by art 10(2), where P is a former underwriting member (art 13(1)(b)(i)) and the contract of insurance in question is one underwritten by P at Lloyd's (art 13(1)(b)(ii)).

   As to the meanings of 'member of the Society' and 'former underwriting member' see the Lloyd's Act 1982 (see INSURANCE vol 25 (2003 Reissue) PARAS 24, 25); definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 13(2).

13 Ie rules made as a result of the Financial Services and Markets Act 2000 s 332(3): see PARA 756.

14 Financial Services and Markets Act 2000 s 327(5). As to the meaning of 'exempt person' see PARA 80 note 4.

15 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

16 Financial Services and Markets Act 2000 s 327(6). An order containing a provision to which, if the order is made, s 429(7) (see below) will apply is not to be made unless a draft of the order has been laid before Parliament and approved by a resolution of each House: s 429(6). The Financial Services and Markets Act 2000 s 429(7) applies to a provision contained in an order if it is the first to be made in the exercise of the power conferred by s 327(6) or it adds a description of regulated activity or investment to those for the time being specified for the purposes of s 327(6): s 429(7)(b). As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

The activities specified for the purposes of the Financial Services and Markets Act 2000 s 327(6) are those mentioned in the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, arts 4–8 (see below): art 3.

The activity mentioned in art 4 is an activity of the kind specified by any of the following provisions of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544: art 5 (accepting deposits) (see PARA 89), art 9B (issuing electronic money) (see PARA 96), art 10 (effecting and carrying out contracts of insurance) (see PARA 100), art 14 (dealing in investments as principal) (see PARA 112), art 51 (establishing etc a collective investment scheme) (see PARA 171), art 52 (establishing etc a pension scheme) (see PARA 187), art 52B (providing basic advice on stakeholder products) (see PARA 188), art 57 (managing the underwriting capacity of a Lloyd's syndicate) (see PARA 198), art 59 (funeral plan contracts) (see PARA 200): Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 4 (amended by SI 2001/3650; SI 2002/682; SI 2004/2737; SI 2006/1969).

The activity mentioned in the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 4A is an activity kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21 (dealing in investments as agent) (see PARA 126) or art 25 (arranging deals in investments) (see PARA 139) in so far as it relates to a transaction for the sale or purchase of rights under a contract of insurance, and is carried on by a person who is not included in the record of insurance intermediaries: Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 4A (added by SI 2003/1476).

The activity mentioned in the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 5 is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 37 (managing investments) (see PARA 152) in so far as it consists of buying or subscribing for a security or contractually based investment: Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 5(1) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 5(1) does not apply: (1) if all routine or day to day decisions, so far as relating to that activity, are taken by an authorised person with permission to carry on that activity or by a person who is an exempt person in relation to such an activity; or (2) to an activity undertaken in accordance with the advice of an authorised person with permission to give advice in relation to such an activity or a person who is an exempt person in relation to the giving of such advice: art 5(2). As to the meaning of 'contractually based investment' see PARA 112 note 4; definition applied by art 2(1).

The activity mentioned in art 5A is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 39A (assisting in the administration and performance of a contract of insurance) (see PARA 104) if it is carried on by a person who is not included in the record of insurance intermediaries: Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 5A (added by SI 2003/1476). As to the meaning of 'contract of insurance' see PARA 90 note 3; definition applied by the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 2(1) (definition added by SI 2003/1476). 'Record of insurance intermediaries' means the record maintained by the Authority under the Financial Services and Markets Act 2000 s 347 (the public record) (see PARA 475) by virtue of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 93 (recorded insurance intermediaries) (see PARA 476): Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 2(1).

The activity mentioned in art 6 is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53 (advising on investments) (see PARA 174) where the advice in question falls within the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6(2), 6(3) or art 6(5) (see below): art 6(1) (amended by SI 2003/1476). Subject to the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6(4), advice falls within art 6(2) in so far as: (a) it is given to an individual (or his agent) other than where the individual acts: (i) in connection with the carrying on of a business of any kind by himself or by an undertaking of which he is, or would become as a result of the transaction to which the advice relates, a controller; or (ii) in his capacity as a trustee of an occupational pension scheme; (b) it consists of a recommendation to buy or subscribe for a particular security or contractually based investment; and (c) the transaction to which the advice relates would be made: (i) with a person acting in the course of carrying on the business of buying, selling, subscribing for or underwriting the security or contractually based investment, whether as principal or agent; (ii) on an investment exchange or any other market to which that investment is admitted for dealing; or (iii) in response to an invitation to subscribe for such an investment which is, or is to be, admitted for dealing on an investment exchange or any other market: art 6(2) (amended by SI 2003/1476). Subject to the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6(4), advice falls within art 6(3) in so far as it consists of a recommendation to a member of a personal pension scheme (or his agent) to dispose of any rights or interests which the member has in or under the scheme: art 6(3). Advice does not fall within art 6(2) or art 6(3) if it indorses a corresponding recommendation given to the individual (or, as the case may be, the member) by an authorised person with permission to give advice in relation to the proposed transaction or a person who is an exempt person in relation to the giving of such advice: art 6(4). Advice falls within art 6(5) in so far it relates to a transaction for the sale or purchase of rights under a contract of insurance; and it is given by a person who is not included in the record of insurance intermediaries: art 6(5) (added by SI 2003/1476). 'Occupational pension scheme' and 'personal pension scheme' have the meanings given by the Pension Schemes Act 1993 s 1 (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARAS 710, 741): Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 2(1).

The activity mentioned in art 6A is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53A (advising on regulated mortgage contracts) (see PARA 174) where the advice in question falls within the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6A(2): art 6A(1) (art 6A added by SI 2003/1475). Subject to the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6A(3), advice falls within art 6A(2) in so far as it consists of a recommendation, given to an individual, to enter as borrower into a regulated mortgage contract with a particular person; and in entering into a regulated mortgage contract that person would be carrying on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61(1) (regulated mortgage contracts) (see PARA 203): Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6A(2) (as so added). Advice does not fall within art 6A(2) if it endorses a corresponding recommendation given to the individual by an authorised person with permission to carry on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53A (see PARA 174) or a person who is an exempt person in relation to an activity of that kind: Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6A(3) (as so added).

The activity mentioned in art 6B is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61(1) or (2) (regulated mortgage contracts) (see PARA 203): Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6B(1) (art 6B added as art 6A by SI 2001/3650; and renumbered by SI 2003/1475). The Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6B(1) does not apply to an activity carried on by a person in his capacity as a trustee or personal representative where the borrower under the regulated mortgage contract in question is a beneficiary under the trust, will or intestacy: art 6B(2) (as so added and renumbered).

The activity mentioned in art 6C is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53B (advising on regulated home reversion plans) (see PARA 174) where the advice in question falls within the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001,

SI 2001/1227, art 6C(2): art 6C(1) (art 6C added by SI 2006/2383). Subject to the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6C(3), advice falls within art 6C(2) in so far as it consists of a recommendation, given to an individual to enter as reversion seller or plan provider into a regulated home reversion plan with a particular person; and in entering into a regulated home reversion plan that person would be carrying on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63B(1) (regulated home reversion plans) (see PARA 209): Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6C(2) (as so added). Advice does not fall within art 6C(2) if it endorses a corresponding recommendation given to the individual by an authorised person with permission to carry on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53B (see PARA 174) or a person who is an exempt person in relation to an activity of that kind: Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6C(3) (as so added). As to the meanings of 'reversion seller' and 'plan provider' see PARA 209; definitions applied by art 2(1) (definitions added by SI 2006/2383).

The activity mentioned in the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6D is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63B(1) or (2) (regulated home reversion plans) (see PARA 209): Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6D(1) (art 6D added by SI 2006/2383). The Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6D(1) does not apply to an activity carried on by a person in his capacity as a trustee or personal representative where the reversion seller under the regulated home reversion plan in question is a beneficiary under the trust, will or intestacy: art 6D(2) (as so added).

The activity mentioned in art 6E is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53C (advising on regulated home purchase plans) (see PARA 174) where the advice in question falls within the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6E(2): art 6E(1) (art 6E added by SI 2006/2383). Subject to the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6E(3), advice falls within art 6E(2) in so far as it consists of a recommendation, given to an individual to enter as home purchaser into a regulated home purchase plan with a particular person; and in entering into a regulated home purchase plan that person would be carrying on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63F(1) (regulated home purchase plans) (see PARA 215): Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6E(2) (as so added). Advice does not fall within art 6E(2) if it endorses a corresponding recommendation given to the individual by an authorised person with permission to carry on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53C (see PARA 174) or a person who is an exempt person in relation to an activity of that kind: Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6E(3) (as so added). As to the meanings of 'home purchaser' and 'regulated home purchase plan' see PARA 215; definitions applied by art 2(1) (definitions added by SI 2006/2383).

The activity mentioned in the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6F is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63F(1) or (2) (regulated home purchase plans) (see PARA 215): Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6F(1) (art 6F added by SI 2006/2383). The Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6F(1) does not apply to an activity carried on by a person in his capacity as a trustee or personal representative where the home purchaser under the regulated home purchase plan in question is a beneficiary under the trust, will or intestacy: art 6F(2) (as so added).

The activity mentioned in art 7 is advising a person to become a member of a particular Lloyd's syndicate: art 7(1). As to the meaning of 'syndicate' see PARA 198 note 2; definition applied by art 2(1). Article 7(1) does not apply to advice which indorses that of an authorised person with permission to give such advice or a person who is an exempt person in relation to the giving of such advice: art 7(2).

The activity mentioned in art 8 is agreeing to carry on any of the activities mentioned in arts 4–7 other than the activities mentioned in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 5, art 9B, and arts 10, 51, 52: Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 8 (amended by SI 2002/682).

17 See note 12.

18 Financial Services and Markets Act 2000 s 327(7).

752. Directions in relation to the general prohibition. The Financial Services Authority[1] may direct that the statutory provision relating to the exemption from the general prohibition[2] is not to apply to the extent specified in the direction[3]. Such a direction: (1) must be in writing; (2) may be given in relation to different classes of person or different descriptions of regulated activity[4]. A direction must be published in the way appearing to the Authority to be best calculated to bring it to the attention of the public[5]. The Authority may charge a reasonable fee for providing a person with a copy of the direction[6]. The Authority must, without delay, give the Treasury[7] a copy of any direction[8].

The Authority may exercise its power to make a direction[9] only if it is satisfied either (a) that it is desirable in order to protect the interests of clients[10]; or (b) that it is necessary to do so in order to comply with a Community obligation imposed by the Insurance Mediation Directive[11]. In considering whether it is satisfied of the matter specified in head (a) above, the Authority must have regard amongst other things to the effectiveness of any arrangements made by any designated professional body[12]:

(i) for securing compliance with rules[13];

(ii) for dealing with complaints against its members in relation to the carrying on by them of exempt regulated activities[14];

(iii) in order to offer redress to clients who suffer, or claim to have suffered, loss as a result of misconduct by its members in their carrying on of exempt regulated activities[15];

(iv) for co-operating with the Authority[16].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Professional Firms (PROF). As to the Handbook generally see PARA 22.

2 Ie the Financial Services and Markets Act 2000 s 327(1): see PARA 751. As to the general prohibition see PARA 80.

3 Financial Services and Markets Act 2000 s 328(1).

4 Financial Services and Markets Act 2000 s 328(2). As to regulated activities see PARA 84 et seq.

5 Financial Services and Markets Act 2000 s 328(3).

6 Financial Services and Markets Act 2000 s 328(4).

7 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

8 Financial Services and Markets Act 2000 s 328(5).

9 Ie the power conferred by the Financial Services and Markets Act 2000 s 328(1): see the text to notes 1–3.

10 Financial Services and Markets Act 2000 s 328(6)(a) (s 328(6) substituted by SI 2003/1473). As to the meaning of 'clients' see PARA 751 note 9.

If a member of a profession is carrying on an exempt regulated activity in his capacity as a trustee, the persons who are, have been or may be beneficiaries of the trust are to be treated as persons who use, have used or are or may be contemplating using services provided by that person in his carrying on of that activity: Financial Services and Markets Act 2000 s 328(9). As to the meaning of 'exempt regulated activity' see PARA 749 note 6.

11 Financial Services and Markets Act 2000 s 328(6)(b) (as substituted: see note 10). The reference is to European Parliament and EC Council Directive 2002/92 (OJ L9, 15.1.2003, p 3) on insurance mediation.

12 Financial Services and Markets Act 2000 s 328(7) (amended by SI 2003/1473). As to the designation of professional bodies see PARA 749.

13 Financial Services and Markets Act 2000 s 328(7)(a). The rules referred to in the text are those made under s 332(1): see PARA 756.

14 Financial Services and Markets Act 2000 s 328(7)(b).

15 Financial Services and Markets Act 2000 s 328(7)(c).

16 Financial Services and Markets Act 2000 s 328(7)(d). The designated professional bodies must co-operate with the Authority under s 325(4): see PARA 750.

753. Orders in relation to the general prohibition. If it appears to the Financial Services Authority[1] that a person to whom the general prohibition[2] does not apply[3] is not a fit and proper person to carry on regulated activities[4], then the Authority may make an order disapplying the exemption from the general prohibition[5] in relation to that person to the extent specified[6] in the order[7]. The Authority may, on the application of the person named in such an order, vary or revoke it[8]. If a partnership[9] is named in an order, the order is not affected by any change in its membership[10]. If a partnership named in an order is dissolved, the order continues to have effect in relation to any partnership which succeeds to the business of the dissolved partnership[11].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Professional Firms (PROF). As to the Handbook generally see PARA 22.

2 As to the general prohibition see PARA 80.

3 Ie as a result of the Financial Services and Markets Act 2000 s 327(1): see PARA 751.

4 Ie in accordance with the Financial Services and Markets Act 2000 s 327: see PARA 751. As to regulated activities see PARA 84 et seq.

5 Ie the exemption set out in the Financial Services and Markets Act 2000 s 327(1): see PARA 751.

6 'Specified' means specified in the order: Financial Services and Markets Act 2000 s 329(4).

7 Financial Services and Markets Act 2000 s 329(1), (2).

8 Financial Services and Markets Act 2000 s 329(3).

9 As to the meaning of 'partnership' see PARA 86 note 11.

10 Financial Services and Markets Act 2000 s 329(5).

11 Financial Services and Markets Act 2000 s 329(6). For the purposes of s 329(6), a partnership is to be regarded as succeeding to the business of another partnership only if: (1) the members of the resulting partnership are substantially the same as those of the former partnership; and (2) succession is to the whole or substantially the whole of the business of the former partnership: s 329(7).

754. Consultation. Before giving a direction[1], the Financial Services Authority[2] must publish a draft of the proposed direction[3]. The draft must be accompanied by: (1) a cost benefit analysis[4]; and (2) notice that representations about the proposed direction may be made to the Authority within a specified time[5]. Before giving the proposed direction, the Authority must have regard to any representations made to it in accordance with head (2) above[6]. If the Authority gives the proposed direction, it must publish an account, in general terms, of the representations made to it in accordance with head (2) above and its response to them[7]. If the direction differs from the draft in a way which is, in the opinion of the Authority, significant: (a) the Authority must[8] publish details of the difference; and (b) those details must be accompanied by a cost benefit analysis[9]. The provisions described above[10] do not apply if the Authority considers that the delay involved in complying with them would prejudice the interests of consumers[11]. When the Authority is required to publish a document[12], it must do so in the way appearing to it to be best calculated to bring it to the attention of the public[13].

1 Ie under the Financial Services and Markets Act 2000 s 328(1): see PARA 752.

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Professional Firms (PROF). As to the Handbook generally see PARA 22.
3 Financial Services and Markets Act 2000 s 330(1). The Authority may charge a reasonable fee for providing a person with a copy of a draft published under s 330(1): s 330(8).
4 'Cost benefit analysis' means an estimate of the costs together with an analysis of the benefits that will arise: (1) if the proposed direction is given; or (2) if head (b) in the text applies, from the direction that has been given: Financial Services and Markets Act 2000 s 330(10). Neither head (1) in the text nor head (b) in the text applies if the Authority considers: (a) that, making the appropriate comparison, there will be no increase in costs; or (b) that, making that comparison, there will be an increase in costs but the increase will be of minimal significance: s 330(7). 'Appropriate comparison' means: (i) in relation to head (1) in the text, a comparison between the overall position if the direction is given and the overall position if it is not given; (ii) in relation to head (b) in the text, a comparison between the overall position after the giving of the direction and the overall position before it was given: s 330(11).
5 Financial Services and Markets Act 2000 s 330(2).
6 Financial Services and Markets Act 2000 s 330(3).
7 Financial Services and Markets Act 2000 s 330(4).
8 Ie in addition to complying with the Financial Services and Markets Act 2000 s 330(4): see the text to note 7.
9 Financial Services and Markets Act 2000 s 330(5).
10 Ie the Financial Services and Markets Act 2000 s 330(1)–(5): see the text to notes 1–9.
11 Financial Services and Markets Act 2000 s 330(6).
12 As to the meaning of 'document' see PARA 10 note 10.
13 Financial Services and Markets Act 2000 s 330(9).

755. Procedure on making or varying orders. If the Financial Services Authority[1] proposes to make an order[2], it must give the person concerned a warning notice[3]. The warning notice must set out the terms of the proposed order[4]. If the Authority decides to make an order[5], it must give the person concerned a decision notice[6]. The decision notice must: (1) name the person to whom the order applies; (2) set out the terms of the order; and (3) be given to the person named in the order[7]. Where an application for the variation or revocation of an order is made[8]: (a) if the Authority decides to grant the application, it must give the applicant written notice of its decision[9]; (b) if the Authority proposes to refuse the application, it must give the applicant a warning notice[10]; (c) if the Authority decides to refuse the application, it must give the applicant a decision notice[11].

A person against whom the Authority has decided to make an order[12], or whose application for the variation or revocation of such an order the Authority has decided to refuse, may refer the matter to the Financial Services and Markets Tribunal[13].

The Authority may not make an order[14] unless: (i) the period within which the decision to make the order may be referred to the Tribunal has expired and no such reference has been made; or (ii) if such a reference has been made, the reference has been determined[15].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Professional Firms (PROF). As to the Handbook generally see PARA 22.
2 Ie under the Financial Services and Markets Act 2000 s 329: see PARA 753.
3 Financial Services and Markets Act 2000 s 331(1). As to warning notices see PARA 769.
4 Financial Services and Markets Act 2000 s 331(2).
5 Ie under the Financial Services and Markets Act 2000 s 329: see PARA 753.
6 Financial Services and Markets Act 2000 s 331(3). As to decision notices see PARA 770.
7 Financial Services and Markets Act 2000 s 331(4).
8 Financial Services and Markets Act 2000 s 331(5). An application is made under s 329: see PARA 753.

9 Financial Services and Markets Act 2000 s 331(6).
10 Financial Services and Markets Act 2000 s 331(7).
11 Financial Services and Markets Act 2000 s 331(8).
12 Ie under the Financial Services and Markets Act 2000 s 329: see PARA 753.
13 Financial Services and Markets Act 2000 s 331(9). As to the Financial Services and Markets Tribunal see PARA 43 et seq.
14 Ie under the Financial Services and Markets Act 2000 s 329: see PARA 753.
15 Financial Services and Markets Act 2000 s 331(10).

756. Rules in relation to persons to whom the general prohibition does not apply. The Financial Services Authority[1] may make rules[2] applicable to persons to whom the general prohibition[3] does not apply[4]. This power is to be exercised for the purpose of ensuring that clients[5] are aware that such persons are not authorised persons[6]. A designated professional body[7] must make rules: (1) applicable to members[8] of the profession in relation to which it is established who are not authorised persons[9]; and (2) governing the carrying on by those members of regulated activities[10] (other than regulated activities in relation to which they are exempt persons)[11].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Professional Firms (PROF). As to the Handbook generally see PARA 22.
2 As to the meaning of 'rule' see PARA 23 note 2.
3 As to the general prohibition see PARA 80.
4 Financial Services and Markets Act 2000 s 332(1). The general prohibition does not apply as a result of s 327(1): see PARA 751.
5 As to the meaning of 'clients' see PARA 751 note 9.
6 Financial Services and Markets Act 2000 s 332(2). As to authorised persons see PARA 314.
7 As to the designation of professional bodies see PARA 749.
8 As to the meaning of 'members' see PARA 749 note 4.
9 Financial Services and Markets Act 2000 s 332(3)(a). Rules made in compliance with s 332(3) must be designed to secure that, in providing a particular professional service to a particular client, the member carries on only regulated activities which arise out of, or are complementary to, the provision by him of that service to that client: s 332(4). Rules made by a designated professional body under s 332(3) require the approval of the Authority: s 332(5).
10 As to regulated activities see PARA 84 et seq. For the purposes of the Financial Services and Markets Act 2000 s 332(3)(b), the reference to 'regulated activities' does not include:
   (1) any activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 10(1) or art 10(2) (see PARA 100), where P is a member of the Society (art 13(1)(a)(i)) and, by virtue of the Financial Services and Markets Act 2000 s 316 (application of the Act to Lloyd's underwriting) (see PARA 743), the general prohibition does not apply to the carrying on by P of that activity (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 13(1)(a)(ii)); or
   (2) any activity of the kind specified by art 10(2), where P is a former underwriting member (art 13(1)(b)(i)) and the contract of insurance in question is one underwritten by P at Lloyd's (art 13(1)(b)(ii)).

   As to the meanings of 'member of the Society' and 'former underwriting member' see the Lloyd's Act 1982 (see INSURANCE vol 25 (2003 Reissue) PARAS 24, 25); definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 13(2).
11 Financial Services and Markets Act 2000 s 332(3)(b). As to the meaning of 'exempt person' see PARA 80 note 4. See note 9.

757. False claims to be a person to whom the general prohibition does not apply. A person who: (1) describes himself (in whatever terms) as a person to whom the general prohibition[1] does not apply, in relation to a particular regulated activity[2], as a result of Part XX of the Financial Services and Markets Act 2000[3]; or (2) behaves, or otherwise holds himself out, in a manner which

indicates (or which is reasonably likely to be understood as indicating) that he is such a person, is guilty of an offence if he is not such a person[4]. In proceedings for such an offence, it is a defence for the accused to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence[5]. A person guilty of such an offence is liable on summary conviction to imprisonment or a fine or both[6]. However, where the conduct constituting the offence involved or included the public display of any material, the maximum fine for the offence is the fine multiplied by the number of days for which the display continued[7].

1 As to the general prohibition see PARA 80.
2 As to regulated activities see PARA 84 et seq.
3 Ie the Financial Services and Markets Act 2000 Pt XX (ss 325–333).
4 Financial Services and Markets Act 2000 s 333(1).
5 Financial Services and Markets Act 2000 s 333(2).
6 Financial Services and Markets Act 2000 s 333(3). Such a person is liable to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale, or both: see s 333(3). As to the standard scale see PARA 27 note 21.
7 Financial Services and Markets Act 2000 s 333(4). The reference is to level 5 on the standard scale so multiplied.

(vi) Mutual Societies and Industrial and Provident Societies

758. The Friendly Societies Commission. The Financial Services and Markets Act 2000 enabled the Treasury[1] to provide: (1) for any functions of the Friendly Societies Commission[2] to be transferred to the Financial Services Authority[3]; (2) for any functions of the Friendly Societies Commission not transferred to the Authority to be transferred to the Treasury[4]. It also gave the Treasury power to abolish the Friendly Societies Commission[5].

1 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
2 See also PARAS 2094, 2105. As to friendly societies generally see PARA 2081 et seq.
3 Financial Services and Markets Act 2000 s 334(1)(a). As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Prudential Standards, Interim Prudential Sourcebook for Friendly Societies (IPRU(FSOC)). As to the Handbook generally see PARA 22. As to the transfer of functions to the Authority see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 4(2). As to the application of the Financial Services and Markets Act 2000 in relation to functions transferred to the Authority see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, Sch 2. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1.
4 Financial Services and Markets Act 2000 s 334(1)(b). As to the transfer of functions to the Treasury see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, Sch 1 Pt II.
5 See the Financial Services and Markets Act 2000 s 334(2). The Friendly Societies Commission ceases to exist in accordance with the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 10.

As to the removal of certain restrictions on the ability of incorporated friendly societies to form subsidiaries and control corporate bodies and connected amendments see the Financial Services and Markets Act 2000 Sch 18 Pt II.

759. The Registry of Friendly Societies. The Financial Services and Markets Act 2000 enabled the Treasury[1] to provide for any functions of: (1) the Chief Registrar of Friendly Societies[2], or of an assistant registrar of friendly societies for the central registration area; (2) the central office of the registry of friendly societies; and (3) the assistant registrar of friendly societies for Scotland, to be transferred to the Financial Services Authority[3]. It enabled the Treasury to

provide for any of those functions not transferred to the Authority to be transferred to the Treasury[4]. The Financial Services and Markets Act 2000 also gave the Treasury power to abolish: (a) the office of Chief Registrar of Friendly Societies; (b) the office of assistant registrar of friendly societies for the central registration area; (c) the central office; or (d) the office of assistant registrar of friendly societies for Scotland[5].

1 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

2 See also PARAS 2094, 2105. As to friendly societies generally see PARA 2081 et seq.

3 Financial Services and Markets Act 2000 s 335(1)(a), (2)(a), (3)(a). As to the Financial Services Authority see PARAS 4, 6 et seq. As to the transfer of functions to the Authority see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 4(2). As to the application of the Financial Services and Markets Act 2000 in relation to functions transferred to the Authority see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, Sch 2. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

4 Financial Services and Markets Act 2000 s 335(1)(b), (2)(b), (3)(b). As to the transfer of functions to the Treasury see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, Sch 1 Pt I.

5 See the Financial Services and Markets Act 2000 s 335(4); and the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 12.

760. The Building Societies Commission. The Financial Services and Markets Act 2000 enabled the Treasury[1] to provide: (1) for any functions of the Building Societies Commission to be transferred to the Financial Services Authority[2]; (2) for any functions of the Building Societies Commission not transferred to the Authority to be transferred to the Treasury[3]. It also gave the Treasury power to abolish the Building Societies Commission[4].

1 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

2 Financial Services and Markets Act 2000 s 336(1)(a). As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Prudential Standards, General Prudential Sourcebook (GENPRU), Prudential Sourcebook for Building Societies (BIPRU), Interim Prudential Sourcebook for Building Societies (IPRU(BSOC)). As to the Handbook generally see PARA 22. As to the transfer of functions to the Authority see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 4(2). As to the application of the Financial Services and Markets Act 2000 in relation to functions transferred to the Authority see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, Sch 2. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to building societies generally see PARA 1856 et seq.

3 Financial Services and Markets Act 2000 s 336(1)(b). As to the transfer of functions to the Treasury see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, Sch 1 Pt III.

4 See the Financial Services and Markets Act 2000 s 336(2); and the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 9.

761. The Building Societies Investor Protection Board. The Financial Services and Markets Act 2000 enabled the Treasury[1] to abolish the Building Societies Investor Protection Board[2].

1 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

2 See the Financial Services and Markets Act 2000 s 337; and the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 11. As to orders made under the Financial Services and Markets Act 2000 s PARA 67 note 1. As to building societies generally see PARA 1856 et seq.

762. Industrial and provident societies and credit unions. The Financial Services and Markets Act 2000 enabled the Treasury[1] to provide for the transfer to the Financial Services Authority[2] of any functions conferred by: (1) the Industrial and Provident Societies Act 1965; (2) the Industrial and Provident Societies Act 1967; (3) the Friendly and Industrial and Provident Societies Act 1968; (4) the Industrial and Provident Societies Act 1975; (5) the Industrial and Provident Societies Act 1978; (6) the Credit Unions Act 1979[3]. It also enabled the Treasury to provide for the transfer to the Treasury of any functions under those enactments which were not transferred to the Authority[4].

1 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Credit Unions (CRED). As to the Handbook generally see PARA 22.
3 Financial Services and Markets Act 2000 s 338(1). As to the order that has been made see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to industrial and provident societies and credit unions generally see PARA 2394 et seq.
4 Financial Services and Markets Act 2000 s 338(2).

763. Provisions that may be included in orders. The additional powers conferred[1] on a person making an order under the Financial Services and Markets Act 2000 include power for the Treasury[2], when making an order in relation to mutual societies[3] transferring functions, to include provision[4]:

(1) for the transfer of any functions of a member of the body, or servant or agent of the body or person, whose functions are transferred by the order[5];
(2) for the transfer of any property, rights or liabilities held, enjoyed or incurred by any person in connection with transferred functions[6];
(3) for the carrying on and completion by or under the authority of the person to whom functions are transferred of any proceedings, investigations or other matters commenced, before the order takes effect, by or under the authority of the person from whom the functions are transferred[7];
(4) amending any enactment relating to transferred functions in connection with their exercise by, or under the authority of, the person to whom they are transferred[8];
(5) for the substitution of the person to whom functions are transferred for the person from whom they are transferred, in any instrument, contract or legal proceedings made or begun before the order takes effect[9].

The additional powers conferred[10] on a person making an order under the Financial Services and Markets Act 2000 include power for the Treasury, when making an order dissolving a mutual society[11], to include provision[12]:

(a) for the transfer of any property, rights or liabilities held, enjoyed or incurred by any person in connection with the office or body which ceases to have effect as a result of the order[13];
(b) for the carrying on and completion by or under the authority of such person as may be specified in the order of any proceedings, investigations or other matters commenced, before the order takes effect, by or under the authority of the person whose office, or the body which, ceases to exist as a result of the order[14];
(c) amending any enactment which makes provision with respect to that office or body[15];

(d) for the substitution of the Financial Services Authority[16], the Treasury or such other body as may be specified in the order in any instrument, contract or legal proceedings made or begun before the order takes effect[17].

On or after the making of an order[18] (the 'original order'), the Treasury may by order make any incidental, supplemental, consequential or transitional provision which it had power to include in the original order[19].

A certificate issued by the Treasury that property vested in a person immediately before an order under Part XXI of the Financial Services and Markets Act 2000[20] took effect has been transferred as a result of the order is conclusive evidence of the transfer[21].

1 Ie by the Financial Services and Markets Act 2000 s 428: see PARA 67 note 1.

2 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

3 Ie under the Financial Services and Markets Act 2000 s 334, s 335, s 336 or s 338: see PARAS 758–760, 762.

4 Financial Services and Markets Act 2000 s 339(1). See the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617; and the Financial Services and Markets Act 2000 (Consequential Amendments and Savings) (Industrial Assurance) Order 2001, SI 2001/3647. The provisions of the Financial Services and Markets Act 2000 s 339(1), (2) are not to be read as affecting in any way the powers conferred by s 428 (see PARA 67 note 1): s 339(5).

5 Financial Services and Markets Act 2000 s 339(1)(a). See note 4.

6 Financial Services and Markets Act 2000 s 339(1)(b). See the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 5 (consequential and transitional provisions in relation to transferred functions). See note 4.

7 Financial Services and Markets Act 2000 s 339(1)(c). See the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, arts 5, 6 (requirements to provide documents etc). As to the anticipatory exercise of powers see art 8. See note 4.

8 Financial Services and Markets Act 2000 s 339(1)(d). See the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 5. See note 4.

9 Financial Services and Markets Act 2000 s 339(1)(e). See the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 7 (consequential modification of non-statutory provisions). See note 4.

10 Ie by the Financial Services and Markets Act 2000 s 428: see PARA 67 note 1.

11 Ie under the Financial Services and Markets Act 2000 s 334(2), s 335(4), s 336(2) or s 337: see PARAS 759–761.

12 Financial Services and Markets Act 2000 s 339(2). See note 4.

13 Financial Services and Markets Act 2000 s 339(2)(a). See the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, arts 9–12. See note 4.

14 Financial Services and Markets Act 2000 s 339(2)(b). See note 4.

15 Financial Services and Markets Act 2000 s 339(2)(c). See the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, Sch 3 (amended by SI 2001/3647; SI 2001/3649). See note 4.

16 As to the Financial Services Authority see PARAS 4, 6 et seq.

17 Financial Services and Markets Act 2000 s 339(2)(d). See the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, arts 9–12. See note 4.

18 Ie under any of the provisions of the Financial Services and Markets Act 2000 ss 334–338: see PARAS 758–762.

19 Financial Services and Markets Act 2000 s 339(3). See the Financial Services and Markets Act 2000 (Transitional Provisions, Repeals and Savings) (Financial Services Compensation Scheme) Order 2001, SI 2001/2967.

20 Ie the Financial Services and Markets Act 2000 Pt XXI (ss 334–339).

21 Financial Services and Markets Act 2000 s 339(4).

(10) ACTUARIES AND AUDITORS

764. Appointment, resignation, etc. Rules[1] may require an authorised person[2], or an authorised person falling within a specified[3] class: (1) to appoint an auditor[4]; or (2) to appoint an actuary[5], if he is not already under an obligation to do so imposed by another enactment[6]. Rules may require an authorised person, or an authorised person falling within a specified class, to produce periodic financial reports and to have them reported on by an auditor or an actuary[7]. Rules may impose such other duties on auditors of, or actuaries acting for, authorised persons as may be specified[8]. An auditor or actuary appointed as a result of rules[9], or on whom duties are imposed by rules[10], must act in accordance with such provision as may be made by the rules, and has such powers in connection with the discharge of his functions as may be provided by the rules[11].

An auditor or actuary[12] must without delay notify the Financial Services Authority if he: (a) is removed from office by an authorised person[13]; (b) resigns before the expiry of his term of office with such a person[14]; or (c) is not re-appointed by such a person[15]. If he ceases to be an auditor of, or actuary acting for, such a person, he must without delay notify the Authority of any matter connected with his so ceasing which he thinks ought to be drawn to the Authority's attention, or notify it that there is no such matter[16].

1 As to the meaning of 'rule' see PARA 23 note 2. 'Auditors and actuaries rules' means rules made under the Financial Services and Markets Act 2000 s 340: s 417(1).
2 As to authorised persons see PARA 314.
3 Ie specified in rules: Financial Services and Markets Act 2000 s 340(7).
4 Financial Services and Markets Act 2000 s 340(1)(a). For the purposes of s 340(1)–(3), 'auditor' or 'actuary' means an auditor, or actuary, who satisfies such requirements as to qualifications, experience and other matters (if any) as may be specified: s 340(6).

Rules under s 340(1) may make provision: (1) specifying the manner in which and time within which an auditor or actuary is to be appointed; (2) requiring the Financial Services Authority to be notified of an appointment; (3) enabling the Authority to make an appointment if no appointment has been made or notified; (4) as to remuneration; (5) as to the term of office, removal and resignation of an auditor or actuary: s 340(4). As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Chs 3–4. As to the Handbook generally see PARA 22.
5 Financial Services and Markets Act 2000 s 340(1)(b). See note 4.
6 Financial Services and Markets Act 2000 s 340(1). See note 4.
7 Financial Services and Markets Act 2000 s 340(2).
8 Financial Services and Markets Act 2000 s 340(3).
9 Ie under the Financial Services and Markets Act 2000 s 340(1): see the text to notes 1–6.
10 Ie under the Financial Services and Markets Act 2000 s 340(3): see the text to note 8.
11 Financial Services and Markets Act 2000 s 340(5).
12 Ie an auditor or actuary of an authorised person appointed under or as a result of a statutory provision: Financial Services and Markets Act 2000 ss 342(1), (2), 344(1).
13 Financial Services and Markets Act 2000 s 344(2)(a).
14 Financial Services and Markets Act 2000 s 344(2)(b).
15 Financial Services and Markets Act 2000 s 344(2)(c).
16 Financial Services and Markets Act 2000 s 344(3).

765. Access to information. An appointed[1] auditor of, or an appointed actuary acting for, an authorised person[2]: (1) has a right of access at all times to the authorised person's books, accounts and vouchers[3]; and (2) is entitled to require from the authorised person's officers such information and explanations as he reasonably considers necessary for the performance of his duties as auditor or actuary[4].

1 'Appointed' means appointed under or as a result of the Financial Services and Markets Act 2000: s 341(2). As to the appointment of auditors and actuaries see PARA 764. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Chs 3–4. As to the Handbook generally see PARA 22.
2 As to authorised persons see PARA 314.
3 Financial Services and Markets Act 2000 s 341(1)(a).
4 Financial Services and Markets Act 2000 s 341(1)(b).

766. Disclosure of information to the Financial Services Authority. An auditor[1] or actuary[2] does not contravene any duty to which he is subject merely because he gives to the Financial Services Authority[3]: (1) information on a matter of which he has, or had, become aware in his capacity as auditor of, or actuary acting for, an authorised person or a person who has close links with an authorised person[4]; or (2) his opinion on such a matter, if he is acting in good faith and he reasonably believes that the information or opinion is relevant to any functions of the Authority[5].

The Treasury[6] may make regulations prescribing circumstances in which an auditor or actuary must communicate matters to the Authority[7]. It is the duty of an auditor or actuary to whom any such regulations apply to communicate a matter to the Authority in the circumstances prescribed by the regulations[8]. The matters to be communicated to the Authority in accordance with the regulations may include matters relating to persons other than the authorised person concerned[9].

1 These provisions apply: (1) to a person who is, or has been, an auditor of an authorised person appointed under or as a result of a statutory provision; and (2) to a person who: (a) is, or has been, an auditor of an authorised person appointed under or as a result of a statutory provision; and (b) is, or has been, an auditor of a person ('CL') who has close links with the authorised person: Financial Services and Markets Act 2000 ss 342(1), 343(1). As to authorised persons see PARA 314.

CL has close links with the authorised person concerned ('A') if CL is: (i) a parent undertaking of A; (ii) a subsidiary undertaking of A; (iii) a parent undertaking of a subsidiary undertaking of A; or (iv) a subsidiary undertaking of a parent undertaking of A: s 343(8). As to the meanings of 'parent undertaking' and 'subsidiary undertaking' see PARA 351 note 32. 'Subsidiary undertaking' includes all the instances mentioned in EC Seventh Council Directive 83/349 based on the article 54(3)(g) of the Treaty on Consolidated Accounts (OJ L193, 18.7.83, p 1) art 1(1), (2) in which an entity may be a subsidiary of an undertaking: Financial Services and Markets Act 2000 s 343(9).

2 These provisions apply: (1) to a person who is, or has been, an actuary acting for an authorised person and appointed under or as a result of a statutory provision; and (2) to a person who: (a) is, or has been, an actuary acting for an authorised person and appointed under or as a result of a statutory provision; and (b) is, or has been, an actuary acting for a person ('CL') who has close links with the authorised person: Financial Services and Markets Act 2000 ss 342(2), 343(2).
3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Chs 3–4. As to the Handbook generally see PARA 22.
4 Financial Services and Markets Act 2000 ss 342(3)(a), 343(3)(a). Sections 342(3), 343(3) apply whether or not the auditor or actuary is responding to a request from the Authority: ss 342(4), 343(4).
5 Financial Services and Markets Act 2000 ss 342(3)(b), 343(3)(b). See note 4.
6 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
7 Financial Services and Markets Act 2000 ss 342(5), 343(5). Regulations have been made which provide that an auditor to whom s 342 or s 343 applies must communicate to the Authority information on, or his opinion on, matters mentioned in head (2) in the text in the following circumstances (Financial Services and Markets Act 2000 (Communications by Auditors) Regulations 2001, SI 2001/2587, reg 2(1)):

(1) the auditor reasonably believes that, as regards the person concerned there is or has been, or may be or may have been, a contravention of any relevant requirement that applies to the person concerned, and that contravention may be of material significance

to the Authority in determining whether to exercise, in relation to the person concerned, any functions conferred on the Authority by or under any provision of the Financial Services and Markets Act 2000 other than Pt VI (ss 72–103) (official listing) (see PARA 385 et seq) (Financial Services and Markets Act 2000 (Communications by Auditors) Regulations 2001, SI 2001/2587, reg 2(2)(a));

(2) the auditor reasonably believes that the information on, or his opinion on, those matters may be of material significance to the Authority in determining whether the person concerned satisfies and will continue to satisfy the threshold conditions (reg 2(2)(b));

(3) the auditor reasonably believes that the person concerned is not, may not be or may cease to be a going concern (reg 2(2)(c));

(4) the auditor is precluded from stating in his report that the annual accounts or, where they are required to be made by any of the following provisions, other financial reports of the person concerned: (a) have been properly prepared in accordance with the Companies Act 2006 or, where applicable, give a true and fair view of the matters referred to in s 495(3) (formerly the Companies Act 1985 s 235(2)) (see COMPANIES); (b) have been prepared so as to conform with the requirements of the Building Societies Act 1986 Pt VIII (ss 71–81B) and the regulations made under it or, where applicable, give a true and fair view of the matters referred to in s 78(4) or s 78(7) (see PARA 2003); (c) have been prepared so as to conform with the Friendly Societies Act 1992 and the regulations made under it or, where applicable, give a true and fair view of the matters referred to in s 73(5A)–(5D) (see PARA 2343); (d) have been prepared so as to conform with the requirements of the Friendly and Industrial and Provident Societies Act 1968 or, where applicable, give a true and fair view of the matters referred to in s 9(2), (3) (see PARA 2515); or (e) have been prepared so as to conform with the requirements of rules made under the Financial Services and Markets Act 2000 where the auditor is, by rules made under s 340 (see PARA 764), required to make such a statement (see the Financial Services and Markets Act 2000 (Communications by Auditors) Regulations 2001, SI 2001/2587, reg 2(2)(d)); or

(5) where applicable, the auditor is required to state in his report in relation to the person concerned any of the facts referred to in the Companies Act 2006 s 498 (formerly the Companies Act 1985 s 237(2), (3), (4A)) (see COMPANIES) (see the Financial Services and Markets Act 2000 (Communications by Auditors) Regulations 2001, SI 2001/2587, reg 2(2)(e)).

'Person concerned' means in relation to an auditor of an authorised person, that authorised person; in relation to an auditor of a person who has close links (within the meaning of the Financial Services and Markets Act 2000 s 343: see note 1) with an authorised person, that authorised person: Financial Services and Markets Act 2000 (Communications by Auditors) Regulations 2001, SI 2001/2587, reg 1(2). 'Relevant requirement' means: a requirement which is imposed by or under any provision of the Financial Services and Markets Act 2000 other than Pt VI (listing) (see PARA 385 et seq) and which relates to authorisation under the Act (whether by way of permission under Pt IV (ss 40–55) (see PARA 348 et seq) or otherwise) or to the carrying on of any regulated activity; or a requirement which is imposed by or under any other Act and whose contravention constitutes an offence which the Authority has power to prosecute under the Financial Services and Markets Act 2000: Financial Services and Markets Act 2000 (Communications by Auditors) Regulations 2001, SI 2001/2587, reg 1(2). As to regulations made under the Financial Services and Markets Act 2000 generally see PARA 67 note 1.

Regulations have also been made which apply to any person who is, or has been, an actuary acting for an authorised person ('A') and who is or was appointed under or as a result of rules made by the Authority under the Financial Services and Markets Act 2000 s 340 (see PARA 764) or appointed under or as a result of any other statutory provision and subject to duties imposed by such rules (Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003, SI 2003/1294, reg 2(1)). Such an actuary and also an actuary acting for a person with close links with A (within the meaning of the Financial Services and Markets Act 2000 s 343(8): see note 1) must communicate to the Authority information on, or his opinion on, matters mentioned in head (2) of the text in the following circumstances (Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003, SI 2003/1294, reg 2(2), (3)):

(i) as regards A the actuary reasonably believes that (A) there is or has been, or may be or may have been, a contravention of any relevant requirement that applies to A; and (B) that contravention may be of material significance to the Authority in determining whether to exercise, in relation to A, any functions conferred on the Authority by or under any provision of the Financial Services and Markets Act 2000 other than Pt VI

(official listing) (see PARA 385 et seq) (Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003, SI 2003/1294, reg 2(4)(a));

(ii) the actuary reasonably believes that the information on, or his opinion on, those matters may be of material significance to the Authority in determining whether A satisfies and will continue to satisfy the threshold conditions (Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003, SI 2003/1294, reg 2(4)(b));

(iii) the actuary reasonably believes that, where applicable, there is a significant risk that assets representing a fund or funds maintained by A in respect of contracts of long-term insurance effected or carried out by him are or may be, or may become, insufficient to meet his liabilities attributable to such contracts (Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003, SI 2003/1294, reg 2(4)(c)); or

(iv) the actuary reasonably believes that, where applicable, there is a significant risk that A did not, does not or is unable to, or will not, may not or may become unable to, take into account in a reasonable and proportionate manner the interests of the policyholders of contracts of long-term insurance effected or carried out by him, and for these purposes the actuary may take into account: (A) the manner in which A exercises his discretion in relation to the operation of the fund or funds maintained by A in respect of contracts of long-term insurance effected or carried out by him, including the distribution and use of surplus assets; (B) the methodology used to determine bonuses; (C) the manner in which A takes into account the interests of different classes of policyholder; (D) the application of fixed or discretionary charges or benefits payable under such contracts; (E) representations made by A to policyholders or potential policyholders; and (F) any obligation (however phrased) imposed on A under the Financial Services and Markets Act 2000 to treat policyholders fairly (Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003, SI 2003/1294, reg 2(4)(d), (5)).

'Relevant requirement' means a requirement which is imposed by or under any provision of the Financial Services and Markets Act 2000 other than Pt VI (official listing) (see PARA 385 et seq); or a requirement which is imposed by or under any other Act and whose contravention constitutes an offence which the Authority has power to prosecute under the Financial Services and Markets Act 2000: Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003, SI 2003/1294, reg 1(2). 'Contract of long-term insurance' has the same meaning as in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544 (see PARA 90 note 3): Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003, SI 2003/1294, reg 1(2).

8 Financial Services and Markets Act 2000 ss 342(6), 343(6).

9 Financial Services and Markets Act 2000 ss 342(7), 343(7).

767. Disqualification for failure to comply with a duty. If it appears to the Financial Services Authority[1] that an auditor or actuary[2] has failed to comply with a duty imposed on him under the Financial Services and Markets Act 2000, it may disqualify him from being the auditor of, or (as the case may be) from acting as an actuary for, any authorised person or any particular class of authorised person[3]. If the Authority proposes to disqualify a person in this way it must give him a warning notice[4]. If it decides to disqualify him it must give him a decision notice[5]. The Authority may remove any disqualification if satisfied that the disqualified person will in future comply with the duty in question[6]. A person who has been disqualified may refer the matter to the Financial Services and Markets Tribunal[7].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Chs 3–4, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 Ie an auditor or actuary of an authorised person appointed under or as a result of a statutory provision: Financial Services and Markets Act 2000 ss 342(1), (2), 345(1). As to authorised persons see PARA 314.

3 Financial Services and Markets Act 2000 s 345(1). An auditor may also be disqualified for breaching trust scheme rules: see s 249; and PARA 616.

4 Financial Services and Markets Act 2000 s 345(2). As to warning notices see PARA 769.
5 Financial Services and Markets Act 2000 s 345(3). As to decision notices see PARA 770.
6 Financial Services and Markets Act 2000 s 345(4).
7 Financial Services and Markets Act 2000 s 345(5). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

768. Penalty for provision of false or misleading information. An authorised person[1] who knowingly or recklessly gives an auditor or actuary appointed under or as a result of the Financial Services and Markets Act 2000[2] information which is false or misleading in a material particular is guilty of an offence and liable to imprisonment or a fine or both[3].

1 As to authorised persons see PARA 314.
2 See the Financial Services and Markets Act 2000 s 346(3). As to the appointment of auditors and actuaries see PARA 764.
3 Financial Services and Markets Act 2000 s 346(1). The authorised person is liable (1) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both; (2) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both: see s 346(1). As to the statutory maximum see PARA 56 note 24.

Section 346(1) applies equally to an officer, controller or manager of an authorised person: s 346(2). As to the meaning of 'controller' see PARA 591 note 16. As to the meaning of 'manager' see PARA 86 note 11.

(11) MISCELLANEOUS PROCEDURAL AND OTHER MATTERS

(i) Procedure for Notices given by the Financial Services Authority

769. Warning notices. A warning notice must:

(1) state the action which the Financial Services Authority[1] proposes to take[2];
(2) be in writing[3];
(3) give reasons for the proposed action[4];
(4) state whether the statutory provision relating to access to Authority material[5] applies[6]; and
(5) if that provision applies, describe its effect and state whether any secondary material exists to which the person concerned must be allowed access under it[7].

The warning notice must specify a reasonable period (which may not be less than 28 days) within which the person to whom it is given may make representations to the Authority[8]. The Authority may extend the period specified in the notice[9]. The Authority must then decide, within a reasonable period, whether to give the person concerned a decision notice[10].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.
2 Financial Services and Markets Act 2000 s 387(1)(a).
3 Financial Services and Markets Act 2000 s 387(1)(b).
4 Financial Services and Markets Act 2000 s 387(1)(c).
5 Ie the Financial Services and Markets Act 2000 s 394: see PARA 776.
6 Financial Services and Markets Act 2000 s 387(1)(d).
7 Financial Services and Markets Act 2000 s 387(1)(e).
8 Financial Services and Markets Act 2000 s 387(2).
9 Financial Services and Markets Act 2000 s 387(3).
10 Financial Services and Markets Act 2000 s 387(4). As to decision notices see PARA 770.

770. Decision notices. A decision notice must:

(1) be in writing[1];

(2) give the Financial Services Authority's[2] reasons for the decision to take the action to which the notice relates[3];

(3) state whether the statutory provision relating to access to Authority material[4] applies[5];

(4) if that provision applies, describe its effect and state whether any secondary material exists to which the person concerned must be allowed access under it[6]; and

(5) give an indication of: (a) any right to have the matter referred to the Financial Services and Markets Tribunal[7] which is given by the Financial Services and Markets Act 2000; and (b) the procedure on such a reference[8].

If the decision notice was preceded by a warning notice[9], the action to which the decision notice relates must be action under the same Part of the Financial Services and Markets Act 2000 as the action proposed in the warning notice[10]. The Authority may, before it takes the action to which a decision notice (the 'original notice') relates, give the person concerned a further decision notice which relates to different action in respect of the same matter[11].

1 Financial Services and Markets Act 2000 s 388(1)(a).
2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.
3 Financial Services and Markets Act 2000 s 388(1)(b).
4 Ie the Financial Services and Markets Act 2000 s 394: see PARA 776.
5 Financial Services and Markets Act 2000 s 388(1)(c).
6 Financial Services and Markets Act 2000 s 388(1)(d).
7 As to the Financial Services and Markets Tribunal see PARA 43 et seq.
8 Financial Services and Markets Act 2000 s 388(1)(e).
9 As to warning notices see PARA 769.
10 Financial Services and Markets Act 2000 s 388(2).
11 Financial Services and Markets Act 2000 s 388(3). The Authority may give a further decision notice as a result of s 388(3) only if the person to whom the original notice was given consents: s 388(4). If the person to whom a decision notice is given under s 388(3) had the right to refer the matter to which the original decision notice related to the Tribunal, he has that right as respects the decision notice under s 388(3): s 388(5).

771. Notices of discontinuance. If the Financial Services Authority[1] decides not to take: (1) the action proposed in a warning notice[2]; or (2) the action to which a decision notice relates[3], it must give a notice of discontinuance to the person to whom the warning notice or decision notice was given[4]. This does not apply if the discontinuance of the proceedings concerned results in the granting of an application made by the person to whom the warning or decision notice was given[5]. A notice of discontinuance must identify the proceedings which are being discontinued[6].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.
2 Financial Services and Markets Act 2000 s 389(1)(a). As to warning notices see PARA 769.
3 Financial Services and Markets Act 2000 s 389(1)(b). As to decision notices see PARA 770.
4 Financial Services and Markets Act 2000 s 389(1).
5 Financial Services and Markets Act 2000 s 389(2).
6 Financial Services and Markets Act 2000 s 389(3).

772. Final notices. If the Financial Services Authority[1] has given a person a decision notice[2] and the matter was not referred to the Financial Services and Markets Tribunal[3] within the 28-day period[4], the Authority must, on taking the action to which the decision notice relates, give the person concerned and any person to whom the decision notice was copied a final notice[5]. If the Authority has given a person a decision notice and the matter was referred to the Tribunal, the Authority must, on taking action in accordance with any directions given by the Tribunal or the court[6], give that person and any person to whom the decision notice was copied a final notice[7].

A final notice about a statement must set out the terms of the statement and give details of the manner in which, and the date on which, the statement will be published[8]. A final notice about an order must set out the terms of the order and state the date from which the order has effect[9]. A final notice about a penalty must state the amount of the penalty, state the manner in which, and the period within which[10], the penalty is to be paid and give details of the way in which the penalty will be recovered if it is not paid by the date stated in the notice[11]. A final notice about a requirement to make a payment or distribution[12] must state the persons to whom, the manner in which and the period within which[13], it must be made[14]. In any other case, the final notice must give details of the action being taken and state the date on which the action is to be taken[15].

If all or any of the amount of a penalty payable under a final notice is outstanding at the end of the period stated, the Authority may recover the outstanding amount as a debt due to it[16]. If all or any of a required payment or distribution has not been made at the end of a period stated in a final notice, the obligation to make the payment is enforceable, on the application of the Authority, by injunction[17].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.
2 As to decision notices see PARA 770.
3 As to the Financial Services and Markets Tribunal see PARA 43 et seq.
4 Ie the period mentioned in the Financial Services and Markets Act 2000 s 133(1): see PARA 46.
5 Financial Services and Markets Act 2000 s 390(1).
6 Ie under the Financial Services and Markets Act 2000 s 137 (appeal on a point of law): see PARA 69.
7 Financial Services and Markets Act 2000 s 390(2).
8 Financial Services and Markets Act 2000 s 390(3).
9 Financial Services and Markets Act 2000 s 390(4).
10 The period may not be less than 14 days beginning with the date on which the final notice is given: Financial Services and Markets Act 2000 s 390(8).
11 Financial Services and Markets Act 2000 s 390(5).
12 Ie in accordance with the Financial Services and Markets Act 2000 s 384(5): see PARA 474.
13 See note 10.
14 Financial Services and Markets Act 2000 s 390(6).
15 Financial Services and Markets Act 2000 s 390(7).
16 Financial Services and Markets Act 2000 s 390(9).
17 Financial Services and Markets Act 2000 s 390(10). As to injunctions see generally INJUNCTIONS.

773. Supervisory notice. The Financial Services Authority[1] may give a supervisory notice in the following circumstances[2]. The circumstances are that the Authority proposes:

(1) to vary a permission to carry on regulated activities[3];
(2) to discontinue or suspend the listing of securities on its own initiative[4];

(3) to discontinue or suspend the listing of securities on the application of the issuer[5];

(4) to suspend trading in a financial instrument[6];

(5) to suspend or prohibit an offer to the public or the admission to trading on a regulated market[7];

(6) to exercise its power of intervention[8];

(7) to give a direction in relation to an authorised unit trust scheme[9];

(8) to give a direction in relation to a recognised overseas scheme[10];

(9) to impose a requirement on a former underwriting member of Lloyd's[11].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 Financial Services and Markets Act 2000 s 395(13) (amended by SI 2005/381; SI 2005/1433; SI 2007/1973). 'Supervisory notice' means a notice given in accordance with the provisions mentioned in notes 3–11: see the Financial Services and Markets Act 2000 s 395(13) (as so amended). Section 395 has effect as if s 395(13) included a reference to a notice given in accordance with the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(3), (8) or (9)(b): see reg 27(15); and PARA 634.

3 Ie in accordance with the Financial Services and Markets Act 2000 s 53(4), (7) or (8)(b): see PARA 357. As to regulated activities see PARA 84 et seq.

4 Ie in accordance with the Financial Services and Markets Act 2000 s 78(2) or (5): see PARA 389. As to the meaning of 'listing' see PARA 387 note 2; and as to the meaning of 'securities' see PARA 385 note 21.

5 Ie in accordance with the Financial Services and Markets Act 2000 s 78A(2) or (8)(b): see PARA 389. As to the meaning of 'issuer' see PARA 385 note 21.

6 Ie in accordance with the Financial Services and Markets Act 2000 s 96C: see PARA 390. As to the meaning of 'financial instrument' see PARA 385 note 12.

7 Ie in accordance with the Financial Services and Markets Act 2000 s 87O(2) or (5): see PARAS 406, 407.

8 Ie under the Financial Services and Markets Act 2000 s 197(3), (6) or (7)(b): see PARA 458.

9 Ie under the Financial Services and Markets Act 2000 s 259(3), (8) or (9)(b): see PARA 619.

10 Ie under the Financial Services and Markets Act 2000 s 268(3), (7)(a) or (9)(a) or s 282(3), (6) or (7)(b): see PARAS 674, 679.

11 Ie under the Financial Services and Markets Act 2000 s 321(2) or (5): see PARA 747.

774. Publication. Neither the Financial Services Authority[1] nor a person to whom a warning notice[2] or decision notice[3] is given or copied may publish the notice or any details concerning it[4].

A notice of discontinuance[5] must state that, if the person to whom the notice is given consents, the Authority may publish such information as it considers appropriate about the matter to which the discontinued proceedings related[6]. A copy of a notice of discontinuance must be accompanied by a statement that, if the person to whom the notice is copied consents, the Authority may publish such information as it considers appropriate about the matter to which the discontinued proceedings related, so far as relevant to that person[7].

The Authority must publish such information about the matter to which a final notice[8] relates as it considers appropriate[9].

When a supervisory notice[10] takes effect, the Authority must publish such information about the matter to which the notice relates as it considers appropriate[11].

The Authority may not publish information if publication of it would, in its opinion, be unfair to the person with respect to whom the action was taken or prejudicial to the interests of consumers[12]. Information is to be published in such manner as the Authority considers appropriate[13].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.
2 As to warning notices see PARA 769.
3 As to decision notices see PARA 770.
4 Financial Services and Markets Act 2000 s 391(1). As to the distinction between disclosure of information under s 348 (see PARA 479) and its publication see *Real Estate Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd* [2007] EWCA Civ 197, [2007] 2 All ER 791.
5 'Notice of discontinuance' means a notice given under the Financial Services and Markets Act 2000 s 389 (see PARA 771): s 391(9).
6 Financial Services and Markets Act 2000 s 391(2).
7 Financial Services and Markets Act 2000 s 391(3).
8 As to final notices see PARA 772.
9 Financial Services and Markets Act 2000 s 391(4).
10 As to the meaning of 'supervisory notice' see PARA 773 note 2; definition applied by the Financial Services and Markets Act 2000 s 391(10).
11 Financial Services and Markets Act 2000 s 391(5). For the purposes of determining when a supervisory notice takes effect, a matter to which the notice relates is open to review if: (1) the period during which any person may refer the matter to the Financial Services and Markets Tribunal is still running; (2) the matter has been referred to the Tribunal but has not been dealt with; (3) the matter has been referred to the Tribunal and dealt with but the period during which an appeal may be brought against the Tribunal's decision is still running; or (4) such an appeal has been brought but has not been determined: s 391(8). As to the Financial Services and Markets Tribunal see PARA 43 et seq.
12 Financial Services and Markets Act 2000 s 391(6). 'Consumers' means persons who are consumers for the purposes of s 138 (see PARA 21 note 5): s 391(11).
13 Financial Services and Markets Act 2000 s 391(7).

775. Third party rights. If any of the reasons contained in a warning notice[1] relates to a matter which identifies a person (the 'third party') other than the person to whom the notice is given, and, in the opinion of the Financial Services Authority[2], is prejudicial to the third party, a copy of the notice must be given to the third party[3]. A copy does not need to be given to the third party if the Authority: (1) has given him a separate warning notice in relation to the same matter[4]; or (2) gives him such a notice at the same time as it gives the warning notice which identifies him[5]. The notice copied to a third party[6] must specify a reasonable period (which may not be less than 28 days) within which he may make representations to the Authority[7].

If any of the reasons contained in a decision notice[8] relates to a matter which identifies a person (the 'third party') other than the person to whom the decision notice is given, and in the opinion of the Authority, is prejudicial to the third party, a copy of the notice must be given to the third party[9]. A copy does not need to be given to the third party if the Authority: (a) has given him a separate decision notice in relation to the same matter[10]; or (b) gives him such a notice at the same time as it gives the decision notice which identifies him[11]. If the person to whom a decision notice is given has a right to refer the matter to the Financial Services and Markets Tribunal[12], then:

(i) a person to whom a copy of the notice is given under these provisions may refer to the Tribunal the decision in question[13], or any opinion expressed by the Authority in relation to him[14];

(ii) the copy must be accompanied by an indication of the third party's right to make a reference to the Tribunal[15] and of the procedure on such a reference[16];

(iii) a person who alleges that a copy of the notice should have been given to

him, but was not, may refer to the Tribunal the alleged failure and the decision in question[17], or any opinion expressed by the Authority in relation to him[18].

The statutory provision relating to access to Authority material[19] applies to a third party as it applies to the person to whom the notice was given, in so far as the material which the Authority must disclose[20] relates to the matter which identifies the third party[21].

Any person to whom a warning notice or decision notice was copied under the provisions described above must be given a copy of a notice of discontinuance[22] applicable to the proceedings to which the warning notice or decision notice related[23].

1 As to warning notices see PARA 769. The Financial Services and Markets Act 2000 s 393 applies to a warning notice given in accordance with s 54(1) (see PARA 357), s 57(1) (see PARA 365), s 63(3) (see PARA 371), s 67(1) (see PARA 374), s 88(4)(b) (see PARA 426), s 89(2) (see PARA 426), s 92(1) (see PARA 429), s 126(1) (see PARA 442), s 207(1) (see PARA 468), s 255(1) (see PARA 613), s 280(1) (see PARA 679), s 331(1) (see PARA 755), s 345(2) (see PARA 767) (whether as a result of s 345(1) or s 249(1) (see PARA 616)), s 385(1) (see PARA 474) or s 412B(4) or (8) (see PARA 783): s 392(a) (amended by SI 2007/126).

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

3 Financial Services and Markets Act 2000 s 393(1). Section 393(1) does not require a copy of the notice to be given to a third party if the Authority considers it impracticable to do so: s 393(7).

4 Financial Services and Markets Act 2000 s 393(2)(a).

5 Financial Services and Markets Act 2000 s 393(2)(b).

6 Ie under the Financial Services and Markets Act 2000 s 393(1): see the text to notes 1–3.

7 Financial Services and Markets Act 2000 s 393(3).

8 As to decision notices see PARA 770. The Financial Services and Markets Act 2000 s 393 applies to a decision notice given in accordance with s 54(2) (see PARA 357), s 57(3) (see PARA 365), s 63(4) (see PARA 371), s 67(4) (see PARA 374), s 88(6)(b) (see PARA 426), s 89(3) (see PARA 426), s 92(4) (see PARA 429), s 127(1) (see PARA 442), s 208(1) (see PARA 469), s 255(2) (see PARA 613), s 280(2) (see PARA 679), s 331(3) (see PARA 755), s 345(3) (see PARA 767) (whether as a result of s 345(1) or s 249(1) (see PARA 616)), s 386(1) (see PARA 474) or s 412B(5) or (9) (see PARA 783): s 392(b) (amended by SI 2007/126).

9 Financial Services and Markets Act 2000 s 393(4). If the decision notice was preceded by a warning notice, a copy of the decision notice must (unless it has been given under s 393(4)) be given to each person to whom the warning notice was copied: s 393(5). Section 393(4) does not require a copy of the notice to be given to a third party if the Authority considers it impracticable to do so: s 393(7).

10 Financial Services and Markets Act 2000 s 393(6)(a).

11 Financial Services and Markets Act 2000 s 393(6)(b).

12 Financial Services and Markets Act 2000 s 393(8). As to the Financial Services and Markets Tribunal see PARA 43 et seq. As to the modified application of the provisions of the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, in regard to the filing of an Authority notice, statements of case and lists of documents where the reference was made under the Financial Services and Markets Act 2000 s 393(9) or s 393(11) see PARAS 47, 48 and 50.

13 Ie so far as it is based on a reason of the kind mentioned in the Financial Services and Markets Act 2000 s 393(4): see the text to note 9.

14 Financial Services and Markets Act 2000 s 393(9). See note 12.

15 Ie under the Financial Services and Markets Act 2000 s 393(9): see the text to note 14.

16 Financial Services and Markets Act 2000 s 393(10).

17 Ie so far as it is based on a reason of the kind mentioned in the Financial Services and Markets Act 2000 s 393(4): see the text to note 9.

18 Financial Services and Markets Act 2000 s 393(11). See note 12.

19 Ie the Financial Services and Markets Act 2000 s 394: see PARA 776.

20 Ie under the Financial Services and Markets Act 2000 s 394: see PARA 776.

21 Financial Services and Markets Act 2000 s 393(12). A copy of a notice given to a third party under s 393 must be accompanied by a description of the effect of s 394 (see PARA 776) as it applies to him: s 393(13).

22 As to notices of discontinuance see PARA 771.

23 Financial Services and Markets Act 2000 s 393(14).

776. Access to material. If the Financial Services Authority[1] gives a person ('A') a notice[2], it must: (1) allow him access to the material on which it relied in taking the decision which gave rise to the obligation to give the notice[3]; (2) allow him access to any secondary material[4] which, in the opinion of the Authority, might undermine that decision[5]. However, the Authority does not have to allow A access to material if the material is excluded material[6] or if it: (a) relates to a case involving a person other than A[7]; and (b) was taken into account by the Authority in A's case only for purposes of comparison with other cases[8].

The Authority may refuse A access to particular material which it would otherwise have to allow him access to if, in its opinion, allowing him access to the material: (i) would not be in the public interest[9]; or (ii) would not be fair, having regard to the likely significance of the material to A in relation to the matter in respect of which he has been given a notice, and the potential prejudice to the commercial interests of a person other than A which would be caused by the material's disclosure[10].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 The Financial Services and Markets Act 2000 s 394 applies to a warning notice given in accordance with s 54(1) (see PARA 357), s 57(1) (see PARA 365), s 63(3) (see PARA 371), s 67(1) (see PARA 374), s 88(4)(b) (see PARA 426), s 89(2) (see PARA 426), s 92(1) (see PARA 429), s 126(1) (see PARA 442), s 207(1) (see PARA 468), s 255(1) (see PARA 613), s 280(1) (see PARA 679), s 331(1) (see PARA 755), s 345(2) (see PARA 767) (whether as a result of s 345(1) or s 249(1) (see PARA 616)), s 385(1) (see PARA 474) or s 412B(4) or (8) (see PARA 783): s 392(a) (amended by SI 2007/126). As to warning notices see PARA 769. The Financial Services and Markets Act 2000 s 394 also applies to a decision notice given in accordance with s 54(2) (see PARA 357), s 57(3) (see PARA 365), s 63(4) (see PARA 371), s 67(4) (see PARA 374), s 88(6)(b) (see PARA 426), s 89(3) (see PARA 426), s 92(4) (see PARA 429), s 127(1) (see PARA 442), s 208(1) (see PARA 469), s 255(2) (see PARA 613), s 280(2) (see PARA 679), s 331(3) (see PARA 755), s 345(3) (see PARA 767) (whether as a result of s 345(1) or s 249(1) (see PARA 616)), s 386(1) (see PARA 474) or s 412B(5) or (9) (see PARA 783): s 392(b) (amended by SI 2007/126). As to decision notices see PARA 770.

3 Financial Services and Markets Act 2000 s 394(1)(a).

4 'Secondary material' means material, other than material falling within head (1) in the text which: (1) was considered by the Authority in reaching the decision mentioned in that head; or (2) was obtained by the Authority in connection with the matter to which the notice relates but which was not considered by it in reaching that decision: Financial Services and Markets Act 2000 s 394(6).

5 Financial Services and Markets Act 2000 s 394(1)(b).

6 'Excluded material' means material which: (1) is material the disclosure of which for the purposes of or in connection with any legal proceedings is prohibited by the Regulation of Investigatory Powers Act 2000 s 17 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 519); or (2) is a protected item (as defined in the Financial Services and Markets Act 2000 s 413 (see PARA 784)): s 394(7) (amended by the Regulation of Investigatory Powers Act 2000 Sch 4 para 11). See note 7.

7 Financial Services and Markets Act 2000 s 394(2)(a). If the Authority does not allow A access to material because it is excluded material consisting of a protected item, it must give A written notice of: (1) the existence of the protected item; and (2) the Authority's decision not to allow him access to it: s 394(4).

8 Financial Services and Markets Act 2000 s 394(2)(b). See note 7.

9 Financial Services and Markets Act 2000 s 394(3)(a). If the Authority refuses under s 394(3) to allow A access to material, it must give him written notice of: (1) the refusal; and (2) the reasons for it: s 394(5).

10 Financial Services and Markets Act 2000 s 394(3)(b). See note 9.

777. Procedure for Financial Services Authority notices. The Financial Services Authority[1] must determine the procedure that it proposes to follow in relation to the giving of: (1) supervisory notices[2]; and (2) warning notices[3] and decision notices[4]. That procedure must be designed to secure, among other things, that the decision which gives rise to the obligation to give any such notice is taken by a person not directly involved in establishing the evidence on which that decision is based[5]. However, the procedure may permit a decision which gives rise to an obligation to give a supervisory notice to be taken by a person other than a person mentioned above[6] if: (a) the Authority considers that, in the particular case, it is necessary in order to protect the interests of consumers[7]; and (b) the person taking the decision is of a level of seniority laid down by the procedure[8].

The Authority must issue a statement of the procedure[9]. The statement must be published in the way appearing to the Authority to be best calculated to bring it to the attention of the public[10]. The Authority may charge a reasonable fee for providing a person with a copy of the statement[11]. The Authority must, without delay, give the Treasury a copy of any statement which it issues under these provisions[12].

When giving a supervisory notice, or a warning notice or decision notice, the Authority must follow its stated procedure[13]. If the Authority changes the procedure in a material way, it must publish a revised statement[14]. The Authority's failure in a particular case to follow its procedure as set out in the latest published statement does not affect the validity of a notice given in that case[15].

Before issuing a statement of procedure[16], the Authority must publish a draft of the proposed statement in the way appearing to the Authority to be best calculated to bring it to the attention of the public[17]. The draft must be accompanied by notice that representations about the proposal may be made to the Authority within a specified time[18]. Before issuing the proposed statement of procedure, the Authority must have regard to any representations made to it[19]. If the Authority issues the proposed statement of procedure it must publish an account, in general terms, of: (i) the representations made to it[20]; and (ii) its response to them[21]. If the statement of procedure differs from the published draft in a way which is, in the opinion of the Authority, significant, the Authority must publish details of the difference[22]. These requirements[23] also apply to a proposal to revise a statement of policy[24].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.
2 As to supervisory notices see PARA 773.
3 As to warning notices see PARA 769.
4 Financial Services and Markets Act 2000 s 395(1). As to decision notices see PARA 770.
5 Financial Services and Markets Act 2000 s 395(2).
6 Ie a person mentioned in the Financial Services and Markets Act 2000 s 395(2): see the text to note 5.
7 Financial Services and Markets Act 2000 s 395(3)(a).
8 Financial Services and Markets Act 2000 s 395(3)(b). A level of seniority laid down by the procedure for the purposes of s 395(3)(b) must be appropriate to the importance of the decision: s 395(4).
9 Financial Services and Markets Act 2000 s 395(5).
10 Financial Services and Markets Act 2000 s 395(6).
11 Financial Services and Markets Act 2000 s 395(7).
12 Financial Services and Markets Act 2000 s 395(8).
13 Financial Services and Markets Act 2000 s 395(9).

14 Financial Services and Markets Act 2000 s 395(10).
15 Financial Services and Markets Act 2000 s 395(11). However, s 395(11) does not prevent the Financial Services and Markets Tribunal from taking into account any such failure in considering a matter referred to it: s 395(12). As to the Financial Services and Markets Tribunal see PARA 43 et seq.
16 Ie under the Financial Services and Markets Act 2000d s 395: see the text and notes 1–15.
17 Financial Services and Markets Act 2000 s 396(1). The Authority may charge a reasonable fee for providing a person with a copy of a draft published under s 396(1): s 396(6).
18 Financial Services and Markets Act 2000 s 396(2).
19 Financial Services and Markets Act 2000 s 396(3).
20 Financial Services and Markets Act 2000 s 396(4)(a).
21 Financial Services and Markets Act 2000 s 396(4)(b).
22 Financial Services and Markets Act 2000 s 396(5). This requirement is in addition to complying with s 396(4): see the text to notes 20, 21.
23 Ie the requirements of the Financial Services and Markets Act 2000 s 396: see the text and notes 16–22.
24 Financial Services and Markets Act 2000 s 396(7).

(ii) Miscellaneous Matters

A. REVIEW OF PAST BUSINESS

778. Schemes for reviewing past business. If the Treasury[1] is satisfied that there is evidence suggesting: (1) that there has been a widespread or regular failure[2] on the part of authorised persons[3] to comply with rules[4] relating to a particular kind of activity; and (2) that, as a result, private persons[5] have suffered (or will suffer) loss in respect of which authorised persons are (or will be) liable to make payments ('compensation payments'), the Treasury may make a scheme order[6]. A scheme order authorises the Financial Services Authority[7] to establish and operate a scheme for: (a) determining the nature and extent of the failure[8]; (b) establishing the liability of authorised persons to make compensation payments[9]; and (c) determining the amounts payable by way of compensation payments[10]. An authorised scheme[11] must be made so as to comply with specified[12] requirements[13]. A scheme order may be made only if: (i) the Authority has given the Treasury a report about the alleged failure and asked it to make a scheme order[14]; (ii) the report contains details of the scheme which the Authority proposes to make[15]; and (iii) the Treasury is satisfied that the proposed scheme is an appropriate way of dealing with the failure[16]. A scheme order may provide for specified provisions of or made under the Financial Services and Markets Act 2000 to apply in relation to any provision of, or determination made under, the resulting authorised scheme subject to such modifications (if any) as may be specified[17]. For the purposes of the Financial Services and Markets Act 2000, failure on the part of an authorised person to comply with any provision of an authorised scheme is to be treated (subject to any provision made by the scheme order concerned) as a failure on his part to comply with rules[18]. The Treasury may prescribe circumstances in which loss suffered by a person ('A') acting in a fiduciary or other prescribed capacity is to be treated, for the purposes of an authorised scheme, as suffered by a private person in relation to whom A was acting in that capacity[19].

No order is to be made under the provisions described above[20] unless a draft of the order has been laid before Parliament and approved by a resolution of each House[21].

1 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

2 The provisions of the Financial Services and Markets Act 2000 s 404 apply whenever the failure in question occurred: s 404(8).
3 As to authorised persons see PARA 314.
4 As to the meaning of 'rule' see PARA 23 note 2.
5 'Private person' has such meaning as may be prescribed: Financial Services and Markets Act 2000 s 404(10). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). At the date at which this volume states the law no such regulations had been made.
6 Financial Services and Markets Act 2000 s 404(1), (2). As to orders under the Financial Services and Markets Act 2000 generally see PARA 67 note 1.

Transitional provision has been made to provide that reviews of pension selling being conducted under the Financial Services Act 1986 are to be treated as if they constituted a scheme under the Financial Services and Markets Act 2000 s 404: see the Financial Services and Markets Act 2000 (Transitional Provisions) (Reviews of Pension Business) Order 2001, SI 2001/2512.

7 As to the Financial Services Authority see PARAS 4, 6 et seq.
8 Financial Services and Markets Act 2000 s 404(2)(a).
9 Financial Services and Markets Act 2000 s 404(2)(b).
10 Financial Services and Markets Act 2000 s 404(2)(c).
11 'Authorised scheme' means a scheme authorised by a scheme order: Financial Services and Markets Act 2000 s 404(9).
12 Ie specified in a scheme order: Financial Services and Markets Act 2000 s 404(11).
13 Financial Services and Markets Act 2000 s 404(3).
14 Financial Services and Markets Act 2000 s 404(4)(a).
15 Financial Services and Markets Act 2000 s 404(4)(b).
16 Financial Services and Markets Act 2000 s 404(4)(c).
17 Financial Services and Markets Act 2000 s 404(5).
18 Financial Services and Markets Act 2000 s 404(6).
19 Financial Services and Markets Act 2000 s 404(7).
20 Ie under the Financial Services and Markets Act 2000 s 404.
21 Financial Services and Markets Act 2000 s 429(1)(a).

B. IMPLEMENTATION OF FOREIGN DECISIONS AND INTERNATIONAL OBLIGATIONS

779. Third countries. For the purpose of implementing a third country decision[1], the Treasury[2] may direct the Financial Services Authority[3] to: (1) refuse an application for permission to carry on regulated activities[4] made by a body incorporated in, or formed under the law of, any part of the United Kingdom[5]; (2) defer its decision on such an application either indefinitely or for such period as may be specified in the direction[6]; (3) give a notice of objection to a person who has served a notice of control[7] to the effect that he proposes to acquire a 50 per cent stake[8] in a UK authorised person[9]; or (4) give a notice of objection to a person who has acquired a 50 per cent stake in a UK authorised person without having served the required notice of control[10]. A direction may also be given in relation to: (a) any person falling within a class specified in the direction; (b) future applications, notices of control or acquisitions[11]. The Treasury may revoke a direction at any time[12], but revocation does not affect anything done in accordance with the direction before it was revoked[13].

If a third country decision[14] has been taken, the Treasury may make a determination[15] in relation to an EFTA firm[16] which is a subsidiary undertaking[17] of a parent undertaking[18] which is governed by the law of the country to which the decision relates[19]. A determination may also be made in relation to any firm falling within a class specified in the determination[20]. The Treasury may withdraw a determination at any time[21], but withdrawal does not affect anything done in accordance with the determination before it was withdrawn[22]. If the Treasury makes a determination in respect of a particular firm, or withdraws such a determination, it must give written notice to that firm[23]. The Treasury must publish notice of any determination (or the

withdrawal of any determination) in such a way as it thinks most suitable for bringing the determination (or withdrawal) to the attention of those likely to be affected by it, and on, or as soon as practicable after, the date of the determination (or withdrawal)[24].

The Treasury may by order modify certain provisions of the Financial Services and Markets Act 2000 in relation to firms which have their head office in Gibraltar or are otherwise connected with Gibraltar[25].

1 'Third country decision' means a decision of the EC Council or the European Commission under: (1) the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 15(3); (2) the First Non-Life Insurance Directive (ie EEC Directive 73/239 (OJ L228, 16.8.73, p 3) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance) art 29b(4); or (3) the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12. 2002, p 1) concerning life assurance) art 59(4): Financial Services and Markets Act 2000 s 405(5) (amended by SI 2004/3379: SI 2006/3221; SI 2007/126).

2 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

3 As to the Financial Services Authority see PARAS 4, 6 et seq.

4 Ie under the Financial Services and Markets Act 2000 Pt IV (ss 40–55): see PARA 348 et seq.

5 Financial Services and Markets Act 2000 s 405(1)(a). As to the meaning of 'United Kingdom' see PARA 2 note 3. If the Authority refuses an application for permission as a result of a direction under s 405(1)(a), then: (1) s 52(7)–(9) (determination of applications) (see PARA 350) does not apply in relation to the refusal; but (2) the Authority must notify the applicant of the refusal and the reasons for it: s 407(1).

6 Financial Services and Markets Act 2000 s 405(1)(b). If the Authority defers its decision on an application for permission as a result of a direction under s 405(1)(b), then: (1) the time limit for determining the application mentioned in s 52(1) or (2) (determination of applications) (see PARA 350) stops running on the day of the deferral and starts running again (if at all) on the day the period specified in the direction (if any) ends or the day the direction is revoked; and (2) the Authority must notify the applicant of the deferral and the reasons for it: s 407(2).

7 As to the meaning of 'notice of control' see PARA 377 note 3.

8 For the purposes of the Financial Services and Markets Act 2000 s 405, a person (the 'acquirer') acquires a 50% stake in a UK authorised person ('A') on first falling within any of the cases mentioned in s 406(2) (see below): s 406(1). Those cases are where the acquirer: (1) holds 50% or more of the shares in A; (2) holds 50% or more of the shares in a parent undertaking ('P') of A; (3) is entitled to exercise, or control the exercise of, 50% or more of the voting power in A; or (4) is entitled to exercise, or control the exercise of, 50% or more of the voting power in P: s 406(2). For the purposes of s 406(2), 'acquirer' means: (a) the acquirer; (b) any of the acquirer's associates; or (c) the acquirer and any of his associates: s 406(3). As to the meaning of 'UK authorised person' see PARA 358 note 3. As to the meaning of 'parent undertaking' see PARA 351 note 32. As to the meanings of 'associate', 'shares' and 'voting power' see PARA 591 note 16.

9 Financial Services and Markets Act 2000 s 405(1)(c). If the Authority gives a notice of objection to a person as a result of a direction under s 405(1)(c) or s 405(1)(d) (see the text and note 10), then: (1) s 189 (improperly acquired shares) (see PARA 384) and s 191 (offences) (see PARA 377) have effect as if the notice was a notice of objection within the meaning of Pt XII (ss 178–192) (see PARA 383 note 9); and (2) the Authority must state in the notice the reasons for it: s 407(3).

10 Financial Services and Markets Act 2000 s 405(1)(d). See note 9.

11 Financial Services and Markets Act 2000 s 405(2).

12 Financial Services and Markets Act 2000 s 405(3).

13 Financial Services and Markets Act 2000 s 405(4).

14 See note 1; definition applied by the Financial Services and Markets Act 2000 s 408(9).

15 'Determination' means a determination that the firm concerned does not qualify for authorisation under the Financial Services and Markets Act 2000 Sch 3 (see PARAS 314–318, 323–329) even if it satisfies the conditions in Sch 3 para 13 or Sch 3 para 14 (see PARA 315): s 408(2).

16 'EFTA firm' means a firm, institution or undertaking which: (1) is an EEA firm as a result of the Financial Services and Markets Act 2000 Sch 3 para 5(a), (b) or (d) (see PARA 315); and (2) is

incorporated in, or formed under the law of, an EEA state which is not a member state: s 408(8). As to the meaning of 'EEA firm' see PARA 315 note 1; and as to the meaning of 'EEA state' see PARA 315 note 1.

17 As to the meaning of 'subsidiary undertaking' see PARA 351 note 32.

18 As to the meaning of 'parent undertaking' see PARA 351 note 32.

19 Financial Services and Markets Act 2000 s 408(1).

20 Financial Services and Markets Act 2000 s 408(3).

21 Financial Services and Markets Act 2000 s 408(4).

22 Financial Services and Markets Act 2000 s 408(5).

23 Financial Services and Markets Act 2000 s 408(6).

24 Financial Services and Markets Act 2000 s 408(7).

25 See the Financial Services and Markets Act 2000 s 409. The Treasury may by order: (1) modify Sch 3 (see PARA 315 et seq) so as to provide for Gibraltar firms of a description specified in the order to qualify for authorisation under that Schedule in circumstances specified in the order; (2) modify Sch 3 so as to make provision in relation to the exercise by UK firms of rights under the law of Gibraltar which correspond to EEA rights; (3) modify Sch 4 (treaty rights) (see PARA 319) so as to provide for Gibraltar firms of a description specified in the order to qualify for authorisation under that Schedule in circumstances specified in the order; (4) modify s 264 (see PARA 672) so as to make provision in relation to collective investment schemes constituted under the law of Gibraltar; (5) provide for the Financial Services Authority to be able to give notice under s 264(2) on grounds relating to the law of Gibraltar; (6) provide for the Financial Services and Markets Act 2000 to apply to a Gibraltar recognised scheme as if the scheme were a scheme recognised under s 264: s 409(1), (5). 'Gibraltar firm' means a firm which has its head office in Gibraltar or is otherwise connected with Gibraltar: s 409(3). As to the meaning of 'UK firm' see PARA 323 note 4; and as to the meaning of 'EEA right' see PARA 315 note 3; definitions applied by s 409(6). As to the meaning of 'collective investment scheme' see PARA 603. 'Gibraltar recognised scheme' means a collective investment scheme: (a) constituted in an EEA state other than the United Kingdom; and (b) recognised in Gibraltar under provisions which appear to the Treasury to give effect to the provisions of a relevant Community instrument: s 409(4). The fact that a firm may qualify for authorisation under Sch 3 as a result of an order under s 409(1) does not prevent it from applying for a Part IV permission: s 409(2). As to the meaning of 'Part IV permission' see PARA 348.

As to the order that has been made under s 409 see the Financial Services and Markets Act 2000 (Gibraltar) Order 2001, SI 2001/3084, which contains provisions relating to the exercise of deemed passport rights by Gibraltar-based firms (see art 2 (amended by SI 2005/1; SI 2006/1805; SI 2007/2932; SI 2007/3254)); EEA firms satisfying conditions under Gibraltar law (see the Financial Services and Markets Act 2000 (Gibraltar) Order 2001, SI 2001/3084, art 3 (amended by SI 2007/3254); and the exercise by UK firms of deemed passport rights in Gibraltar (see the Financial Services and Markets Act 2000 (Gibraltar) Order 2001, SI 2001/3084, art 4 (amended by SI 2006/3221)). As to orders under the Financial Services and Markets Act 2000 generally see PARA 67 note 1.

780. International obligations. If it appears to the Treasury[1] that any action proposed to be taken by a relevant person[2] would be incompatible with European Community obligations or any other international obligations of the United Kingdom[3], they may direct that person not to take that action[4]. If it appears to the Treasury that any action which a relevant person has power to take is required for the purpose of implementing any such obligations, it may direct that person to take that action[5]. A direction: (1) may include such supplemental or incidental requirements as the Treasury considers necessary or expedient[6]; and (2) is enforceable, on an application made by the Treasury, by injunction[7].

1 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

2 'Relevant person' means: (1) the Financial Services Authority (see PARAS 4, 6 et seq); (2) any person exercising functions conferred by the Financial Services and Markets Act 2000 Pt VI (ss 72–103) (see PARA 385 et seq) on the competent authority; (3) any recognised investment exchange (other than one which is an overseas investment exchange); (4) any recognised clearing house (other than one which is an overseas clearing house); (5) a person included in the list maintained under s 301 (see PARA 720); or (6) the scheme operator of the ombudsman scheme:

s 410(4). As to the competent authority see PARA 385. As to the meaning of 'recognised investment exchange' see PARA 684 note 1. As to the meaning of 'overseas investment exchange' see PARA 709 note 12. As to the meaning of 'recognised clearing house' see PARA 684 note 6. As to the meaning of 'overseas clearing house' see PARA 709 note 12. As to the scheme operator and the ombudsman scheme see PARA 575.

3 As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 Financial Services and Markets Act 2000 s 410(1).

5 Financial Services and Markets Act 2000 s 410(2).

6 Financial Services and Markets Act 2000 s 410(3)(a).

7 Financial Services and Markets Act 2000 s 410(3)(b). As to injunctions see generally INJUNCTIONS.

C. ENFORCEABILITY OF GAMING CONTRACTS

781. Gaming contracts. A contract is not void or unenforceable because of provisions of any applicable gaming legislation[1] if: (1) it is entered into by either or each party by way of business[2]; (2) the entering into or performance of it by either party constitutes an activity of a specified[3] kind or one which falls within a specified class of activity[4]; and (3) it relates to an investment[5] of a specified kind or one which falls within a specified class of investment[6].

1 Financial Services and Markets Act 2000 s 412(1) (amended by the Gaming Act 2005 Sch 17). See the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985, SI 1985/1204 (NI 11), art 170 which is the only provision remaining in the Financial Services and Markets Act 2000 s 412(1).

2 Financial Services and Markets Act 2000 s 412(2)(a).

3 Ie specified in an order made by the Treasury: Financial Services and Markets Act 2000 s 412(6). The activities specified are any activity of the kind: (1) specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 or art 21 (dealing in investments as principal or agent) (see PARAS 112, 126); (2) specified by art 64 (agreeing to carry on specified kinds of activity) (see PARA 221), so far as relevant to either of those provisions; or (3) which would be so specified apart from any exclusion from any of those provisions made by the order: Financial Services and Markets Act 2000 (Gaming Contracts) Order 2001, SI 2001/2510, art 2(1). As to orders under the Financial Services and Markets Act 2000 generally see PARA 67 note 1. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

4 Financial Services and Markets Act 2000 s 412(2)(b).

5 'Investment' includes any asset, right or interest: Financial Services and Markets Act 2000 s 412(5).

6 Financial Services and Markets Act 2000 s 412(2)(c). The specified class is the class of investment consisting of securities and contractually based investments (within the meaning of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544 (see PARA 88 et seq)): Financial Services and Markets Act 2000 (Gaming Contracts) Order 2001, SI 2001/2510, art 2(2).

The provisions of the Financial Services and Markets Act 2000 Sch 2 Pt II (investments) (see PARA 85) apply for the purposes of s 412(2)(c), with the references to s 22 being read as references to s 412(2)(c): s 412(3). Nothing in Sch 2 Pt II, as applied by s 412(3), limits the power conferred by s 312(2)(c): s 412(4).

D. TRADE-MATCHING AND REPORTING SYSTEMS

782. Approval and monitoring of trade-matching and reporting systems. The Financial Services Authority[1] must approve a relevant system[2] if, on an application[3] by the operator of the system, it is satisfied that the arrangements established by the system for reporting transactions comply with the relevant Regulation[4]. If, at any time after approving a relevant system[5], the Authority is not so satisfied, it may suspend or withdraw the approval[6].

The operator of an approved relevant system must make reports to the Authority at specified[7] intervals containing specified information relating to the

system, the reports made by the system[8] and the transactions to which those reports relate[9]. The Authority may by written notice require the operator of an approved relevant system to provide such additional information as may be specified in the notice, by such reasonable time as may be so specified, about any of the matters mentioned above[10].

The Authority must keep under review the arrangements established by an approved relevant system for reporting transactions for the purpose of ensuring that the arrangements comply with the relevant Regulation[11].

1 As to the Financial Services Authority see PARAS 4, 6 et seq.
2 In the Financial Services and Markets Act 2000 ss 412A, 412B 'relevant system' means a trade-matching or reporting system of a kind described in EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) art 12: Financial Services and Markets Act 2000 s 412A(9) (s 412A added by SI 2007/126). A relevant system is an approved relevant system if it is approved by the Authority under the Financial Services and Markets Act 2000 s 412A(2) (see the text to note 4) for the purposes of the Markets in Financial Instruments Directive (i e European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 25.5; and references in the Financial Services and Markets Act 2000 ss 412A, 412B to an 'approved relevant system' are to be read accordingly: s 412A(1) (as so added).
3 The Financial Services and Markets Act 2000 s 51(3), (4) (see PARA 349) applies to an application under s 412A as it applies to an application under Pt IV (ss 40–55) (see PARA 348 et seq): Financial Services and Markets Act 2000 s 412A(3) (as added: see note 2).
4 Financial Services and Markets Act 2000 s 412A(2) (as added: see note 2). The reference is to the EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) art 12(1).
5 Ie under the Financial Services and Markets Act 2000 s 412A(2).
6 Financial Services and Markets Act 2000 s 412A(4) (as added: see note 2).
7 Ie specified by the Authority: see the Financial Services and Markets Act 2000 s 412A(6) (as added: see note 2).
8 Ie in accordance with the Markets in Financial Instruments Directive (i e European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 25 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1).
9 Financial Services and Markets Act 2000 s 412A(6) (as added: see note 2).
10 Financial Services and Markets Act 2000 s 412A(7) (as added: see note 2). The reference is to the matters mentioned in s 412A(6): see the text to notes 7–9. The recipient of a notice under s 412A(7) must provide the information by the time specified in the notice: s 412A(8) (as so added).
11 Financial Services and Markets Act 2000 s 412A(5) (as added: see note 2). For the purposes of s 412A(5), the Authority must have regard to information provided to it under s 412A(6), (7) (see the text to notes 7–10): see s 412A(5) (as so added).

783. Procedure for approval and suspension or withdrawal of approval. If the Financial Services Authority[1] approves[2] a relevant system[3], it must give the operator of the system written notice specifying the date from which the approval has effect[4].

If the Authority proposes to refuse to approve a relevant system, it must give the operator of the system a warning notice[5]. If the Authority decides to refuse to approve a relevant system, it must give the operator of the system a decision notice[6]. If the Authority proposes to suspend or withdraw its approval in relation to an approved relevant system[7], it must give the operator of the system a warning notice[8]. If the Authority decides to suspend or withdraw its approval in relation to an approved relevant system, it must give the operator of the system a decision notice specifying the date from which the suspension or withdrawal is to take effect[9].

If the Authority has suspended its approval in relation to an approved relevant system, and the operator of the system has applied for the suspension to be cancelled[10]:

(1) the Authority must grant the application if it is satisfied that the relevant arrangements for reporting transactions are in compliance[11]; and in such a case the Authority must give written notice to the operator that the suspension is to be cancelled from the date specified in the notice[12];

(2) if the Authority proposes to refuse the application, it must give the operator a warning notice[13];

(3) if the Authority decides to refuse the application, it must give the operator a decision notice[14].

A person who receives a decision notice[15] may refer the matter to the Financial Services and Markets Tribunal[16].

1 As to the Financial Services Authority see PARAS 4, 6 et seq.
2 As to approval see PARA 782.
3 As to the meaning of 'relevant system' see PARA 782 note 2.
4 Financial Services and Markets Act 2000 s 412B(1) (s 412B added by SI 2007/126).
5 Financial Services and Markets Act 2000 s 412B(2) (as added: see note 4). As to warning notices see PARA 769.
6 Financial Services and Markets Act 2000 s 412B(3) (as added: see note 4). As to decision notices see PARA 770.
7 As to the meaning of 'approved relevant system' see PARA 782 note 2.
8 Financial Services and Markets Act 2000 s 412B(4) (as added: see note 4).
9 Financial Services and Markets Act 2000 s 412B(5) (as added: see note 4).
10 Financial Services and Markets Act 2000 s 412B(6) (as added: see note 4).
11 Ie as mentioned in the Financial Services and Markets Act 2000 s 412A(2): see PARA 782.
12 Financial Services and Markets Act 2000 s 412B(7) (as added: see note 4).
13 Financial Services and Markets Act 2000 s 412B(8) (as added: see note 4).
14 Financial Services and Markets Act 2000 s 412B(9) (as added: see note 4).
15 Ie under the Financial Services and Markets Act 2000 s 412B(3), (5) or (9): see the text to notes 6, 9, 14.
16 Financial Services and Markets Act 2000 s 412B(10) (as added: see note 4). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

E. LIMITATION ON POWER TO REQUIRE DISCLOSURE OF PROTECTED ITEMS

784. Protected items. A person may not be required under the Financial Services and Markets Act 2000 to produce, disclose or permit the inspection of protected items[1]. 'Protected items' means:

(1) communications between a professional legal adviser and his client or any person representing his client which are made in connection with the giving of legal advice to the client, or in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings[2];

(2) communications between a professional legal adviser, his client or any person representing his client and any other person which are made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings[3];

(3) items which: (a) are enclosed with, or referred to in, such communications; (b) are made in connection with the giving of legal advice to the client, or in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings; and (c) are in the possession of a person entitled to possession of them[4].

A communication or item is not a protected item if it is held with the intention of furthering a criminal purpose[5].

1 Financial Services and Markets Act 2000 s 413(1).
2 Financial Services and Markets Act 2000 s 413(2)(a), (3).

3 Financial Services and Markets Act 2000 s 413(2)(b), (3).
4 Financial Services and Markets Act 2000 s 413(2)(c), (3).
5 Financial Services and Markets Act 2000 s 413(4).

F. SERVICE OF DOCUMENTS

785. Power of the Treasury to make provision as to procedure. The Treasury[1] may by regulations make provision with respect to the procedure to be followed, or rules to be applied, when a provision of or made under the Financial Services and Markets Act 2000 requires a notice, direction or document[2] of any kind to be given or authorises the imposition of a requirement[3].

The regulations may, in particular, make provision:

(1) as to the manner in which a document must be given[4];
(2) as to the address to which a document must be sent[5];
(3) requiring, or allowing, a document to be sent electronically[6];
(4) for treating a document as having been given, or as having been received, on a date or at a time determined in accordance with the regulations[7];
(5) as to what must, or may, be done if the person to whom a document is required to be given is not an individual[8];
(6) as to what must, or may, be done if the intended recipient of a document is outside the United Kingdom[9].

1 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
2 As to the meaning of 'document' see PARA 10 note 10.
3 Financial Services and Markets Act 2000 s 414(1). As to the regulations made see the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420; and PARAS 786–789. As to regulations made under the Financial Services and Markets Act 2000 generally see PARA 67 note 1.

Section 414(1) applies however the obligation to give a document is expressed (and so, in particular, includes a provision which requires a document to be served or sent): s 414(3).

The Interpretation Act 1978 s 7 (service of notice by post) (see STATUTES vol 44(1) (Reissue) PARA 1388) has effect in relation to provisions made by or under the Financial Services and Markets Act 2000 subject to any provision made by regulations under s 414: s 414(4).
4 Financial Services and Markets Act 2000 s 414(2)(a). As to methods of service see the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, regs 2, 7; and PARA 786.
5 Financial Services and Markets Act 2000 s 414(2)(b). As to the proper address for service see the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 4; and PARA 786.
6 Financial Services and Markets Act 2000 s 414(2)(c). As to service by electronic means of communication see the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, regs 5, 8; and PARA 787.
7 Financial Services and Markets Act 2000 s 414(2)(d). As to deemed service see the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, regs 6, 9, 10, 11; and PARA 788.
8 Financial Services and Markets Act 2000 s 414(2)(e). As to the appropriate person to be served see the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 3; and PARA 789.
9 Financial Services and Markets Act 2000 s 414(2)(f). As to the proper address for service see the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 4; and PARA 786.

786. Methods of service, and proper address for service. Any relevant document[1] must be given by a relevant authority[2] to any person (the 'recipient') by one of the following methods[3]:

(1) by delivering it to the recipient, the recipient's nominee[4] or the appropriate person[5];
(2) by leaving it at the proper address of the recipient, the recipient's nominee or the appropriate person[6];
(3) by posting[7] it to that address[8]; or
(4) by transmitting it by fax or other means of electronic communication to the recipient, the recipient's nominee or the appropriate person[9].

A relevant document which is to be given to a relevant authority may be given by any method of serving or transmitting documents[10]. Where a relevant document is given by delivering it to the relevant authority, it must be delivered: (a) to the employee or other individual with responsibility for the matter to which the document relates, if the identity of that individual is known[11]; or (b) in any other case, to the published address of that authority[12]. Where a relevant document is given to a relevant authority by leaving it at, or posting[13] it to, the address of a relevant authority, it must be left at or posted to the published address of that authority[14].

The proper address:

(i) in the case of any person who is required by any provision of or made under the Financial Services and Markets Act 2000 to provide to the Financial Services Authority an address of a place in the United Kingdom for the service of documents, is the address so provided[15]; and
(ii) in the case of a person to whom no such requirement applies, is any current address provided by that person as an address for service of relevant documents[16].

In the case of any person who has not provided an address as mentioned in heads (i) and (ii) above, the proper address is the last known address of that person (whether of his residence, or of a place where he carries on business or is employed), or any address under such of the following as may be applicable:

(A) in the case of a body corporate[17] (other than a limited liability partnership)[18], its secretary or its clerk, the address of its registered or principal office in the United Kingdom[19];
(B) in the case of a limited liability partnership or any of its designated members, the address of its registered or principal office in the United Kingdom[20];
(C) in the case of a partnership[21] (other than a limited liability partnership) or any of its partners, the address of its principal office in the United Kingdom[22];
(D) in the case of an unincorporated association other than a partnership, or its governing body, the address of its principal office in the United Kingdom[23];
(E) in the case of a member of a designated professional body[24], if the member does not have a place of business in the United Kingdom, the address of that body[25].

1 'Relevant document' means:
(1) a document in relation to which a provision of or made under the Financial Services and Markets Act 2000 (other than a provision of or made under Pt IX (ss 132–137) (see PARAS 43, 45–46, 65–69) or Pt XXIV (ss 355–379) (see PARA 490 et seq)) requires a document of that kind to be given (Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 1(2)); or
(2) where a provision of or made under the Financial Services and Markets Act 2000 (other than a provision of or made under Pt IX or Pt XXIV) authorises the imposition of a requirement, a document by which such a requirement is imposed (Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 1(2)).

For these purposes, 'document' means a notice, direction or document (as defined in the Financial Services and Markets Act 2000 s 417 (see PARA 10 note 10)) of any kind: Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 1(2). In the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, references to a requirement to give any document apply however the requirement is expressed (and so, in particular, include any requirement for a document to be served or sent): reg 1(4).

2 'Relevant authority' means: the Financial Services Authority, the Secretary of State, the Office of Fair Trading, an investigator, the scheme manager, the scheme operator, or an ombudsman: Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 1(2) (definition amended by the Enterprise Act 2002 s 2). As to the Financial Services Authority see PARAS 4, 6 et seq. As to the Secretary of State see PARA 3. As to the Office of Fair Trading see TRADE, INDUSTRY AND INDUSTRIAL RELATIONS vol 47 (2001 Reissue) PARA 504 et seq. 'Investigator' means a person appointed by an investigating authority under the Financial Services and Markets Act 2000 s 97(2) (see PARA 434), s 167 (see PARA 449), s 168(3) or (5) (see PARA 449), s 169(1)(b) (see PARA 450) or s 284 (see PARA 683), or under regulations made under s 262 (see PARA 621), to carry out an investigation: Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 1(2). 'Investigating authority' means the Financial Services Authority or the Secretary of State, as the case may be: reg 1(2). As to the meaning of 'scheme manager' see PARA 583. As to the meaning of 'scheme operator' see PARA 575. As to the meaning of 'ombudsman' see PARA 575 note 15; definition applied by reg 1(2). For the purposes of the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, the scheme operator and ombudsmen are treated as the same relevant authority (with the effect, in particular, that a document given to one is to be treated as also given to the other): reg 1(3).

3 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 2(1), (2). The provisions of the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, have effect subject to any contrary provision made by a relevant authority under the Financial Services and Markets Act 2000 with respect to the service of documents: Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 1(6).

4 'Nominee', in relation to any person to whom a document is to be given ('A'), means a person ('B') who is authorised for the time being to receive relevant documents on behalf of A, to whom relevant documents may be given: (1) if A has notified the Financial Services Authority in writing that B is so authorised, by any relevant authority; or (2) if A has notified a relevant authority in writing that B is so authorised, by that relevant authority: Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 1(2). For the purposes of the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, 'writing' includes any means of electronic communication which may be processed to produce a legible text: reg 1(5).

5 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 2(2)(a). 'Appropriate person' means: (1) an individual to whom a relevant document may be given, in accordance with reg 3(1) (see PARA 789), in order to give that document to a person who is not an individual; or (2) in the case of a relevant document given to an appointed representative, his principal: reg 1(2). As to appointed representatives see PARA 346.

6 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 2(2)(b). Such person is determined in accordance with reg 4 (see heads (i)–(ii), (A)–(E) in the text).

7 For the purposes of the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 2, 'posting' a relevant document means sending that document pre-paid by a postal service which seeks to deliver documents by post within the United Kingdom no later than the next working day in all or the majority of cases, and to deliver by post outside the United Kingdom within such a period as is reasonable in all the circumstances: reg 2(3). As to the meaning of 'United Kingdom' see PARA 2 note 3.

8 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 2(2)(c).

9 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 2(2)(d). As to such transmission see reg 5; and PARA 787.

10 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 7(1). This is subject to reg 7(2), (3) (see the text to notes 11, 12, 14), reg 8 (see PARA 787), and reg 10 (see PARA 789).

11 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 7(2)(a).

12 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 7(2)(b).
13 For the purposes of the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 7, 'posting' a document means sending it by a pre-paid postal service: reg 7(4).
14 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 7(3).
15 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 4(1)(a).
16 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 4(1)(b). However, where the address mentioned in reg 4(1)(b) is situated in a country or territory other than the United Kingdom, a relevant authority may give a relevant document by leaving it at, or posting it to, any applicable address of a place in the United Kingdom falling within reg 4(2) (see heads (A)–(E) in the text): reg 4(3).
17 As to the meaning of 'body corporate' see PARA 86 note 11. As to bodies corporate see generally COMPANIES.
18 As to limited liability partnerships see PARTNERSHIP.
19 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 4(2)(a).
20 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 4(2)(b).
21 As to the meaning of 'partnership' see PARA 86 note 11. As to partnerships generally see PARTNERSHIP.
22 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 4(2)(c).
23 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 4(2)(d).
24 As to designated professional bodies see PARA 749.
25 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 4(2)(e).

787. Service by electronic means of communication. A relevant authority[1] may give a relevant document[2] by fax only if the person to whom it is to be given has indicated in writing[3] to that authority (and has not withdrawn the indication): (1) that he is willing to receive relevant documents by fax[4]; and (2) the fax number to which such documents should be sent[5]. If a relevant authority gives a relevant document by fax it must, by the end of the business day[6] following the day on which it did so, send a copy of that document to the person to whom the document is to be given by any method specified[7] other than fax[8].

A relevant authority may give a relevant document by any other electronic means of communication only if the person to whom it is to be given:

(a) has indicated in writing to that authority (and has not withdrawn the indication) that he is willing to receive relevant documents by those means[9]; and
(b) has provided, in writing to that authority for this purpose, an e-mail address, or other electronic identification such as an ISDN or other telephonic link number[10].

Where a relevant document which is to be given to a relevant authority is given by fax or other electronic means, it must be sent to a fax number, e-mail address or other electronic identification:

(i) which has been notified to the sender by the relevant authority as the appropriate number, address or other electronic identification for the purpose of receiving relevant documents of the kind in question[11]; or
(ii) in all other cases, which has been published by the relevant authority for the purpose of receiving relevant documents[12].

Where any provision of or made under the Financial Services and Markets Act 2000 requires a person to give a relevant document to the Financial Services

Authority before the end of a specified period, that person may give that document by fax only if by the end of the business day following the day on which he did so, he sends a copy of that document to the Authority by any method other than fax[13].

1 As to the meaning of 'relevant authority' see PARA 786 note 2.
2 As to the meaning of 'relevant document' see PARA 786 note 1. In the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, references to a requirement to give any document apply however the requirement is expressed (and so, in particular, include any requirement for a document to be served or sent): reg 1(4).
3 For the purposes of the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, writing includes any means of electronic communication which may be processed to produce a legible text: reg 1(5).
4 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 5(1)(a). A fax number, e-mail address or other electronic identification provided to the Financial Services Authority for the purpose of accepting the service of relevant documents is sufficient indication, for any relevant authority, for the purposes of reg 5(1) or (3): reg 5(4). As to the Financial Services Authority see PARAS 4, 6 et seq.
5 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 5(1)(b). See note 4.
6 'Business day' means any day except Saturday, Sunday or a bank holiday, where 'bank holiday' includes Christmas Day and Good Friday: Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 1(2).
7 Ie specified in the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 2: see PARA 786.
8 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 5(2).
9 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 5(3)(a). See note 4.
10 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 5(3)(b). See note 4.
11 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 8(1)(a).
12 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 8(1)(b).
13 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 8(2).

788. Deemed service etc. A relevant document[1] which is given by a relevant authority[2] to any person in accordance with the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001[3] is, for each method of giving, to be treated as having been received on the days shown below[4]:

(1) where the document is left at the proper address[5], on the business day[6] after the day on which it is left at the proper address;
(2) where the document is posted to an address in the United Kingdom[7], on the second business day after posting;
(3) where the document is posted to an address in any EEA state (other than the United Kingdom), on the fifth business day after posting;
(4) where the document is sent by fax[8], on the business day after the day on which the document is transmitted;
(5) where the document is sent by other electronic means of communication, on the business day after the day on which the document is transmitted[9].

Special provision is made for certain notices stated to take effect immediately[10]. No relevant document which is to be given to a relevant authority is to be treated as given until it is received by that authority in legible form; and for the purposes of any provision of or made under the Financial Services and Markets Act 2000 which requires a relevant authority to take any action within

a specified period beginning with the day on which a document was received by that authority, that day is the day on which the document is actually received in legible form[11].

For the purposes of any provision of or made under the Financial Services and Markets Act 2000 which requires a person to give a document to the Financial Services Authority before the end of a specified period, that person is to be regarded as having complied with that requirement (irrespective of the day on which the document is in fact received by the Authority if it is sent by post, fax or other electronic means) if he sends the document to the Authority in accordance with any applicable directions[12] before the end of the specified period or, where no such directions apply, if he:

(a) delivers the document to an employee of the Authority with responsibility for the matter to which the document relates before the end of the specified period[13];

(b) leaves the document at the Authority's address before the end of the specified period, and obtains a time stamped receipt[14];

(c) posts[15] the document to the Authority's address before the final day of the specified period[16];

(d) sends the document to the Authority by fax before the end of the specified period, provided that he has also sent or subsequently sends a copy of that document by any method other than fax[17]; or

(e) sends the document to the Authority by other electronic means of communication before the end of the specified period, and obtains electronic confirmation of receipt[18].

No relevant document is to be treated as given by a relevant authority to a host state regulator[19] until it is received by that regulator[20].

1 As to the meaning of 'relevant document' see PARA 786 note 1.

2 As to the meaning of 'relevant authority' see PARA 786 note 2.

3 Ie the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420.

4 See the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 6(1). This is subject to reg 11 (see the text to note 20). In the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, references to a requirement to give any document apply however the requirement is expressed (and so, in particular, include any requirement for a document to be served or sent): reg 1(4).

5 As to the proper address for service see PARA 786.

6 As to the meaning of 'business day' see PARA 787 note 6.

7 As to the meaning of the 'United Kingdom' see PARA 2 note 3.

8 Where a relevant document is given by fax, that document is to be treated as having been received on the deemed day of receipt of the fax, determined in accordance with the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 6(1), regardless of whether a relevant authority has sent a copy of that document in accordance with reg 5(2) (see PARA 787): reg 6(2).

9 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 6(1).

10 See the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 6(3) (added by SI 2005/274). Where (1) a notice given under the Financial Services and Markets Act 2000 s 53(4) (see PARA 357) states that a variation of an authorised person's Part IV permission (see PARA 348) takes effect immediately; (2) a notice given under s 78(2) (see PARA 389) states that a discontinuance or suspension of the listing of any securities takes effect immediately; or (3) a notice given under s 259(3) (see PARA 619), or under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27 (see PARA 634) states that a direction to which it relates takes effect immediately, that notice is to be treated as having been received at the time it is in fact received if that is earlier than the day on which

heads (1)–(5) of the text would otherwise require it to be treated as having been received: see the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 6(3) (as so added).

11 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 9(1). For the purposes of reg 9(1), where a relevant document is given by fax and a copy sent in accordance with reg 8(2) (see PARA 787), that document is to be treated as given to the Financial Services Authority on either the day on which the fax is actually received by the Authority or the day on which the copy is actually received by the Authority, whichever day is the earlier: reg 9(2). As to the Financial Services Authority see PARAS 4, 6 et seq.

12 For the purposes of the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 10, 'applicable direction' means any direction given by the Authority under the Financial Services and Markets Act 2000 which specifies the manner in which the relevant document in question is to be given: Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 10(2)(b).

13 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 10(1)(a).

14 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 10(1)(b).

15 For the purposes of the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 10, 'posts' means:

(1) where the person who is required to give a document is located in the United Kingdom, sending that document pre-paid by a postal service which seeks to deliver documents by post within the United Kingdom no later than the next working day in all or the majority of cases (reg 10(2)(a)(i)); and

(2) where the person who is required to give a document is located outside the United Kingdom, sending that document pre-paid by a postal service which seeks to deliver documents by post in the fastest time which is reasonable in the circumstances (reg 10(2)(a)(ii)).

16 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 10(1)(c).

17 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 10(1)(d). As to the sending of the copy of the document see reg 8(2); and PARA 787.

18 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 10(1)(e).

19 As to the meaning of 'host state regulator' see PARA 323 note 10; definition applied by the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 1(2).

20 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 11.

789. Appropriate person to be served. A relevant document[1] which is required to be given[2] by a relevant authority[3] to a person (other than a relevant authority) who is not an individual may:

(1) where that person is a body corporate[4] (other than a limited liability partnership)[5], be given to the secretary or the clerk of that body, or to any person holding a senior position in that body[6];

(2) where that person is a limited liability partnership, be given to any designated member[7];

(3) where that person is a partnership[8] (other than a limited liability partnership), be given to any partner[9];

(4) where that person is an unincorporated association other than a partnership, be given to any member of the governing body of the association[10].

A relevant document which is required to be given to an appointed representative[11] may be given to his principal[12].

1 As to the meaning of 'relevant document' see PARA 786 note 1.

2 In the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, references to a requirement to give any document apply however the requirement is expressed (and so, in particular, include any requirement for a document to be served or sent): reg 1(4).
3 As to the meaning of 'relevant authority' see PARA 786 note 2.
4 As to the meaning of 'body corporate' see PARA 86 note 11. As to bodies corporate generally see COMPANIES.
5 As to limited liability partnerships see PARTNERSHIP.
6 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 3(1)(a). For the purposes of reg 3, persons holding a senior position in a body corporate include: (1) a director, the treasurer, secretary or chief executive (reg 3(3)(a)); and (2) a manager or other officer of that body who, in either case, has responsibility for the matter to which the relevant document relates (reg 3(3)(b)).
7 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 3(1)(b). The reference in the text is a reference to any designated member within the meaning of the Limited Liability Partnerships Act 2000 s 8: see PARTNERSHIP.
8 As to the meaning of 'partnership' see PARA 86 note 11. See generally PARTNERSHIP.
9 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 3(1)(c).
10 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 3(1)(d).
11 As to appointed representatives see PARA 346.
12 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 3(2).

G. JURISDICTION IN CIVIL PROCEEDINGS

790. Jurisdiction of the High Court. Proceedings arising out of any act or omission (or proposed act or omission) of: (1) the Financial Services Authority[1]; (2) the competent authority[2] for the purposes of Part VI of the Financial Services and Markets Act 2000[3]; (3) the compensation scheme manager[4]; or (4) the ombudsman scheme operator[5], in the discharge or purported discharge of any of its functions under the Financial Services and Markets Act 2000 may be brought before the High Court[6].

1 Financial Services and Markets Act 2000 s 415(1)(a). As to the Financial Services Authority see PARAS 4, 6 et seq.
2 As to the competent authority see PARA 385.
3 Financial Services and Markets Act 2000 s 415(1)(b). The reference is to the Financial Services and Markets Act 2000 Pt VI (ss 72–103): see PARA 385 et seq.
4 Financial Services and Markets Act 2000 s 415(1)(c). As to the scheme manager see PARA 583.
5 Financial Services and Markets Act 2000 s 415(1)(d).
6 Financial Services and Markets Act 2000 s 415(1). The jurisdiction conferred by s 415(1) is in addition to any other jurisdiction exercisable by the High Court: s 415(2).

3. BANKING

(1) INTRODUCTION

(i) Legislation and Common Law

791. Introduction. The statutory regulation of banking has changed considerably with the enactment of the Financial Services and Markets Act 2000[1]. Prior to this, the regulation of banking was governed by the Banking Act 1987 which covered the regulation of deposit-taking business[2], the deposit protection scheme[3], banking names and descriptions[4], overseas institutions with representative offices[5], restriction on disclosure of information[6] and miscellaneous related matters[7]. The Banking Act 1987 also gave the Bank of England supervisory duties over the field of banking[8]. The Financial Services and Markets Act 2000 takes away the distinction between banking and other forms of financial services and imposes a system to regulate all financial services[9].

Although the statutory regulation of banking has been subsumed into that of financial services generally, there are a number of matters that remain distinctive to banks[10] and banking law. The Bank of England remains a powerful institution that has been granted new powers for the formulation of monetary policy under the Banking Act 1998[11]. The business of banking is primarily governed by the common law and covers such matters as the relation of banker and customer[12], the payment of cheques and the protection and duties of the paying banker[13], banker's lien[14], the appropriation of payments[15], statement of account[16], the banker as bailee[17], the collection of cheques and the protection and duties of the collecting banker[18], electronic funds transfer[19], bankers' books[20], secrecy, references and advice[21], letters of credit and performance bonds[22], lending and security[23], guarantees[24], and freezing injunctions[25]. There are specific accounting requirements for banking companies and groups[26].

One further statute that should be mentioned in this general context is the Banking (Special Provisions) Act 2008 which makes provision for the Treasury[27] in certain circumstances to make an order relating to the transfer of securities issued by, or of property, rights or liabilities belonging to, an authorised UK deposit-taker[28].

1 See generally PARAS 2, 5 et seq. See also PARA 792.
2 See the Banking Act 1987 Pt I (ss 1–49) (repealed).
3 See the Banking Act 1987 Pt II (ss 50–66) (repealed).
4 See the Banking Act 1987 Pt III (ss 67–73) (repealed).
5 See the Banking Act 1987 Pt IV (ss 74–81) (repealed).
6 See the Banking Act 1987 Pt V (ss 82–87) (repealed).
7 See the Banking Act 1987 Pt VI (ss 88–110) (repealed).
8 See the Banking Act 1987 ss 1, 16, 17 (repealed).
9 See PARA 792; and PARAS 2, 5 et seq.
10 As to the constitution of banks see PARAS 793–814.
11 See PARA 793 et seq.
12 See PARAS 815–831.
13 See PARAS 832–859.
14 See PARAS 860–864.
15 See PARAS 865–872.
16 See PARAS 873–874.
17 See PARAS 875–878.
18 See PARAS 879–905.
19 See PARA 906.
20 See PARAS 907–909.

21 See PARAS 910–922.
22 See PARAS 923–966.
23 See PARAS 967–990.
24 See PARAS 991–997.
25 See PARAS 998–1012.
26 See generally the Companies Act 2006 Pt 15 (ss 380–474), Pt 16 (ss 475–539); the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410; the Bank Accounts Directive (Miscellaneous Banks) Regulations 2008, SI 2008/567; and COMPANIES.
27 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
28 'Authorised UK deposit-taker' means a United Kingdom undertaking that under the Financial Services and Markets Act 2000 Pt IV (ss 40–55) has permission (see PARA 348 et seq) to accept deposits (see PARA 89 et seq): Banking (Special Provisions) Act 2008 s 1(1). That expression does not, however, include such an undertaking with permission to accept deposits only for the purposes of, or in the course of, an activity other than accepting deposits: s 1(2). As to the meaning of 'United Kingdom' see PARA 2 note 3.

The Banking (Special Provisions) Act 2008 received Royal Assent on 21 February 2008 and was intended to enable the United Kingdom government to nationalise high-street banks under emergency circumstances by secondary legislation. Specifically the Act was introduced in order to nationalise the failing bank Northern Rock plc after a private-sector solution was deemed of insufficient value to the taxpayer, although the legislation is of potentially wider application. It also has provisions on the following matters: cases where the Treasury's powers are exercisable (s 2); transfer of securities (s 3); extinguishment of subscription rights (s 4); compensation etc for securities transferred etc (s 5); transfer of property, rights and liabilities (s 6); compensation etc for property etc transferred (s 7); further transfers following transfer to public sector (s 8); supplementary provision about compensation schemes etc (s 9); tax consequences (s 10); modification of legislation applying in relation to building societies) (s 11) (see also PARA 1856 note 4); consequential and supplementary provision (s 12); orders and regulations: general (s 13); orders and regulations: retrospective provisions (s 14); interpretation (s 15); financial provision (s 16); short title, commencement and extent (s 17); transfer orders under s 3 (Sch 1); transfer orders under s 6 (Sch 2). The Northern Rock plc Transfer Order 2008, SI 2008/432, was made in exercise of the powers conferred by the Banking (Special Provisions) Act 2008 ss 3, 4, 12 and 13 to protect the public interest, in circumstances where the Treasury has provided financial assistance to Northern Rock plc, being an authorised UK deposit-taker (see above), for the purpose of maintaining the stability of the UK financial system (see also PARA 807). The Northern Rock plc Compensation Scheme Order 2008, SI 2008/718, was made under the Banking (Special Provisions) Act 2008 ss 5, 9, 12, 13 and provides a scheme for determining the amount of compensation, if any, payable by the Treasury to those whose securities were transferred, or whose rights were extinguished, by the Northern Rock plc Transfer Order 2008, SI 2008/432 (see above).

(ii) The Financial Services and Markets Act 2000

792. The statutory regulation of financial services and markets. The Financial Services and Markets Act 2000 provides for the Financial Services Authority[1] to be the sole regulatory authority for the financial services industry, with powers of authorisation, supervision and enforcement[2]. It also creates a tribunal, known as the Financial Services and Markets Tribunal, to hear references from certain decisions of the Financial Services Authority[3].

The Act contains a general prohibition, which prohibits a person from carrying on a regulated activity which relates to investment or property[4] unless he is either an authorised person or an exempt person[5]. The former prohibitions on investment advertisement and unsolicited calls are replaced with a new scheme to control financial promotion[6]. In addition to powers of investigation and enforcement[7], there are powers to impose penalties for market abuse[8] which supplement the provisions relating to insider dealing[9]. The Act also makes provision for consumer protection[10], and provides for there to be a single compensation scheme[11] and a single ombudsman[12].

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Financial Services Authority's Handbook of Rules and Guidance, Prudential Standards, General Prudential Sourcebook (GENPRU), Prudential Sourcebook for Banks, Building Societies and Investment Firms (BIPRU). As to the Handbook generally see PARA 22.
2 See PARA 314 et seq. The Bank of England previously had the duty to supervise banking institutions under the Banking Act 1987 s 1 (repealed) but this duty was removed and transferred to the Financial Services Authority: see the Bank of England Act 1998 Pt III (ss 21–30), Sch 4 (ss 21, 23 amended, and ss 25–29 repealed, by SI 2001/3649). The Bank did not owe individual commercial banks a duty of care in carrying out its supervisory functions: *Minories Finance Ltd v Arthur Young* [1989] 2 All ER 105. But it could be liable for misfeasance in public office: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, [2000] 3 All ER 1, HL.
3 As to the Financial Services and Markets Tribunal see PARA 43 et seq.
4 As to regulated activities see PARA 84 et seq.
5 See the Financial Services and Markets Act 2000 s 19; and PARA 80. As to authorisation see PARA 314 et seq. As to exemption see PARA 330 et seq.
6 See the Financial Services and Markets Act 2000 ss 21, 25; and PARA 225 et seq.
7 See eg the Financial Services and Markets Act 2000 Pt XI (ss 165–177); and PARA 447 et seq.
8 See the Financial Services and Markets Act 2000 Pt VIII (ss 118–131A); and PARA 437 et seq.
9 As to insider dealing see the Criminal Justice Act 1993 Pt V (ss 52–64); and COMPANIES vol 7(2) (2004 Reissue) PARA 1653 et seq.
10 See PARAS 8–9, 21.
11 See PARA 583 et seq.
12 See PARA 575 et seq.

(2) CONSTITUTION OF BANKS

(i) Bank of England

793. Governor and Company of the Bank of England. In 1694, by Act of Parliament[1] and by a charter granted under letters patent authorised by the Act[2], the subscribers and contributors to a government loan of £1,200,000, their successors and assigns, were constituted a body corporate and politic by the name of the Governor and Company of the Bank of England, with perpetual succession and a common seal[3]. A supplemental charter was granted in 1896[4].

On 1 March 1946[5], the capital, amounting to £14,553,000[6], was brought into public ownership by transfer to the Treasury Solicitor[7] to be held on behalf of the Treasury[8]. The existing charters were with some exceptions[9] revoked, and a new Bank of England charter was granted, as from the same date[10].

1 See the Bank of England Act 1694 s 19 (amended by the Statute Law Revision Act 1888; and the Statute Law Revision Act 1948).
2 The letters patent were dated 27 July 1694.
3 Bank of England Act 1694 s 19 (as amended: see note 1).
4 This was granted by letters patent dated 19 August 1896, authorised by the Bank Act 1892 s 7(1) (repealed).
5 See the Bank of England (Appointed Day) Order 1946, SR & O 1946/237.
6 Ie the amount specified in the Bank of England (Advance) Act 1816 s 3 (repealed).
7 The Treasury Solicitor was nominated as the transferee by the Bank of England (Transfer of Stock) Order 1946, SR & O 1946/238. As to the Treasury Solicitor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 541.
8 Bank of England Act 1946 s 1(1)(a).
9 The exceptions are those parts of the charter of 1694 which incorporate the Bank of England, constitute its capital stock, and authorise it to have a common seal, to hold land and other property as mentioned, and to sue and be sued: see the *Bank of England Charter* (Cmd 6752) (1 March 1946) art 1.
10 See the *Bank of England Charter* (Cmd 6752) (1 March 1946).

794. Treasury control of the Bank of England. The Treasury may from time to time give such directions to the Bank of England as, after consultation with the Governor of the Bank, it thinks necessary in the public interest, except in relation to monetary policy[1]. Subject to any such directions, the affairs of the Bank are managed by the court of directors[2].

If it thinks it necessary in the public interest, the Bank may request information from and make recommendations to bankers and may, if so authorised by the Treasury, issue directions to any banker[3] for the purpose of securing that effect is given to any such request or recommendation[4]. Before authorising the issue of any such directions, the Treasury must give the banker concerned or such person as appears to the Treasury to represent him, an opportunity of making representations with respect to the proposed direction[5]. No request or recommendations may be made by the Bank with respect to the affairs of any particular customer of a banker[6].

1 Bank of England Act 1946 s 4(1) (amended by the Bank of England Act 1998 s 10). As to the Bank's relations with the Treasury in regard to the National Debt see the National Loans Act 1968 ss 12(7), 14(7) (s 12(7) amended by the Statute Law (Repeals) Act 1973; and the National Loans Act 1968 s 14(7) amended by SI 2002/2521; SI 2004/1662). As to the formulation of monetary policy see PARA 801. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

'From time to time' means 'as the occasion shall arise' or 'as and when it is appropriate so to do': see *Holliday v Wakefield Corpn* (1887) 57 LT 559 at 562–563 per Mathew J; *Re Von Dembinska, ex p Debtor* [1954] 2 All ER 46 at 48, [1954] 1 WLR 748 at 750–751, CA, per Evershed MR.

2 As to the court of directors see the Bank of England Act 1998 s 1, Sch 1; and PARA 795.

3 'Banker' means any such person carrying on a banking undertaking as may be declared by order of the Treasury to be a banker for the purposes of the Bank of England Act 1946 s 4: see s 4(6), (7).

4 Bank of England Act 1946 s 4(3).

5 Bank of England Act 1946 s 4(3) proviso (b).

6 Bank of England Act 1946 s 4(3) proviso (a).

795. The court of directors. The court of directors consists of a Governor, two Deputy Governors and 16 directors of the Bank of England, all of whom are appointed by Her Majesty[1].

Subject to Treasury directions[2], the court of directors manages the affairs of the Bank of England (other than the formulation of monetary policy, which is the responsibility of the Bank's Monetary Policy Committee)[3]. In particular, the functions of the court of directors include determining the Bank's objectives (including objectives for its financial management) and its strategy[4]. In so doing, the aim of the court of directors is to ensure the effective discharge of the Bank's functions; but, subject to that, in determining objectives for the financial management of the Bank, its aim is to ensure the most efficient use of the Bank's resources[5]. The court of directors must also keep the procedures followed by the Monetary Policy Committee under review[6]; and, in particular, it must determine whether the Committee has collected the regional, sectoral and other information necessary for the purposes of formulating monetary policy[7]. The court of directors has custody of the Bank's seal[8].

Certain functions of the court of directors are delegated to a sub-committee consisting of the directors of the Bank[9]. Those functions are:

(1) keeping under review the Bank's performance in relation to the objectives and strategy for the time being determined by the court of directors[10];

(2) monitoring the extent to which the objectives set by the court of directors in relation to the Bank's financial management have been met[11];

(3) keeping under review the internal financial controls of the Bank with a view to securing the proper conduct of its financial affairs[12];

(4) determining how the functions relating to remuneration and pensions of executive members of the court of directors[13] should be exercised[14]; and

(5) keeping under review the procedures followed by the Monetary Policy Committee[15].

Provision is made as to the proceedings of the sub-committee, including the declaration of interests, and the further delegation of its functions to two or more of its members[16].

1 Bank of England Act 1998 s 1(1), (2). As to the terms of office see s 1(4), Sch 1 paras 1–4. As to qualification for appointment see Sch 1 paras 5, 6. As to removal from office see Sch 1 paras 7, 8. As to remuneration see Sch 1 paras 14, 15. As to the powers, meetings and proceedings of the court of directors see Sch 1 paras 9–13. See also the House of Commons Disqualification Act 1975 s 1(1)(f), Sch 1 Pt III, which disqualifies the governor, deputy governor and any director of the Bank of England from membership of the House of Commons.

2 See PARA 794. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

3 Bank of England Act 1998 s 2(1). A member of the court of directors is not eligible for appointment (i e under s 13(2)(b) or s 13(2)(c): see PARA 801) as a member of the Monetary Policy Committee: Sch 3 para 5(b). As to the Monetary Policy Committee and as to the formulation of monetary policy see PARA 801.

4 Bank of England Act 1998 s 2(2).

5 Bank of England Act 1998 s 2(3), (4).

6 Bank of England Act 1998 s 16(1).

7 Bank of England Act 1998 s 16(2).

8 Bank of England Act 1998 s 5(1). As to the Bank's seal see PARA 793. The seal may only be affixed to an instrument if the affixation has been authorised by the court of directors or by a sub-committee of that court acting in exercise of delegated authority: s 5(2). The affixing of the seal must be attested by the signature of: (1) two members of the court of directors; (2) one member of the court of directors and the secretary to that court; or (3) two other officers of the Bank authorised by the court of directors for the purpose: s 5(3).

9 Bank of England Act 1998 s 3(1).

10 Bank of England Act 1998 s 3(2)(a).

11 Bank of England Act 1998 s 3(2)(b).

12 Bank of England Act 1998 s 3(2)(c).

13 Ie the functions under the Bank of England Act 1998 Sch 1 para 14.

14 Bank of England Act 1998 s 3(2)(d).

15 Bank of England Act 1998 s 16(3). The function referred to in head (5) in the text is the function of the directors under s 16(1): see the text to note 6.

16 See the Bank of England Act 1998 s 3(3)–(7).

796. Issue and recall of notes. The Bank of England has the exclusive right of note issue in England and Wales[1]. The Bank may issue bank notes of such denominations as the Treasury may approve and no others[2]. Bank notes issued by the Bank may be put into circulation in Scotland and Northern Ireland as well as in England and Wales[3].

Unless expressly made payable also at some other place, bank notes are payable only at the head office of the Bank[4]. Bank notes may be called in on the Bank's giving one month's notice in the London, Edinburgh and Belfast Gazettes, and on payment of their face value[5].

On demand by the holder, bank notes of any denominations must be exchanged for bank notes of such lower denominations, being bank notes which for the time being are legal tender in the United Kingdom[6] or in England and Wales, as may be specified by him[7].

The writing off of an amount from the total amount of bank notes issued from the issue department of the Bank of England does not affect the Bank's liability to pay any bank note included in the amount so written off[8].

1 See the Bank Charter Act 1844 s 11 (amended by the Statute Law Revision Act 1891; and the Currency and Bank Notes Act 1928 Schedule). The amalgamation in 1921 of Messrs Fox, Fowler & Co of Wellington, Somerset, with Lloyds Bank Ltd marked the disappearance of the last private bank in England and Wales with note-issuing powers.

As to theft of notes etc see the Theft Act 1968 ss 1–7; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 282 et seq. As to counterfeiting of notes and related offences see the Forgery and Counterfeiting Act 1981 Pt II (ss 14–28); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 544 et seq.

2 Currency and Bank Notes Act 1954 s 1(1). 'Bank notes' means notes of the Bank of England payable to bearer on demand: s 3. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

3 Currency and Bank Notes Act 1954 s 1(1).

4 Currency and Bank Notes Act 1954 s 1(3).

5 Currency and Bank Notes Act 1954 s 1(5). Any such notes with respect to which a notice has been so given cease to be legal tender on the expiration of the notice: s 1(5). See further PARA 797.

6 As to the meaning of 'United Kingdom' see PARA 2 note 3.

7 Currency and Bank Notes Act 1954 s 1(4). The demand must be made during office hours at the head office of the Bank of England or, in the case of notes payable also at some place other than the head office, either at the head office or at that other place: s 1(4).

8 Currency Act 1983 s 3(4). See further PARA 798.

797. Notes as legal tender. All bank notes of denominations approved by the Treasury[1] which are issued by the Bank of England are legal tender in England and Wales, and all such notes of denominations of less than £5 are legal tender in Scotland and Northern Ireland[2]. Notes called in by the Bank cease to be legal tender on the expiration of the calling-in notice[3].

1 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

2 See the Currency and Bank Notes Act 1954 s 1(2), (6). See also *Suffell v Bank of England* (1882) 9 QBD 555 at 563, CA.

3 Currency and Bank Notes Act 1954 s 1(5). Currency notes issued under the Currency and Bank Notes Act 1914 (repealed) and not called in at 22 November 1928 were 'transferred currency notes' deemed to be bank notes (i e notes of the Bank of England), and the Bank of England was accordingly liable in respect of them: see the Currency and Bank Notes Act 1928 ss 4, 13(3). Transferred currency notes were called in pursuant to s 4(3) on 28 April 1933 and ceased to be legal tender on 1 August 1933.

798. Amount of issue and assets held in the issue department. The Bank of England may not cause the limit on the amount of the fiduciary note issue to be exceeded[1]; and for these purposes the limit is that specified in the Currency Act 1983 or such other amount as may from time to time be specified in a direction given by the Treasury[2], which may not be greater than the former limit by more than 25 per cent[3]. Such a direction must be given by a Treasury minute, a copy of which must be laid before each House of Parliament[4]. By order made by statutory instrument the Treasury may direct that the 25 per cent limitation is not to apply to any such direction which is given during a specified period not exceeding two years beginning with the day on which the order is made[5].

The Bank may write off from the total amount of notes issued from the issue department of the Bank the amount of any bank notes[6] which have not been presented for payment and which, by virtue of the Currency and Bank Notes Act 1954[7], have ceased to be legal tender and have not been legal tender for ten years[8]. Any amount so written off must be deducted from the amount included

in the next weekly account[9] as the amount of issued bank notes, and a return of the amount so written off must forthwith be sent to the Treasury, which must lay a copy of the return before each House of Parliament[10].

In addition to the gold coin and bullion for the time being in the issue department, the Bank of England must appropriate to and hold in the issue department securities[11] of an amount in value sufficient to cover the fiduciary note issue for the time being[12]. Such securities may include silver coin[13] to an amount not exceeding £5.5 million[14].

The Bank of England must give a weekly account, which must be periodically published, of the amount of notes issued and of the gold and silver bullion and securities in the issue department[15].

The assets held in the issue department must be valued, at market prices, at such times and in such manner as may be agreed between the Treasury and the Bank, but at least once in each financial year[16]; and if, as a result of such valuation, the value of the assets then held falls short of the total amount of the Bank of England notes then outstanding, the Treasury must assume a liability to the issue department of an amount equal to the difference[17]. The profits of the issue department must ordinarily be paid into the National Loans Fund[18]; but so long as any part of a liability assumed by the Treasury is outstanding, the profits must be applied towards meeting that liability, instead of being paid into the National Loans Fund[19].

1 Currency Act 1983 s 2(1).
2 Currency Act 1983 s 2(2). The limit specified in s 2(2) is £13,500 million, but the limit was increased to £16,500 million by a Treasury minute dated 17 December 1986. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
3 Currency Act 1983 s 2(3). 'Former limit' means the limit which was in force under s 2 at the beginning of the period of two years ending with the day on which the direction is given: s 2(4).
4 Currency Act 1983 s 2(5).
5 Currency Act 1983 s 2(6). A draft of any statutory instrument containing an order under s 2(6) must be laid before Parliament: s 2(7).
6 'Bank notes' means notes of the Bank of England payable to bearer on demand: Currency Act 1983 s 4(2).
7 Ie the Currency and Bank Notes Act 1954 s 1(5): see PARA 797.
8 Currency Act 1983 s 3(1), (2). No writing off of an amount under s 3 affects the liability of the bank to pay any bank note which was included in that amount: s 3(1), (4).
9 Ie the weekly account rendered by the Bank under the Bank Charter Act 1844 s 6: see the text and note 15.
10 Currency Act 1983 s 3(1), (3). See also note 8.
11 For these purposes, 'securities' includes securities and assets in currency of any country and in whatever form held: Finance Act 1932 s 25(7) (amended by the Exchange Equalisation Account Act 1979 Schedule). Any liability assumed by the Treasury under the National Loans Act 1968 s 9(3) (see the text to note 17) is to be included among the assets held to cover the fiduciary note issue: s 9(4)(a).
12 Currency and Bank Notes Act 1928 s 3(1). The Bank must from time to time give to the Treasury such information as it may require with respect to the securities held in the issue department: s 3(3) (amended by the Statute Law (Repeals) Act 1973).
13 References to 'silver coin' in the Currency and Bank Notes Act 1928 s 3(2) include references to: (1) coin of cupro-nickel; and (2) coin specified in a proclamation made under the Coinage Act 1971 s 3(1)(cc) (see PARA 1282), not being coin of gold, silver or cupro-nickel or coin of a denomination of less than five pence: s 12(1), (2), Sch 2 (s 12(2) amended by the Currency Act 1983 s 1(7); and the Coinage Act 1971 Sch 2 amended by the Forgery and Counterfeiting Act 1981 Schedule Pt II; and by the Statute Law (Repeals) Act 1989).
14 Currency and Bank Notes Act 1928 s 3(2).
15 See the Bank Charter Act 1844 s 6, Sch (A) (s 6 amended by the Statute Law Revision Act 1891). That Schedule may be modified by the Treasury: see the Currency and Bank Notes Act 1928 s 10; and the Coinage Act 1971 s 12(1), (2), (4) (s 12(2) as amended: see note 13).
16 National Loans Act 1968 s 9(2).

17 See the National Loans Act 1968 s 9(3), (4).
18 National Loans Act 1968 s 9(1). As to the National Loans Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq; PARLIAMENT vol 34 (Reissue) PARA 953.
19 Currency and Bank Notes Act 1928 s 6(1) (amended by the Currency Act 1983 s 3(6)); National Loans Act 1968 s 9(5).

799. Stamp duty. The notes of the Bank of England are exempt from all stamp duty, and the Bank is no longer liable to make any payment in consideration of this exemption[1].

1 Specific provisions exempting Bank of England notes from stamp duty, and relieving it from liability to make payment in consideration of the exemption, were made by the Bank Charter Act 1844 s 7, and by the Currency and Bank Notes Act 1928 s 6(4), respectively. These enactments were repealed by the Finance Act 1972 Sch 28 Pt XI as they were no longer necessary in view of the repeal by that Act (see ss 126, 134, Sch 28 Pt XI) of the provisions of the Stamp Act 1891 relating to stamp duty on bank notes. As to stamp duty generally see STAMP DUTIES AND STAMP DUTY RESERVE TAX.

800. Defective title or material alteration. A holder with no title or a defective title cannot compel payment of a bank note by the Bank of England[1]; but any person taking such a note honestly and for value acquires a good independent title to it and may enforce payment[2].

Any material alteration in a bank note invalidates it, even in the hands of a holder in due course. An alteration of the number is a material alteration[3].

1 *De la Chaumette v Bank of England* (1829) 9 B & C 208. Cf *Suffell v Bank of England* (1882) 9 QBD 555 at 567, CA; *Ransted v Bank of England* (1900) 21 Journal of the Institute of Bankers vol xxi 157.
2 *Raphael v Governor & Co of Bank of England* (1855) 17 CB 161, where a person taking, for full value and without knowledge that the party from whom he took had no title, was held entitled to payment even though he might have had the means of acquiring knowledge. The inability of a person with no title or a defective title to recover is not really an exception to the proposition that bank notes are currency. Honest acquisition is a condition of right, even to coin.
3 *Suffell v Bank of England* (1882) 9 QBD 555, CA, which is not affected by the Bills of Exchange Act 1882 s 64(1) proviso (see *Leeds & County Bank Ltd v Walker* (1883) 11 QBD 84 at 90), and which was distinguished in the case of accidental destruction of the number on a note or bill in *Hong Kong and Shanghai Banking Corpn v Lo Lee Shi* [1928] AC 181, PC. See further PARA 1559. Any person who prints or stamps or by any like means impresses words, letters or figures on any bank note is liable on summary conviction to a fine not exceeding level 1 on the standard scale for each offence: Currency and Bank Notes Act 1928 s 12 (amended by the Criminal Law Act 1977 s 31(6); and the Criminal Justice Act 1982 ss 37, 46). As to the standard scale see PARA 27 note 21.

801. Formulation of monetary policy by the Monetary Policy Committee. The objectives of the Bank of England in relation to monetary policy are to maintain price stability, and, subject to that, to support the economic policy of the government, including its objectives for growth and employment[1]. The Treasury may by notice in writing to the Bank specify what price stability is to be taken to consist of, or what the government's economic policy is to be taken to be[2].

The Monetary Policy Committee of the Bank of England has responsibility within the Bank for formulating monetary policy[3].

As soon as practicable after each meeting of the Committee, the Bank must publish a statement[4] as to whether it was decided at the meeting that the Bank should take any action, other than action by way of intervening in financial markets, for the purpose of meeting its objectives and, if so, what the action is[5]. If, at any meeting, the Committee decides that the Bank should intervene in

financial markets, it must also consider at the meeting whether immediate publication of the decision would be likely to impede or frustrate the achievement of the intervention's purpose[6].

After each meeting of the Committee, the Bank must publish minutes of the meeting[7] before the end of the period of six weeks beginning with the day of the meeting[8]. However, this does not apply to minutes of any proceedings relating to a decision to intervene in financial markets, or a decision about the publication of a decision to intervene in financial markets, unless the Committee has decided that publication of the decision to intervene would not be likely, or would no longer be likely, to impede or frustrate the achievement of the intervention's purpose[9]. Minutes published must record, in relation to any decision of the Committee, the voting preference of the members who took part in the vote on the decision[10].

The procedures of the Committee are kept under review by the court of directors[11].

1 Bank of England Act 1998 s 11. The Treasury no longer has power to give directions to the Bank in relation to monetary policy, except in the circumstances set out in s 19: see PARA 803. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

2 Bank of England Act 1998 s 12(1). The Treasury must specify these matters at least once a year, and must publish the notice in such manner as it thinks fit and lay a copy of it before Parliament: s 12(2), (3).

As to the nationalising powers of the Treasury under the Banking (Special Provisions) Act 2008 see PARA 791.

3 Bank of England Act 1998 ss 13(1), 20. The Committee consists of: (1) the Governor and Deputy Governors of the Bank (s 13(2)(a)); (2) two members appointed by the Governor of the Bank after consultation with the Chancellor of the Exchequer (s 13(2)(b)); and (3) four members appointed by the Chancellor of the Exchequer (s 13(2)(c)). Of the two members appointed under head (2) above, one must be a person who has executive responsibility within the Bank for monetary policy analysis, and the other must be a person who has executive responsibility within the Bank for monetary policy operations: s 13(3). The Chancellor of the Exchequer must only appoint a person under head (3) above if he is satisfied that the person has knowledge or experience which is likely to be relevant to the Committee's functions: s 13(4). As to members' terms of office, appointments to and qualification for membership, and meetings and proceedings of the Committee, see Sch 3 paras 1–13. Members of the Committee are disqualified for membership of the House of Commons: Sch 3 para 15. The Committee must submit a monthly report on its activities to the court of directors of the Bank: Sch 3 para 14. As to the Chancellor of the Exchequer see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 514. As to the court of directors see PARA 795.

4 The statement must be published in such manner as the Bank thinks fit: Bank of England Act 1998 s 14(6).

5 Bank of England Act 1998 s 14(1).

6 Bank of England Act 1998 s 14(2). If the Committee decides that immediate publication of a decision would not have that effect, the Bank must, when it publishes its statement, publish a statement as to what action by way of intervening in financial markets the Committee has decided the Bank should take: s 14(3). If it is decided that immediate publication of a decision would have that effect, the Committee must keep under consideration the question of whether publication of the decision would still have that effect: s 14(4). As soon as practicable after the Committee has decided that publication of such a decision would no longer have that effect, the Bank must publish a statement as to what action by way of intervening in financial markets the Committee decided the Bank should take and when the decision was made: s 14(5).

7 The minutes must be published in such manner as the Bank thinks fit: Bank of England Act 1998 s 15(5).

8 Bank of England Act 1998 s 15(1).

9 Bank of England Act 1998 s 15(2). Minutes of proceedings relating to a decision to intervene in financial markets, or a decision about the publication of a decision to intervene in financial markets, if not required to be published before the end of the period of six weeks beginning with

the day of the meeting, must be published by the Bank before the end of the period of six weeks beginning with the day on which a statement about the decision to intervene is published under s 14(5) (see note 6): s 15(3).

10 Bank of England Act 1998 s 15(4).

11 See PARA 795. See also note 3.

802. Information and reports. The Bank of England may by notice[1] in writing require certain undertakings[2] to provide the Bank with such information as may be specified in the notice, being information about the relevant financial affairs[3] of the undertaking which the Bank considers it necessary or expedient to have for the purposes of its functions in relation to monetary policy[4]. A person who fails without reasonable excuse to comply with any such requirement imposed on him is guilty of an offence[5].

The Bank must prepare and publish reports containing: (1) a review of the monetary policy decisions published by the Bank in the period to which the report relates[6]; (2) an assessment of the developments in inflation in the economy of the United Kingdom in that period; and (3) an indication of the expected approach to meeting the Bank's objectives[7]. No such report may be published without the approval of the Monetary Policy Committee[8].

1 The notice may require information to be provided in specified form or manner, at a specified time or times, and in relation to a specified period or periods: Bank of England Act 1998 s 17(2).

2 This provision applies to an undertaking if:

(1) it has a place of business in the United Kingdom (Bank of England Act 1998 s 17(3)(a) (s 17(3) substituted, and s 17(3A)–(3D) added, by SI 2001/3649)); and

(2) it falls within heads (a) to (d) below (Bank of England Act 1998 s 17(3)(b) (as so substituted)):

(a) it is a deposit-taker (s 17(3A) (as so added));

(b) it is not a deposit-taker, but: (i) it falls within the subsector 'other monetary financial institution', as defined by EC Council Regulation 2223/96 on the European system of national and regional accounts in the Community (OJ L310, 30.11.96, p 1) Annex A PARA 2.48; (ii) it carries on a business of granting credits secured on land used for residential purposes; (iii) it has issued a debt security; or (iv) it has acted as an agent in connection with arranging or managing the issue of debt security (Bank of England Act 1998 s 17(3B) (as so added));

(c) it is a financial holding company (s 17(3C) (as so added));

(d) it is not a deposit-taker, but it continues to have a liability in respect of a deposit which was held by it in accordance with the Banking Act 1979 or the Banking Act 1987 or a permission under the Financial Services and Markets Act 2000 Pt IV (ss 40–55) (see PARA 348 et seq) (Bank of England Act 1998 s 17(3D) (as so added)).

'Undertaking' has the meaning given by the Companies Act 2006 s 1161(1) (see COMPANIES): Bank of England Act 1998 s 17(7D) (s 17(7A)–(7D) added by SI 2001/3649; Bank of England Act 1998 s 17(7D) amended by SI 2008/948)). 'Deposit taker' means: (A) a person who has permission under the Financial Services and Markets Act 2000 Pt IV to accept deposits; or (B) an EEA firm of the kind mentioned in Sch 3 para 5(b) or (c) which has permission under Sch 3 para 15 (as a result of qualifying for authorisation under Sch 3 para 12(1)) to accept deposits or other repayable funds (see PARA 315): Bank of England Act 1998 s 17(7) (substituted by SI 2001/3649). 'Debt security' means any instrument creating or acknowledging indebtedness (including a government or public security): Bank of England Act 1998 s 17(7A) (as so added). The provisions of s 17(7) and s 17(7A) must be read with the Financial Services and Markets Act 2000 s 22, any relevant order under s 22, and Sch 2 (see PARA 84 et seq): Bank of England Act 1998 s 17(7B) (as so added). 'Financial holding company' has the meaning given by European Parliament and EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions art 4(19): Bank of England Act 1998 s 17(7C) (as so added; and amended by SI 2006/3321). As to the meaning of 'United Kingdom' see PARA 2 note 3.

The Treasury may by order amend the provisions of the Bank of England Act 1998 s 17(3) and s 17(3A)–(3D): s 17(5) (amended by SI 2001/3649). Before making such an order, the

Treasury must consult the Bank, the Office for National Statistics, such persons as appear to be representative of persons likely to be materially affected by the order, and such other persons as it considers appropriate: Bank of England Act 1998 s 17(6). As to the Office for National Statistics see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 516, 528. Any power of the Treasury to make an order under the Bank of England Act 1998 is exercisable by statutory instrument: s 40(1). An order under s 17(4) (see note 3) or s 17(5) may not be made unless a draft of the order has been laid before and approved by resolution of each House of Parliament: s 40(2). At the date at which this volume states the law no order had been made under s 17(5). As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

3 The Treasury may by order provide which financial affairs of an undertaking are relevant financial affairs, and may make different provision for different undertakings or classes of undertaking: Bank of England Act 1998 s 17(4). As to the making of orders under s 17 see note 2. As to the order that has been made under s 17(4) see the Bank of England (Information Powers) Order 1998, SI 1998/1270 (amended by SI 2001/3649).

4 Bank of England Act 1998 s 17(1). As to the formulation of monetary policy see PARA 801. As to restrictions on disclosure of such information see PARA 805.

5 Bank of England Act 1998 s 38(1). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale: s 38(1). As to the standard scale see PARA 27 note 21. If after conviction under s 38(1) a person continues the failure for which he was convicted, he is guilty of a further offence and liable on summary conviction to be punished accordingly: s 38(2). A person who, in purported compliance with a requirement imposed on him under s 17(1), provides information which he knows to be false or misleading in a material particular, or recklessly provides information which is false or misleading in a material particular, is guilty of an offence and liable: (1) on conviction on indictment, to imprisonment for a term not exceeding two years, or to a fine, or to both; or (2) on summary conviction, to imprisonment for a term not exceeding three months, or to a fine not exceeding the statutory maximum, or to both: s 38(3). As to the statutory maximum see PARA 56 note 24.

Where an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and is liable to be proceeded against and punished accordingly: Bank of England Act 1998 s 39(1). Where the affairs of a body corporate are managed by its members, s 39(1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 39(2).

6 Such a report must relate to a period of three months, or such other period as the Treasury and the Monetary Policy Committee may agree: Bank of England Act 1998 s 18(3). As to the Monetary Policy Committee see PARA 801. Periods to which such reports relate are successive, the first such period commencing on such day within the period of three months ending with 1 June 1998 as the Treasury, after consultation with the Bank, specifies in writing to it: s 18(4). A report must be published as soon as practicable after the end of the period to which it relates and in such manner as the Bank thinks fit: s 18(6).

7 Bank of England Act 1998 s 18(1), (2). As to the Bank's objectives see s 11; and PARA 801.

8 Bank of England Act 1998 s 18(5).

803. Reserve powers of the Treasury. After consultation with the Governor of the Bank of England[1], the Treasury[2] may by order give the Bank directions with respect to monetary policy if it is satisfied that the directions are required in the public interest and by extreme economic circumstances[3]. Such an order which does not cease to have effect before the end of the period of three months beginning with the day on which it is made ceases to have effect at the end of that period[4]. While such an order made by the Treasury has effect, it overrides the provisions relating to the objectives of the Bank in relation to monetary policy[5].

1 As to the Governor of the Bank of England see PARA 794.

2 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

3 Bank of England Act 1998 s 19(1). Such an order may include such consequential modifications of the Bank of England Act 1998 relating to the Monetary Policy Committee as the Treasury

thinks fit: s 19(2). As to the Monetary Policy Committee see PARA 801. Any power of the Treasury to make an order under the Bank of England Act 1998 is exercisable by statutory instrument: s 40(1). A statutory instrument containing an order under s 19 must be laid before Parliament after being made: ss 19(3), 40(5). Unless an order under s 19 is approved by resolution of each House of Parliament before the end of the period of 28 days beginning with the day on which it is made, it ceases to have effect at the end of that period: s 19(4). In reckoning the period of 28 days for the purposes of s 19(4), no account is to be taken of any time during which Parliament is dissolved or prorogued or during which either House is adjourned for more than four days: s 19(5). At the date at which this volume states the law no order had been made under s 19.

4 Bank of England Act 1998 s 19(6).

5 Bank of England Act 1998 s 19(7). As to the provisions relating to the objectives of the Bank in relation to monetary policy see s 11; and PARA 801.

804. Cash ratio deposits. The Bank of England may give an eligible institution[1] a call notice[2]. A call notice must be in writing, and must specify the period to which it relates[3] and the amount which, in relation to that period, is the institution's depositable amount[4]. The depositable amount is the amount, or, as the case may be, the sum of the amounts, produced by multiplying so much of the institution's average liability base[5] for the reference period as falls into each value band by the ratio applicable to that band[6].

Where the Bank has given an eligible institution a call notice, then, if at any time in the period to which the notice relates the following conditions are met, namely: (1) the institution is an eligible institution; and (2) the institution does not have on deposit in the appropriate account[7] with the Bank the amount specified in the notice as its depositable amount in relation to that period, the Bank may by notice[8] in writing require the institution to make a payment in lieu of deposit[9].

The Bank may by notice[10] in writing require an eligible institution to provide such information as may be specified in the notice, being information which the Bank considers it necessary or expedient to have for the purposes of its functions in relation to cash ratio deposits[11].

The provisions described above are modified in relation to the first call notice issued to an institution after it becomes an eligible institution[12].

1 Each deposit-taker is an eligible institution for the purposes of the Bank of England Act 1998 Sch 2: Sch 2 para 1(1) (Sch 2 para 1(1) substituted, and Sch 2 para 1(1A)–(1C) added, by SI 2001/3649). 'Deposit-taker' has the meaning given in the Bank of England Act 1998 s 17 (see PARA 802), except that it does not include: (1) a credit union; (2) a friendly society; (3) a person who has permission to accept deposits under the Financial Services and Markets Act 2000 Pt IV (ss 40–55) only in the course of effecting or carrying out contracts of insurance in accordance with that permission (see PARA 989 et seq); or (4) an EEA firm of the kind mentioned in the Financial Services and Markets Act 2000 s 37, Sch 3 PARA 5(c) (see PARA 315): Bank of England Act 1998 Sch 2 para 1(1A) (as so added). 'Credit union' has the meaning given by the Credit Unions Act 1979 (see PARA 2402): Bank of England Act 1998 Sch 2 para 1(1B) (as so added). 'Friendly society' means: (a) a society which is registered within the meaning of the Friendly Societies Act 1974; or (b) a society incorporated under the Friendly Societies Act 1992 (see PARA 2082): Bank of England Act 1998 Sch 2 para 1(1C) (as so added).

The Treasury may by order amend Sch 2 para 1(1) and Sch 2 para 1(1A)–(1C) as it thinks fit: Sch 2 para 1(2) (amended by SI 2001/3649). Before making an order under the Bank of England Act 1998 Sch 2, the Treasury must consult: (i) the Bank; (ii) such persons as appear to it to be representative of persons likely to be materially affected by the order; and (iii) such other persons as it thinks fit: Sch 2 para 10. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq. Any power of the Treasury to make an order under the Bank of England Act 1998 is exercisable by statutory instrument: s 40(1). An order under Sch 2 para 1(2) may not be made unless a draft of the order has been laid before and approved by resolution of each House of Parliament: s 40(2). At the date at which this volume states the law no order had been made under Sch 2 para 1(2).

2 Bank of England Act 1998 Sch 2 para 3(1).

3 The period to be specified must be a period of six months beginning at least four working days after the date of the notice, and may not include any part of a period specified in a previous call notice given to the institution concerned: Bank of England Act 1998 Sch 2 para 3(3).

4 Bank of England Act 1998 Sch 2 para 3(2).

5 The liability base of an eligible institution at any time is the aggregate of those sterling and foreign currency liabilities of the institution which are eligible liabilities: Bank of England Act 1998 Sch 2 para 2(1). The Treasury may by order define eligible liabilities and make provision about the calculation of any description of eligible liability, including provision for the amount of a liability of any description to be treated as reduced by the amount of an asset of any description: Sch 2 para 2(2). In exercising the power to make orders under the Bank of England Act 1998 Sch 2 para 2(2), the Treasury must have regard to the financial needs of the Bank: Sch 2 para 11. As to the making of orders under the Bank of England Act 1998 see note 1. A statutory instrument containing an order under Sch 2 para 2(2) is subject to annulment in pursuance of a resolution of either House of Parliament: s 40(3). As to the order that has been made see the Cash Ratio Deposits (Eligible Liabilities) Order 1998, SI 1998/1130 (amended by SI 2000/2952; SI 2004/1862; SI 2005/3203).

6 Bank of England Act 1998 Sch 2 para 4(1). The Bank may use such method to calculate an institution's average liability base as it thinks fit, and may use different methods for different institutions: Sch 2 para 4(2). Value bands and the ratios applicable to them are such as may be specified by order made by the Treasury: Sch 2 paras 4(3), 5. As to the making of orders under the Bank of England Act 1998 see note 1. An order under Sch 2 para 5 may not be made unless a draft of the order has been laid before and approved by resolution of each House of Parliament: s 40(2). In exercising the power to make orders under Sch 2 para 5, the Treasury must have regard to the financial needs of the Bank: Sch 2 para 11. As to the order that has been made see the Cash Ratio Deposits (Value Bands and Ratios) Order 2004, SI 2004/1270.

7 The appropriate account, in relation to an eligible institution, is such account of the institution with the Bank as is designated by the Bank for the purpose: Bank of England Act 1998 Sch 2 para 6(5).

8 The notice must specify what period it covers, and the period specified must: (1) fall within the period to which the call notice relates; and (2) be a period throughout which the conditions mentioned in heads (1) and (2) in the text have been met: Bank of England Act 1998 Sch 2 para 6(2).

9 Bank of England Act 1998 Sch 2 para 6(1). The amount which the Bank may require an institution to pay is an amount equal to interest for the period covered by the notice, at 4% over the benchmark rate, on the average shortfall during that period: Sch 2 para 6(3), (6).

As to the determination of the benchmark rate of interest see Sch 2 para 7, which may be amended by order under Sch 2 para 8. As to the making of orders under the Bank of England Act 1998 see note 1. A statutory instrument containing an order under Sch 2 para 8 is subject to annulment in pursuance of a resolution of either House of Parliament: s 40(3). At the date at which this volume states the law no order had been made under Sch 2 para 8.

The Bank may use such method to calculate the average shortfall as it thinks fit: Sch 2 para 6(4).

10 Such a notice may require information to be provided: (1) in such form or manner as may be specified in the notice; (2) at such time or times as may be so specified; (3) in relation to such period or periods as may be so specified: Bank of England Act 1998 Sch 2 para 9(2).

11 Bank of England Act 1998 Sch 2 para 9(1). As to restrictions on disclosure of such information see PARA 805. Sections 38, 39 (offences in relation to the provision of information) apply to a requirement under Sch 2 para 9: see PARA 802 note 5.

12 See the Bank of England Act 1998 Sch 2 para 13.

805. Restriction on disclosure of information. Restricted information obtained for monetary policy or cash ratio deposit purposes[1] may not be disclosed by the Bank of England or any officer or servant of the Bank, or by any person obtaining the information directly or indirectly from the Bank, without the consent of the person from whom the Bank obtained the information and, if different, the person to whom the information relates[2]. Any person who discloses information in contravention of this provision is guilty of an offence[3].

The disclosure of information is not precluded, however, in any case in which disclosure is for the purpose of enabling or assisting the Bank to discharge: (1) its functions as a monetary authority[4]; (2) its functions as a supervisor of systems

for the transfer of funds between credit institutions[5] and their customers; or (3) its functions relating to cash ratio deposits[6]. The Bank may also disclose information to specified authorities if the Bank considers that the disclosure would enable or assist such an authority to discharge its functions[7]. The disclosure by any authority of information obtained by it in this way is not precluded if it is made with the consent[8] of the Bank, and for the purpose of enabling or assisting the authority to discharge its functions[9]. Disclosure of information is not prohibited if it is: (a) with a view to the institution of, or otherwise for the purposes of, any proceedings in connection with a payment in lieu of cash ratio deposit[10]; (b) with a view to the institution of, or otherwise for the purposes of, any criminal proceedings[11]; or (c) in pursuance of any Community obligation[12].

1 Information is restricted information for this purpose if: (1) it is obtained by the Bank of England by virtue of the power conferred by the Bank of England Act 1998 s 17(1) (see PARA 802) or Sch 2 para 9 (see PARA 804), whether or not it was obtained pursuant to a notice under that provision; and (2) it relates to the business or other affairs of any person: s 37, Sch 7 para 1(1). Information is not restricted information if: (a) it has been made available to the public from other sources; or (b) it is in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it: Sch 7 para 1(2).

2 Bank of England Act 1998 Sch 7 para 1(3).

3 Bank of England Act 1998 Sch 7 para 1(4). A person guilty of such an offence is liable: (1) on conviction on indictment, to imprisonment for a term not exceeding two years, or to a fine, or to both; or (2) on summary conviction, to imprisonment for a term not exceeding three months, or to a fine not exceeding the statutory maximum, or to both: Sch 7 para 1(4). As to the statutory maximum see PARA 56 note 24.

4 See PARA 801.

5 'Credit institution' means an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account: Bank of England Act 1998 Sch 7 para 2(2) (substituted by SI 2001/3649).

6 Bank of England Act 1998 Sch 7 para 2(1). As to the Bank's functions relating to cash ratio deposits see PARA 804.

7 Bank of England Act 1998 Sch 7 para 3(1). The specified authorities and functions are: (1) the Treasury, in relation to its functions under the Financial Services and Markets Act 2000 (see PARA 2); (2) the Secretary of State, in relation to his functions under the Financial Services and Markets Act 2000 (see PARAS 2, 3); (3) an inspector appointed under the Companies Act 1985 Pt XIV (ss 431–453C) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), Pt XV, in relation to his functions under those provisions (see COMPANIES vol 7(2) (2004 Reissue) PARA 1669 et seq); (4) a person authorised to exercise powers under the Companies Act 1985 s 447, the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), art 440 or the Companies Act 1989 s 84, in relation to his functions under those provisions (see COMPANIES vol 7(2) (2004 Reissue) PARA 1679); (5) a person appointed to conduct an investigation under the Financial Services and Markets Act 2000 s 167, s 168(3), s 168(5) or s 284, in relation to his functions relating to that investigation (see PARAS 449, 683); (6) the Financial Services Authority, in relation to its functions under the legislation relating to friendly societies (see PARA 2081 et seq), the Building Societies Act 1986 (see PARA 1856 et seq), the Companies Act 1989 Pt VII (ss 154–191) (see PARA 509 et seq) or the Financial Services and Markets Act 2000 (see PARA 6 et seq); (7) the competent authority for the purposes of the Financial Services and Markets Act 2000 Pt VI (ss 72–103), in relation to its functions under those provisions (see PARA 385); (8) the Office for National Statistics, in relation to its functions under the Statistics of Trade Act 1947 (see TRADE, INDUSTRY AND INDUSTRIAL RELATIONS vol 47 (2001 Reissue) PARA 951 et seq); (9) the Pensions Regulator in relation to its functions under the Pension Schemes Act 1993, the Pensions Act 1995, the Welfare Reform and Pensions Act 1999, the Pensions Act 2004 or any corresponding Northern Ireland enactment (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 598 et seq): Bank of England Act 1998 Sch 7 para 3, Table (substituted by SI 2001/3649; and amended by the Pensions Act 2004 Sch 12 para 70). As from a day to be appointed, in head (8) above the reference to 'the Office for National Statistics' is replaced by a reference to 'the Chancellor of the Exchequer or any person to whom any functions of the Chancellor of the Exchequer under the Statistics of Trade

Act 1947 are delegated': Bank of England Act 1998 Sch 7 para 3, Table (prospectively amended by the Statistics and Registration Service Act 2007 Sch 2 para 7). At the date at which this volume states the law no such day had been appointed. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq. As to the Financial Services Authority see PARAS 4, 6 et seq. As to the Office for National Statistics see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 516, 528. As to the Pensions Regulator see SOCIAL SECURITY AND PENSIONS. As to the Secretary of State see PARA 3.

The list of authorities and functions may be amended by order: see the Bank of England Act 1998 Sch 7 para 3(2). The Treasury may by order restrict the circumstances in which, or impose conditions subject to which, disclosure is permitted in the case of any authority for the time being specified: Sch 7 para 3(3). Before making any order under Sch 7 para 3, the Treasury must consult the Bank: Sch 7 para 3(4). Any power of the Treasury to make an order under the Bank of England Act 1998 is exercisable by statutory instrument: s 40(1). An order under Sch 7 para 3(2) may not be made unless a draft of the order has been laid before and approved by resolution of each House of Parliament: s 40(2). A statutory instrument containing an order under Sch 7 para 3(3) is subject to annulment in pursuance of a resolution of either House of Parliament: s 40(3). At the date at which this volume states the law, no order had been made under the Bank of England Act 1998 Sch 7 para 3.

8 Before deciding whether to give its consent to disclosure, the Bank must take account of such representations as the authority proposing to make the disclosure may make about the desirability of or necessity for the disclosure: Bank of England Act 1998 Sch 7 para 4(2).

9 Bank of England Act 1998 Sch 7 para 4(1). The functions referred to in the text are any of its functions set out in Sch 7 para 3, Table: see note 7.

10 Bank of England Act 1998 Sch 7 para 5(a). As to payments in lieu of cash ratio deposits see PARA 804.

11 Bank of England Act 1998 Sch 7 para 5(b).

12 Bank of England Act 1998 Sch 7 para 5(c).

806. Annual report and accounts. As soon as practicable after the end of each of its financial years, the Bank of England must make to the Chancellor of the Exchequer[1] a report on its activities in that year[2]. The Bank must publish every report in such manner as it thinks appropriate[3], and the Chancellor of the Exchequer is required to lay copies of every report before Parliament[4].

The Bank has a duty to keep proper accounts and records in relation to the accounts[5]. It must prepare for each of its financial years a statement of accounts consisting of a balance sheet as at the last day of the year, and a profit and loss account[6]. The Bank must appoint an auditor or auditors to audit its accounts, including any statement of accounts[7]. As soon as practicable after receiving the report of its auditors on a statement, the Bank must send a copy of the report and the statement to the Chancellor of the Exchequer[8].

After consulting the Bank, the Treasury[9] may by notice in writing to the Bank require it to publish in such manner as it thinks fit such additional information relating to its accounts as the Treasury may specify in the notice[10].

1 As to the Chancellor of the Exchequer see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 514.

2 Bank of England Act 1998 s 4(1). The report must, in particular, contain: (1) a report by the directors of the Bank on the matters for which the sub-committee constituted by s 3 is responsible (see PARA 795); and (2) a copy of the statement for the year prepared under s 7(2) and the report of the Bank's auditors on it (see the text and notes 6–7): s 4(2). The report mentioned in head (1) above must, in particular, include a review of the Bank's performance in relation to its objectives and strategy, as determined by the court of directors of the Bank, in the financial year to which the report relates: s 4(3). A report must also contain: (a) a statement of the rate or rates at which directors of the Bank have been remunerated in the financial year to which the report relates; and (b) a statement of the Bank's objectives and strategy, as determined by the court of directors of the Bank, for the financial year in which the report is made: s 4(4). As to the court of directors see PARA 795.

3 Bank of England Act 1998 s 4(5).

4 Bank of England Act 1998 s 4(6).

5 Bank of England Act 1998 s 7(1).

6 Bank of England Act 1998 s 7(2). In preparing accounts under s 7(2), the Bank is subject to requirements corresponding to the relevant Companies Act requirements, except in so far as the accounts relate to the issue department: Bank of England Act 1998 s 7(3). The Bank may disregard a requirement to which it is subject under s 7(3) to the extent that it considers it appropriate to do so having regard to its functions: s 7(4). In s 7(3), the reference to 'the relevant Companies Act requirements' is a reference to the requirements to which the directors of a company which is a banking company for the purposes of the Companies Act 2006 are for the time being subject under that Act (except ss 412, 413 (directors' benefits)) in relation to the preparation of accounts under s 394 (see COMPANIES): see the Bank of England Act 1998 s 7(9) (amended by SI 2008/948).

7 Bank of England Act 1998 s 7(5). As to auditors see further COMPANIES vol 7(2) (2004 Reissue) PARA 1328 et seq.

8 Bank of England Act 1998 s 7(6).

9 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

10 Bank of England Act 1998 s 7(7), (8). This may include information which the Bank has excluded under s 7(4) from a statement under s 7(2) (see note 6): s 7(7).

807. Bank of England's other powers and duties. The Bank of England must keep registers of the holders of specified stocks[1] and bonds[2]. Gilts are registrable in the books of the Bank, following the closure to gilts of the National Savings Stock Register[3].

The Bank may lend any sums which the Treasury[4] has power to borrow[5] in connection with the National Debt[6].

The Bank of England no longer has statutory power to establish branches in any part of England[7].

The Bank's supervisory role in the regulation of banking business under the Banking Act 1987 has been removed and that role is now performed by the Financial Services Authority[8].

Apart from the monetary policy objective in the Bank of England Act 1998[9], the Bank now has no general statutory objectives[10] but it has two core purposes[11] of monetary stability and financial stability. Monetary stability relates to stable prices[12] and confidence in the currency and financial stability involves the detection and reduction of threats to the financial system as a whole[13]. The Bank in pursuit of both the core purposes communicates its views and works closely with others including the Treasury and the Authority[14] and other central banks[15] and international organisations to improve the international monetary system.

1 Ie the stocks specified in the Finance Act 1942 s 47(1)(a), (1ZA), (1A), Sch 11 Pt I; and the Bank of England Act 1946 s 1, Sch 1 PARA 6. See further PARA 1335.

2 See the Finance Act 1942 s 47(1)(b) (substituted by the Finance Act 2002 s 140(1)(a)); and the Government Stock Regulations 2004, SI 2004/1611. As to the Bank's liability in respect of acting on a forged transfer see *Welch v Bank of England* [1955] Ch 508, [1955] 1 All ER 811.

3 See the Bank of England Act 1998 ss 33, 40(1), (4); and the National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446 (amended by SI 2004/1662). As to the National Savings Stock Register see PARA 1347. 'Gilts' are stocks or bonds of any description included in the Finance Act 1942 Sch 11 Pt I (see PARA 1347 note 8): Bank of England Act 1998 s 33(6); National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, art 2(1).

4 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq. See note 13.

5 Ie under the National Loans Act 1968 s 12: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 728.

6 National Loans Act 1968 s 12(7) (amended by the Statute Law (Repeals) Act 1973).

7 The Country Bankers Act 1826 s 15, which conferred such powers, was repealed by the Statute Law Revision Act 1958 s 1, Sch 1.

8 As to the Financial Services Authority see PARA 792; and PARAS 4, 6 et seq.

9 As to the formulation of monetary policy see PARA 801.

10 The Bank's functions as seen by the Treasury, the Authority and the Bank itself are described in the Memorandum of Understanding between them, issued in October 1997 and revised in March 2006.

11 Ie as determined by the court of directors in its role in setting the Bank's objectives and strategy: see PARA 795. These core purposes were reaffirmed by a statement in March 2007. See also note 13.

12 Stable prices relate back to the government's inflation target, which the Bank seeks to meet through decisions on interest rates taken by the Monetary Policy Committee: see PARA 120.

13 The Bank has responsibility for the stability of the financial system as a whole while the Authority supervises individual banks and other financial organisations. In this role the Bank has surveillance and market intelligence functions. Threats to the financial system as a whole are reduced by strengthening the infrastructure and various financial operations both nationally and internationally, including in exceptional circumstances by acting as the 'lender of last resort' to financial institutions in difficulty (eg in the Northern Rock plc crisis of 2007/2008 but see also PARA 791 note 28). This is part of the Bank's central banking functions and would be exercised to prevent loss of confidence spreading through the system as a whole: it is set out in the Memorandum of Understanding (see note 10). Related to this is the Bank's role in oversight of payment systems (payment and settlement systems being at the centre of the financial infrastructure), its main objective being to ensure that sufficient weight is given to risk reduction and management in their design and operation while taking into account the potential effect of risk mitigation measures on system efficiency. The Bank's principal focus is on the UK payment systems and its oversight activities and priorities are set out in an annual Payment Systems Oversight Report. The Bank also takes part in a joint Working Group of the European System of Central Banks (ESCB) (see note 15) and the Committee of European Securities Regulators (CESR) on standards for securities settlement systems.

As to the nationalising powers of the Treasury under the Banking (Special Provisions) Act 2008 generally see PARA 791.

14 See the Memorandum of Understanding; and note 10.

15 The Bank is a member of the European System of Central Banks (ESCB) which comprises the European Central Bank (ECB) and the national central banks of all 27 EU member states. See also PARA 1398 note 5. At the date at which this volume states the law, the website for the ECB and ESCB is www.ecb.int.

(ii) Banks Generally

808. Origin and constitution of banks. The development of joint stock banks began in 1826, when corporate bodies, or co-partnerships, unlimited in number, were authorised to carry on banking business, both deposit and issue, outside a radius of 65 miles from London[1]. In 1833, the carrying on of banking other than issue business within London and that radius by corporations, companies or partnerships, irrespective of the number of members, was recognised as permissible[2].

In 1837, powers were given to the Crown to grant charters of incorporation to trading companies, including banking companies[3], and provision was made for the renewal or extension of such charters[4].

A system of constituting banks of more than six persons by letters patent was instituted in 1844. Pre-existing banks under the legislation of 1826 and 1833 were given the option of coming under the new system by petitioning for letters patent, but, if in operation before 6 May 1844, were not compelled to do so[5]. The powers and privileges of banks formed within the 65-mile radius under the 1833 legislation were assimilated to those formed outside it under the legislation of 1826[6], except with regard to the right to issue notes[7].

In 1857, a limit of ten members was imposed on all unregistered partnerships carrying on the business[8] of banking[9], but partnerships of not more than ten were authorised to carry on banking business in all respects as any partnership of not more than six, before the passing of the Joint Stock Banking Companies

Act 1857, could then do[10]. At the same time all banks consisting of seven or more members formed under the 1844 legislation were compelled to register with unlimited liability[11]. Those of the earlier joint stock banks or companies which had merely availed themselves of the privileges of the 1844 scheme were not affected, nor were any of the banks existing prior to 1844 which had merely stood on their rights; any of such banks, however, if consisting of more than seven members, or any new coalition of more than seven persons, was entitled to register as a banking company with unlimited liability[12].

In 1858, banking companies, whether already registered or newly formed, were permitted to register with limited liability, save as to note issue, if any[13].

All banks formed or registered under the legislation of 1857 and 1858 were made subject to the company legislation of 1862[14], as if registered under it. This legislation, as subsequently amended and consolidated[15], governs their constitution and that of all banks incorporated since 1862 otherwise than by royal charter or special Act of Parliament. Banks came into the regime of the company legislation as limited or unlimited according to their previous constitution[16], but no existing or new bank could by registering with limited liability preclude the liability of its shareholders being unlimited with regard to note issue, if any[17]. In 1879 banking companies registered as unlimited were afforded the opportunity of registering as limited[18].

1 See the Country Bankers Act 1826 ss 1, 2 (repealed).

2 Bank of England Act 1833 ss 1–3 (repealed). As to the Bank of England's exclusive right of note issue see PARA 796.

3 Chartered Companies Act 1837 s 2 (repealed).

4 Chartered Companies Act 1884 s 1 (repealed).

5 Joint Stock Banks Act 1844 ss 1, 44, 45 (repealed). Banking companies of more than six persons formed by agreement or co-partnership covenant on or after 6 May 1844, unless by virtue of letters patent, were illegal companies: s 1 (repealed). See also *O'Connor v Bradshaw* (1850) 5 Exch 882; *R v Whitmarsh* (1850) 15 QB 600.

6 Joint Stock Banks Act 1844 s 47 (repealed); Companies Act 1948 s 459(9)(f), Sch 18 (repealed); Companies Act 1967 s 129, Sch 7 (repealed).

7 See the Bank Charter Act 1844 ss 10, 11, 26, 27 (ss 10, 26, 27 repealed; s 11 amended by the Statute Law Revision Act 1891 and by the Currency and Bank Notes Act 1928 s 13, Schedule). See also PARA 796 note 1.

8 As to the meaning of 'banking business' see PARA 815.

9 Joint Stock Banking Companies Act 1857 s 13 (repealed). Before the passing of the Companies Act 1967, a partnership carrying on a banking business continued to be restricted to ten partners: Companies Act 1948 s 429 (repealed). Under the Companies Act 1967, a partnership carrying on banking business could consist of up to 20 partners, provided that, if there were more than ten partners, each partner had been authorised by the Department of Trade and Industry to be a partner: s 119 (repealed).

10 Joint Stock Banking Companies Act 1857 s 12 (repealed); Companies Act 1948 s 459(9)(f), Sch 18 (repealed); Companies Act 1967 s 129, Sch 7 (repealed).

11 Joint Stock Banking Companies Act 1857 s 4 (repealed).

12 Joint Stock Banking Companies Act 1857 ss 6, 13 (repealed).

13 Joint Stock Banks Act 1858 s 1 (repealed).

14 Ie the Companies Act 1862.

15 See COMPANIES vol 7(1) (2004 Reissue) PARA 209.

16 Companies Act 1862 ss 175, 176 (repealed); Companies Act 1948 ss 377, 455 (repealed); Companies Act 1985 ss 675, 735 (both prospectively repealed) (as to replacement provisions for s 735 see the Companies Act 2006 ss 1, 1171).

17 Companies Act 1862 s 182 (repealed); Companies Act 1948 s 431 (repealed). As to the disappearance in 1921 of the last private bank with note issuing powers see PARA 796 note 1.

18 Companies Act 1879 s 4 (repealed); Companies Act 1948 s 430 (repealed).

(iii) Savings Banks

A. TRUSTEE SAVINGS BANKS

809. Reorganisation of trustee savings banks. The Trustee Savings Banks Act 1985 was passed[1] for the purpose of enabling the then existing TSB group[2] to be reorganised into the new TSB group[3]. The Act provided for the transfer and vesting[4] of property, rights, liabilities and obligations and for the transfer of the business of each of the existing banks to its successor[5]; and the transfer included customers' accounts and rights, liabilities and obligations under contracts which are not normally capable of being transferred or assigned[6].

The new TSB group was required to seek authority as necessary to take deposits; and its customers' accounts were governed by the normal relationship of banker and customer[7]. The Trustee Savings Banks Central Board was given additional powers to assist in the reorganisation[8]; and following the completion of that task, was wound up by the Treasury[9].

1 The Trustee Savings Banks Act 1985 received the Royal Assent on 25 July 1985 and came into force on 25 September 1985: s 7(2). For a description of the legislative history of trustee savings banks from 1817 until their reorganisation in 1985 see *Ross v Lord Advocate* [1986] 3 All ER 79 at 84–93, [1986] 1 WLR 1077 at 1084–1095, HL, per Lord Templeman.

2 'Existing TSB group' means the following, taken as a whole:
   (1) the existing trustee savings banks certified under the Trustee Savings Banks Act 1969 or the Trustee Savings Banks Act 1981 (the 'existing banks');
   (2) the Trustee Savings Banks Central Board (the 'Central Board');
   (3) Trustee Savings Banks (Holdings) Limited (the 'existing holding company'); and
   (4) the existing subsidiaries of any of the existing banks, the Central Board or the existing holding company,

   and 'existing' with reference to any of those banks or companies means existing immediately before 21 July 1986 (see note 4) and, in the case of a bank, with a certification under the Trustee Savings Banks Act 1969 or the Trustee Savings Banks Act 1981 effective on 17 December 1984: Trustee Savings Banks Act 1985 s 1(1)(a).

3 Trustee Savings Banks Act 1985 s 1(5). 'New TSB group' means the following, taken as a whole: (1) the companies formed or to be formed with objects including that of assuming and conducting, after 21 July 1986 (see note 4), the respective businesses of the existing banks and eligible to succeed them; (2) the companies which, immediately before 21 July 1986, were subsidiaries of the existing banks, the Central Board or the existing holding company (see note 2); (3) the company formed or to be formed with objects including that of acting as the holding company for the companies falling within heads (1) and (2) above and which, immediately before 21 July 1986, was a subsidiary of the Central Board (the 'new holding company'): s 1(1)(b).

4 The vesting day under the Trustee Savings Banks Act 1985 was to be appointed by the Treasury by order made by statutory instrument after consulting the Central Board: s 1(4). In exercise of the power so conferred, the Treasury appointed 21 July 1986 as the vesting day: see the Trustee Savings Banks Act 1985 (Appointed Day) (No 3) Order 1986, SI 1986/1222, art 2. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

5 See the Trustee Savings Banks Act 1985 s 3, Sch 1 (s 3 amended by the Employment Rights Act 1996 Sch 1 para 27; and the Trustee Savings Banks Act 1985 Sch 1 amended by the Banking Act 1987 Sch 6 para 19, Sch 7 Pt I; the Building Societies Act 1986 s 120, Sch 19 Pt I; SI 2001/3649; and SI 2002/1501). At the date of the passing of the Trustee Savings Banks Act 1985, the depositors had no proprietary interest in the surplus assets of the existing trustee savings banks and accordingly by s 3(3) such assets were transferred to the successor company: *Ross v Lord Advocate* [1986] 3 All ER 79, [1986] 1 WLR 1077, HL.

6 See the Trustee Savings Banks Act 1985 s 3(6).

7 See PARA 815 et seq. The TSB group was acquired by Lloyds Bank plc in 1994, and thus no longer exists as an independent entity.

8 See the Trustee Savings Banks Act 1985 s 2 (repealed by the Statute Law (Repeals) Act 2004).

9 See the Trustee Savings Banks Act 1985 s 2(4) (repealed: see note 8); and the Trustee Savings Banks Act 1985 (Appointed Day) (No 7) Order 1990, SI 1990/1982. As to the dissolution of the

existing banks and the repeal of the Trustee Savings Banks Act 1981 see the Trustee Savings Banks Act 1985 s 4 (amended by the Statute Law (Repeals) Act 2004); the Trustee Savings Banks Act 1985 (Appointed Day) (No 2) Order 1986, SI 1986/1220; the Trustee Savings Banks Act 1985 (Appointed Day) (No 4) Order 1986, SI 1986/1223; and the Trustee Savings Banks Act 1985 (Appointed Day) (No 6) Order 1988, SI 1988/1168.

B. THE NATIONAL SAVINGS BANK

810. The National Savings Bank. The National Savings Bank (formerly known as the Post Office Savings Bank) exists for the receipt and repayment of deposits, and its business is carried on by the Director of Savings[1] who is appointed by the Treasury[2]. Regulations may be made by the Treasury for superintending, inspecting and regulating the manner in which accounts of depositors are kept and examined, and with respect to the making of deposits and the withdrawal of deposits and interest[3]. The National Savings Bank provided facilities for certified contractual savings schemes[4] and under the Savings Contracts Regulations 1969 savings contracts may be administered by the Director of Savings[5].

1 National Savings Bank Act 1971 s 1. The Director of Savings may authorise another person, or that person's employees, to exercise certain of the Director's functions: see the Contracting Out (Functions Relating to National Savings) Order 1998, SI 1998/1449.

2 National Debt Act 1972 s 1(1). Unless required by any Act to be borne in some other manner, any expenses of the Director of Savings must be defrayed out of money provided by Parliament: s 1(2). As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 e seq.

3 National Savings Bank Act 1971 s 2(1). Regulations may also be made as to particular matters: see s 8 (amended by the Finance Act 1982 Sch 2 para 1, Sch 20 para 1; and the Finance Act 2003 s 208). Regulations may restrict the classes of persons who may open accounts with the National Savings Bank, but any such restriction does not apply to any account opened before the coming into force of the regulations imposing the restriction: National Savings Bank Act 1971 s 2(1A) (added by the Finance Act 1989 s 184(1)). As to the regulations in force at the date at which this volume states the law see the National Savings Bank Regulations 1972, SI 1972/764 (amended by SI 1974/553; SI 1978/888; SI 1981/484; SI 1982/1282; SI 1982/1762; SI 1983/1750; SI 1984/9; SI 1984/602; SI 1986/2001; SI 1988/1166; SI 1988/2144; SI 1989/25; SI 1989/2045; SI 1991/72; SI 1992/2892; SI 1996/801; SI 1996/1724; SI 1998/1446; SI 1999/588; SI 1999/1611; SI 2001/858; SI 2003/2895; SI 2004/1662; SI 2006/1066; SI 2007/1265; SI 2008/734). As to the disapplication of particular regulations in relation to certain accounts see the National Savings Bank Regulations 1972, SI 1972/764, reg 2A (added by SI 2003/2895; and amended by SI 2008/734). Any provision which may be made in relation to investment deposits by regulations under the National Savings Bank Act 1971 s 2 may, in the case of deposits in investment accounts of any description first made available after the passing of the Finance Act 2003, be included instead in the terms and conditions of the accounts, although any such provision has effect subject to regulations under the National Savings Bank Act 1971 s 2 and orders under s 4 (see PARA 812): s 9A(1), (2) (s 9A added by the Finance Act 2003 s 208). For these purposes, 'terms and conditions' means terms and conditions set by the Treasury and published by the Director of Savings in a manner approved by the Treasury: National Savings Bank Act 1971 s 9A(3) (as so added). As to investment deposits see PARA 812.

Any power to make regulations, orders or warrants under the National Savings Bank Act 1971 is exercisable by statutory instrument: s 26(1). A statutory instrument containing regulations under s 2, or an order under s 4 (see PARA 812), is subject to annulment in pursuance of a resolution of either House of Parliament: s 26(2) (substituted by the Finance Act 2000 s 152(2)). As to the procedure for statutory instruments made under the National Savings Bank Act 1971 s 11 (see PARA 811 note 1) see s 26(4).

4 See the Income and Corporation Taxes Act 1988 s 326(1), (2) (repealed); and INCOME TAXATION vol 23(2) (Reissue) PARA 1192.

5 See the Savings Contracts Regulations 1969, SI 1969/1342 (amended by SI 1977/1456; SI 1984/599; SI 1986/2001; SI 1988/1358; SI 1991/76; SI 1992/3112; SI 1997/1858; SI 2005/2114).

811. Kinds of deposit. A deposit with the National Savings Bank may be made either as an ordinary deposit or as an investment deposit[1]. Treasury regulations[2] may make different provision with respect to ordinary deposits, investment deposits and investment deposits of different descriptions, and may prevent the making of an investment deposit or an investment deposit of a particular description unless the person who will be the depositor in respect of the investment deposit is also a depositor in respect of ordinary deposits and the sum due to him in respect of those deposits is not less than such amount as may be specified in the regulations[3].

An ordinary deposit of less than £10, and an investment deposit of less than £20, may only be made at the principal office of the National Savings Bank unless the Director of Savings, in any case in which he thinks fit, accepts any such deposit made at any other savings bank office[4]. Where an account is opened, a deposit book must be issued to the depositor in which deposits are to be duly entered[5]. Where investment deposits are to be made by or on behalf of a depositor, a separate account must be opened and a separate deposit book must be issued in respect of those deposits[6].

1 National Savings Bank Act 1971 s 3(1). This is subject to any provision made in relation to ordinary accounts or ordinary deposits by regulations under s 2 (see PARA 810) made by virtue of s 8(3) (see PARA 810): s 3(1A) (added by the Finance Act 2003 s 208). As to the making of regulations see PARA 810 note 3. As to the management of ordinary deposits see PARA 813; and as to investment deposits see PARA 812.

2 Ie regulations made by the Treasury under the National Savings Bank Act 1971 s 2: see PARA 810. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

3 National Savings Bank Act 1971 s 3(2) (amended by the Finance Act 1982 Sch 20 para 2).

4 See the National Savings Bank Act 1971 s 8(1)(e); and the National Savings Bank Regulations 1972, SI 1972/764, regs 20, 28(5) (both substituted by SI 1988/2144; and amended by SI 1992/2892).

5 See the National Savings Bank Regulations 1972, SI 1972/764, regs 16, 19. The Treasury's power to make regulations under the National Savings Bank Act 1971 s 2 (see PARA 810) includes power to make regulations for the giving of statements of accounts or the issuing of depositors' books and for prescribing the entries to be made in such books: s 8(1)(b) (substituted by the Finance Act 1982 Sch 20 para 1). Except in such cases as the Director of Savings may direct, every person who may properly sign an application to withdraw deposits must sign his name in the space provided in the book: National Savings Bank Regulations 1972, SI 1972/764, reg 16(2). No charge may be made for a deposit book, which is the property of the Director of Savings and must be delivered up as and when required by him: reg 16(3), (4). Every depositor must, at such times as the Director of Savings may direct and whenever required, forward to the Director of Savings the deposit book relating to any account in his name: reg 17. On the application of a depositor, the Director of Savings may, if he thinks fit, issue a new deposit book to replace a lost one; and if in his opinion any deposit book has been tampered with or is in such a condition as to render the issue of a new book desirable, he may, if he thinks fit, require the surrender and cancellation of the book and issue a new book to the depositor: reg 18(1), (2). Notwithstanding anything in the National Savings Bank Regulations 1972, SI 1972/764, the Director of Savings may pay any sum in respect of any amount in the National Savings Bank without the production of the deposit book where he is satisfied that the depositor or other claimant is entitled to receive that sum: reg 18(3).

6 National Savings Bank Regulations 1972, SI 1972/764, reg 28(1).

812. Investment deposits. Investment deposits[1] are received on such terms as to notice of withdrawal[2] and interest[3] (other than terms as to rate of interest) as the Treasury may from time to time prescribe, and in respect of interest different terms may be prescribed in relation to different descriptions of investment deposits[4]. The Treasury may by order prescribe an amount as the minimum balance for investment accounts and may provide for converting into a different description of investment account any account into which investment deposits of

any description are made if the balance of that account falls below the minimum balance so prescribed for an account of that description[5].

The maximum amount which any person may have in an investment deposit account (except for the credit of a treasurer's account or an individual savings account) or in one or more such accounts, whether solely or jointly with any other person, is £100,000[6]. The maximum amount that may be credited to a treasurer's account is £2,000,000[7]. The maximum deposit for crediting to an individual savings account is £3,600 in any year beginning on 6 April[8]. Interest on investment deposits is payable at such rates as the Treasury may from time to time determine, and different rates may be so determined in relation to different descriptions of investment deposits and different periods of notice of withdrawal[9].

All sums received by the Director of Savings as investment deposits with the National Savings Bank must from time to time be paid by him into the National Loans Fund in accordance with directions given by the Treasury; and the sums required for repaying, or paying interest on, investment deposits with the National Savings Bank are to be charged on that Fund with recourse to the Consolidated Fund[10]. However, there may be retained by the Director of Savings out of the sums so received by him such amounts as may be required by him as a working balance; and there must be paid to him from time to time out of the National Loans Fund or, as the case may be, the Consolidated Fund, the sums required for repaying, or paying interest on, investment deposits or for increasing his working balance[11].

1 As to the different kinds of deposit see PARA 811.

2 Except where the Director of Savings otherwise directs, money deposited in a treasurer's account by way of investment deposit, or any interest thereon, may not be withdrawn or transferred, except to an investment deposit account, unless the relevant prior notice of withdrawal or transfer in the approved form has been given to the Director of Savings: National Savings Bank Act 1971 s 7(2) (substituted by the Finance Act 1982 Sch 20 para 6(b)); National Savings Bank Regulations 1972, SI 1972/764, reg 29(1) (reg 29 substituted by SI 1996/801; and the National Savings Bank Regulations 1972, SI 1972/764, reg 29(1) amended by SI 1996/1724 and SI 2006/1066). The relevant prior notice is 30 days: National Savings Bank Regulations 1972, SI 1972/764, reg 29(1A) (reg 29 as so substituted; and reg 29(1A) added by SI 1996/1724 and amended by SI 2006/1066). Withdrawals and transfers from accounts other than a treasurer's account are governed by comparable provisions contained in the National Savings Bank Regulations 1972, SI 1972/764, reg 28A (added by SI 2006/1066).

3 'Interest', in relation to investment deposits, includes any bonus or other payment, whether payable annually or otherwise, which constitutes income derived from the whole or any part of the deposits: National Savings Bank Act 1971 s 27 (definition added by the Finance Act 1982 Sch 20 para 8). As to the calculation of interest see the National Savings Bank Regulations 1972, SI 1972/764, reg 42 (amended by SI 1983/1750; SI 1996/1724; SI 1999/588; SI 1999/1611).

4 See the National Savings Bank Act 1971 s 6(1) (amended by the Finance Act 1982 Sch 20 para 5(2)); and the National Savings Bank Act 1971 s 7(2) (amended by the Finance Act 1982 Sch 20 para 6(b)). As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

5 National Savings Bank Act 1971 s 4(1A) (added by the Finance Act 1982 Sch 20 para 3(1)). As to the making of orders under the National Savings Bank Act 1971 see PARA 810 note 3.

6 See the National Savings Bank (Investment Deposits) (Limits) Order 1977, SI 1977/1210, art 3 (amended by SI 1993/1239; SI 1996/1854; SI 1999/1056). See note 8. The National Savings Bank (Investment Deposits) (Limits) Order 1977, SI 1977/1210, art 3 does not apply to an investment account of any description for which terms and conditions have been set pursuant to the National Savings Bank Act 1971 s 9A(1) (see PARA 810 note 3): National Savings Bank (Investment Deposits) (Limits) Order 1977, SI 1977/1210, art 3ZA (added by SI 2003/2895).

7 National Savings Bank (Investment Deposits) (Limits) Order 1977, SI 1977/1210, art 3A (added by SI 1996/1854). See note 8. As to treasurer's accounts see the National Savings Bank Regulations 1972, SI 1972/764, regs 29A–29K (all added by SI 1996/1724; and the National

Savings Bank Regulations 1972, SI 1972/764, reg 29H amended by SI 2006/1066; and the National Savings Bank Regulations 1972, SI 1972/764, reg 29K amended by SI 1999/588).

Notwithstanding the National Savings Bank Regulations 1972, SI 1972/764, regs 21, 29, 29A, 29B(3), 29F–29H, 29K (see also PARA 823): (1) a treasurer's account may not be opened after 10 May 2007; (2) no deposit may be made to the credit of a treasurer's account after 10 August 2007; and (3) any withdrawal from a treasurer's account after 10 August 2007 must be a withdrawal of the balance standing to the credit of the account at the date of withdrawal and any accrued interest that has not been credited to the account: reg 2C (regs 2C, 2D added by SI 2007/1265). If a valid application to withdraw the whole amount referred to in the National Savings Bank Regulations 1972, SI 1972/764, reg 2C(c) (see head (3) above) from a treasurer's account has not been made before 10 November 2007, the Director of Savings may transfer the balance standing to the credit of that account and any accrued interest that has not been credited to that account to a special Director's account: reg 2D (as so added).

8 National Savings Bank (Investment Deposits) (Limits) Order 1977, SI 1977/1210, art 3B (added by SI 1999/1056; and amended by SI 2001/858; SI 2008/734). As to individual savings accounts see the National Savings Bank Regulations 1972, SI 1972/764, regs 29L–29R (all added by SI 1999/588; and the National Savings Bank Regulations 1972, SI 1972/764, reg 29L amended by SI 1999/1611; SI 2001/858; SI 2005/2114).

Nothing in the National Savings Bank (Investment Deposits) (Limits) Order 1977, SI 1977/1210, art 3, art 3A or art 3B operates to prevent: (1) the receipt or crediting of any amount allowed by the National Savings Bank to a depositor by way of interest in respect of his investment deposit account; (2) the receipt or crediting of any amount transferred from the investment deposit account of another depositor in the National Savings Bank who has died; (3) the crediting of any amount by the Director of Savings under the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 45 (see PARA 814) or paid under the National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, art 21 (see PARA 1347); (4) the receipt or crediting of any amount received or credited in contravention of art 21 from being treated as having been lawfully received or credited for such period as the Director of Savings, in his discretion, thinks appropriate provided that at the time the amount was received or credited the Director was unaware of the contravention and provided also that the Director considers it just and reasonable that the amount should be so treated; (5) the receipt of any amount for, or the crediting of any amount to, any account of the Accountant General of the Supreme Court of Judicature of Northern Ireland; or (6) the receipt or crediting of any amount to an individual savings account of a sum transferred by an account manager pursuant to the Individual Savings Account Regulations 1998, SI 1998/1870: see the National Savings Bank (Investment Deposits) (Limits) Order 1977, SI 1977/1210, art 4(1) (substituted by SI 1981/108; and amended by SI 1987/329; SI 1988/1030; SI 1998/1446; SI 1999/2060; SI 2000/1421). A trustee is treated separately in his personal capacity and in his capacity as trustee and separately in respect of each trust fund: see the National Savings Bank (Investment Deposits) (Limits) Order 1977, SI 1977/1210, art 4(2), (3).

9 National Savings Bank Act 1971 s 6(2) (amended by the Finance Act 1982 Sch 20 para 5(2); and the Finance Act 2003 s 208). The Treasury may determine that the rate is to be produced by the operation of a formula: see the National Savings Bank Act 1971 s 6(2ZA) (added by the Finance Act 2003 s 208). Without prejudice to the generality of the National Savings Bank Act 1971 s 6(2), the Treasury may determine, in relation to an account into which investment deposits of any description are made, different rates of interest by reference to one or more of the following factors, namely: (1) the balance of that account at any time or over any period or the aggregate balance of that account and the depositor's other accounts of the same description, or the depositor's other investment accounts of any description, at any time or over any period; and (2) the number of withdrawals from that account over any period or the number of withdrawals from that account and the depositor's other accounts of the same description, or the depositor's other investment accounts of any description, over any period: s 6(2A) (added by the Finance Act 1982 Sch 20 para 5(3)).

The Director of Savings must give notice in the London, Edinburgh and Belfast Gazettes of any alteration in a rate of interest payable on investment deposits or investment deposits of a particular description (other than one occasioned by the operation of a formula); and any such alteration may affect deposits received at or before, as well as after, the time the alteration is made: National Savings Bank Act 1971 s 6(3) (amended by the Finance Act 1982 Sch 20 para 5(4); and the Finance Act 2003 s 208).

10 Finance Act 1980 s 120(1). As to the National Loans Fund and the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 711 et seq, 727 et seq; PARLIAMENT vol 34 (Reissue) PARAS 952–955.

11 Finance Act 1980 s 120(2). The amounts to be retained by or paid to the Director of Savings must be determined by agreement between him and the Treasury: s 120(3). The expenses of the Director of Savings in connection with investment deposits are to be defrayed out of moneys provided by Parliament: s 120(6).

813. Management of ordinary deposits. The balance of ordinary deposits received in excess of the amount required to meet withdrawals must be paid over to, and invested by, the National Debt Commissioners, after deducting expenses incurred by them and by the Director of Savings[1]. The Director of Savings and the National Debt Commissioners must prepare annual statements with respect to matters relating to ordinary deposits and expenses[2]. If in any period the aggregate of the sums accrued by way of interest on the investment of surplus deposits[3], after deduction of any sum required by the Treasury to be set aside to provide for depreciation in the value of the investments so made, exceeds the aggregate of:

(1) the aggregate of the sums paid or credited during that period by way of interest on ordinary deposits; and

(2) the amount of the expenses incurred during that period in connection with ordinary deposits,

then the excess must be paid into the Consolidated Fund[4]. If in any period the aggregate of the sums that so accrued, after deduction of any sum required to be so set aside, falls short of the second-mentioned aggregate, the deficiency must be made good out of that Fund[5].

1 See the National Savings Bank Act 1971 s 17(1)–(3). As to the National Debt Commissioners see PARA 1332. As to securities in which ordinary deposits may be invested see s 18 (amended by the Finance Act 1999 s 134(7)). As to sums to be included in the expenses of the Director of Savings and the National Debt Commissioners see the National Savings Bank Act 1971 s 24(1), (2) (s 24(1) amended by the Superannuation Act 1972 Sch 6 para 83). As to limits on the amount of ordinary deposits, and the rate of interest payable on them, see the National Savings Bank Act 1971 ss 4, 5; and PARA 814.

2 See the National Savings Bank Act 1971 s 19 (amended by the Finance Act 1998 s 162).

3 Ie under the National Savings Bank Act 1971 s 17: see the text to note 1.

4 National Savings Bank Act 1971 s 20 (amended by the Finance Act 1998 s 162). If at any time claims in respect of ordinary deposits cannot be met, the Treasury must provide the Director of Savings with such sum out of the Consolidated Fund as is necessary to meet them: National Savings Bank Act 1971 s 25 (amended by the Finance Act 1980 Sch 20 Pt XV). As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq. As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 34 (Reissue) PARAS 952–955.

5 National Savings Bank Act 1971 s 20 (as amended: see note 4).

814. Regulation of deposit and withdrawal. Regulations for the conduct of business by the National Savings Bank are made by the Treasury[1]. The Treasury may by order limit the amount which may be received by way of deposit in the National Savings Bank from any person whatsoever either in one year or in the aggregate; and the limit which a person may have in an ordinary deposit account or accounts, whether solely or jointly with any other person, is £10,000, exclusive of money deposited or credited for specified purposes[2]. The Director of Savings may, with the consent of the Treasury, from time to time determine the rate or rates at which interest is to be payable on amounts deposited in ordinary accounts or determine that no interest is to be payable on such amounts[3].

Deposits may be made by and in the name of any person who has attained the age of seven years and who is not under any legal disability, otherwise than by

reason of his age[4]. Deposits may also be made on behalf of and in the name of a minor under the age of seven years, and of a person who lacks capacity[5]. Trust accounts may be opened[6].

A depositor may apply to transfer deposits standing in his name into the name of any other depositor or into an account to be opened in the name of any person entitled to make deposits in the National Savings Bank; and, if the Director of Savings is satisfied as to the applicant's title, the death of the applicant before the transfer is effected will not, in the absence of notice, determine his authority for the transfer to be made[7].

Withdrawals may be made by a depositor[8] on written application in the approved form, payments being made by warrant unless otherwise directed by the Director of Savings[9].

Where the total amount due to a depositor at the date of his death does not exceed £5,000, the Director of Savings may dispense with probate or letters of administration and pay the amount due, or any part of it, to a person who has a beneficial interest in the deceased's estate or falls within certain other specified categories[10]. Where, on the death of a depositor, the aggregate value of specified assets[11] exceeds £50,000, the Director of Savings must, before making any payment or transfer of any of the deposits standing to the credit of the depositor either alone or jointly, require the production of a statement from the Commissioners for Revenue and Customs with regard to payment of inheritance tax[12].

Before 1 May 1981, a depositor, being a person who had attained the age of 16 years, could nominate any person to receive any sum due to the depositor at his death in respect of deposits; but a nomination made after 30 April 1981 is of no effect[13].

At the request of the depositor, investments may be made out of the deposit in government stock[14].

Restrictions are imposed on the disclosure of depositors' names and of amounts deposited or withdrawn[15].

Where a first or any other deposit is made or received in error, the Director of Savings may return the same and cancel all proceedings taken in respect of it, or may take such other steps as may be necessary to give effect to the intention of the parties[16].

1 See the National Savings Bank Act 1971 ss 2(1), 8; and PARA 810. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

2 National Savings Bank Act 1971 s 4(1); Savings Banks (Ordinary Deposits) (Limits) Order 1969, SI 1969/939, art 3(1) (art 3(1), (2) amended by SI 1969/1699; SI 1987/330; SI 1998/1446). See also the Savings Banks (Ordinary Deposits) (Limits) Order 1969, SI 1969/939, arts 3(2)–(5), 4 (art 3(2) as so amended; and art 4 amended by SI 1969/1699).

3 See the National Savings Bank Act 1971 s 5(1) (amended by the Finance Act 1989 s 184(2)). As to the calculation of interest on ordinary deposits see the National Savings Bank Regulations 1972, SI 1972/764, reg 43 (substituted by SI 1991/72). An ordinary account may not be opened after 28 January 2004, nor may an ordinary deposit be made after 31 July 2004, and any withdrawal from an ordinary account after 31 July 2004 must be for the whole amount standing to the credit of the account at the date of the withdrawal and any accrued interest that has not been credited to the account: National Savings Bank Regulations 1972, SI 1972/764, reg 2B (added by SI 2003/2895).

4 National Savings Bank Regulations 1972, SI 1972/764, reg 5(1) (amended by SI 1989/2045). As to the particulars to be disclosed by a depositor and the declaration to be made see the National Savings Bank Regulations 1972, SI 1972/764, reg 4.

5 See the National Savings Bank Regulations 1972, SI 1972/764, regs 6(1), 7(1) (reg 7 amended by SI 2007/1898). As to the particulars to be disclosed by a minor of under seven years of age and a person who lacks capacity see the National Savings Bank Regulations 1972, SI 1972/764,

reg 6(2)–(4) (reg 6(4) substituted by SI 1989/2045); the National Savings Bank Regulations 1972, SI 1972/764, reg 7(2)–(4) (as so amended), reg 45. As to persons unable to write see reg 46 (amended by SI 2006/1066).

6 See the National Savings Bank Regulations 1972, SI 1972/764, regs 5(2), 9 (both amended by SI 1989/2045; and the National Savings Bank Regulations 1972, SI 1972/764, reg 9 further amended by SI 2007/1898). As to the provisions preventing the Director of Savings from receiving, or being affected with, notice of any trust see the National Savings Bank Regulations 1972, SI 1972/764, reg 48. As to powers of attorney see reg 49.

Joint accounts could be opened before 1 January 1990 and friendly, charitable, building and other societies, corporations and government departments could open accounts before that date: see regs 8, 10–12 (reg 8 amended by SI 1984/9; SI 1989/2045; SI 2007/1898; the National Savings Bank Regulations 1972, SI 1972/764, regs 10–12 amended by SI 1989/2045; the National Savings Bank Regulations 1972, SI 1972/764, reg 11 further amended by SI 2003/2895). As to deposits by charities etc see the National Savings Bank Act 1971 s 16.

7 See the National Savings Bank Regulations 1972, SI 1972/764, reg 30(1), (2). As to the transfer of an ordinary deposit in the National Savings Bank to an overseas savings bank, and vice versa, see the National Savings Bank Act 1971 s 15; and the National Savings Bank Regulations 1972, SI 1972/764, reg 31. As to the addition of names to an account see reg 32.

8 An application for the withdrawal of money deposited by or in the name of a minor may be made by the minor if he has attained the age of seven years: National Savings Bank Regulations 1972, SI 1972/764, reg 25. As to withdrawals in the case of bankrupts see reg 26 (amended by SI 1986/2001).

9 See the National Savings Bank Act 1971 s 7(1) (amended by the Finance Act 1982 Sch 20 para 6(a)); and the National Savings Bank Regulations 1972, SI 1972/764, regs 21, 29 (reg 21 amended by SI 1982/1282; SI 2006/1066; and the National Savings Bank Regulations 1972, SI 1972/764, reg 29 substituted by SI 1996/801; and amended by SI 1996/1724; SI 2006/1066). In the case of ordinary deposits, the depositor is entitled to repayment within ten days of his demand: see the National Savings Bank Act 1971 s 7(1) (as so amended). As to withdrawal of investment deposit accounts see PARA 812 note 2. Withdrawal of ordinary deposits may be made without previous notice: (1) at any savings bank office, to an amount not exceeding £100 in cash; or (2) at a designated savings bank office, to an amount not exceeding £250 in cash: National Savings Bank Regulations 1972, SI 1972/764, reg 22(1) (substituted by SI 1982/1762; and amended by SI 1989/25). As to the provisos applicable to such payments see the National Savings Bank Regulations 1972, SI 1972/764, reg 22(1) provisos (i)–(vi) (substituted by SI 1982/1762). As to designated savings bank offices see the National Savings Bank Regulations 1972, SI 1972/764, reg 22(1A) (added by SI 1982/1762). As to authority for payment to third parties see the National Savings Bank Regulations 1972, SI 1972/764, reg 27 (amended by SI 2006/1066). As to exemption of warrants etc from stamp duty see the National Savings Bank Regulations 1972, SI 1972/764, reg 50. As to stamp duty generally see STAMP DUTIES AND STAMP DUTY RESERVE TAX.

As to treasurer's accounts and their closure see PARA 812 note 7.

The provisions of the Bills of Exchange Act 1882 ss 76, 77(1), (3), (4), (5) and (6) (so far as they relate to crossed cheques), ss 78–81 (s 80 as amended) and the Cheques Act 1957 ss 3, 4 (both as amended) (see PARAS 882, 890) apply to any crossed warrant issued under the National Savings Bank Regulations 1972, SI 1972/764, as if the warrant were a cheque drawn on the Director of Savings by the officer issuing it, but nothing in those regulations makes any such warrant negotiable: reg 21(5).

10 See the National Savings Bank Act 1971 s 9 (amended by SI 1984/539); and the National Savings Bank Regulations 1972, SI 1972/764, reg 40 (amended by SI 1984/602). As to the law applicable on the death of a depositor see the National Savings Bank Regulations 1972, SI 1972/764, reg 39.

11 Ie the assets held in the National Savings Bank and specified in the National Savings Bank Regulations 1972, SI 1972/764, reg 41(2), (3) (reg 41(2) amended by SI 1988/1166; the National Savings Bank Regulations 1972, SI 1972/764, reg 41(3) amended by SI 1978/888; and SI 2004/1662).

12 See the National Savings Bank Regulations 1972, SI 1972/764, reg 41(1) (amended by SI 1978/888; SI 1993/3130; SI 2005/2114). The functions of the Inland Revenue and of Her Majesty's Customs and Excise have been taken over by the Commissioners for Her Majesty's Revenue and Customs appointed under the Commissioners for Revenue and Customs Act 2005 s 1: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 900 et seq; INCOME TAXATION. See also CONSTITUTIONAL LAW AND HUMAN RIGHTS; VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 13. As to inheritance tax see INHERITANCE TAXATION vol 24 (Reissue) PARA 401 et seq.

13 National Savings Bank Regulations 1972, SI 1972/764, reg 33(1) (amended by SI 1981/484). As to the former power of nomination see the National Savings Bank Regulations 1972, SI 1972/764, regs 33–38A (regs 33, 35 amended by SI 1981/484; the National Savings Bank Regulations 1972, SI 1972/764, reg 35 further amended by SI 2005/2114; the National Savings Bank Regulations 1972, SI 1972/764, reg 37 amended by SI 2007/1898; the National Savings Bank Regulations 1972, SI 1972/764, reg 38 amended by SI 1998/1446; and the National Savings Bank Regulations 1972, SI 1972/764, reg 38A added by SI 1998/1446 and amended by SI 2004/1662).

14 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 45 (amended by SI 1989/2046).

15 See the National Savings Bank Act 1971 s 12 (amended by the Finance Act 1988 s 126(5); the Finance Act 1989 s 142(9), (10); and the Finance Act 1999 s 137).

16 National Savings Bank Regulations 1972, SI 1972/764, reg 47.

(3) BUSINESS OF BANKING

(i) Relation of Banker and Customer

815. Meanings of 'bank' and 'banker'. It is the existence of enactments, instruments, agreements, rules, usages and practices which apply to a person by virtue of his being a bank or banker that makes relevant the meanings of the terms 'bank' and 'banker'[1].

The principal enactments which apply to a person by virtue of his being a bank or banker are the Bills of Exchange Act 1882 and the Cheques Act 1957[2]. Both statutes refer exclusively to 'banker'[3] rather than 'bank'[4].

The characteristics usually found in bankers are: (1) that they accept money from, and collect cheques for, their customers and place them to their credit; (2) that they honour cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly; and (3) that they keep current accounts in their books in which the credits and debits are entered[5]. This statement of the essentials of banking business is not, however, exhaustive of all that is ordinary in such business; transactions which lack the above characteristics may nevertheless be usual banking transactions[6].

The judicial recognition of the banker's lien[7] implies the inclusion in banking business of the making of advances or the granting of overdrafts to customers.

1 See *United Dominions Trust Ltd v Kirkwood* [1966] 2 QB 431 at 445, [1966] 1 All ER 968 at 974, CA, where Lord Denning MR collected together the statutory privileges then enjoyed by bankers.

2 See PARA 819 et seq. For examples of other statutes which define 'bank' or 'banker' see: (1) the Bank Charter Act 1844 (which provides that the term 'banker' is to extend and apply to all corporations, societies, partnerships, and persons, and every individual person, carrying on the business of banking, whether by the issue of notes or otherwise, except only the Bank of England: see s 28 (amended by the Statute Law Revision Act 1891; and the Statute Law Revision (No 2) Act 1893)); (2) the Agricultural Credits Act 1928 (which provides that 'Bank' means the Bank of England, a person who has permission under the Financial Services and Markets Act 2000 Pt IV (ss 40–55) (see PARA 348 et seq) to accept deposits, or an EEA firm of the kind mentioned in Sch 3 para 5(b) which has permission under Sch 3 para 15 (as a result of qualifying for authorisation under Sch 3 para 12(1)) to accept deposits or other repayable funds from the public (see PARA 315): see the Agricultural Credits Act 1928 s 5(7) (definition substituted by SI 2001/3649). As to the meaning of 'banking business' see *Koh Kim Chai v Asia Commercial Banking Corpn Ltd* [1984] 1 WLR 850, PC.

3 In the Bills of Exchange Act 1882, 'banker', unless the context otherwise requires, includes a body of persons whether incorporated or not who carry on the business of banking: s 2. The Cheques Act 1957 contains no definition of 'banker' but is to be construed as one with the Bills of Exchange Act 1882: Cheques Act 1957 s 6(1).

4 See eg the Bills of Exchange Act 1882 ss 60, 73, 74, 79, 80; and the Cheques Act 1957 ss 1–4. As to these provisions see PARAS 1405, 1411, 1519, 1552, 1575.

5 *United Dominions Trust Ltd v Kirkwood* [1966] 2 QB 431 at 447, [1966] 1 All ER 968 at 975, CA, per Lord Denning MR, where the main question was whether the plaintiff finance house was excluded from the statutory definition of 'moneylenders' by virtue of an exception for 'any person bona fide carrying on the business of banking' (see the Moneylenders Act 1900 s 6(d) (repealed)). See further *Re Roe's Legal Charge, Park Street Securities Ltd v Roe* [1982] 2 Lloyd's Rep 370, CA.

6 *Royal Bank of Canada v IRC* [1972] Ch 665 at 679, [1972] 1 All ER 225 at 235 per Megarry J. Numerous other transactions are undertaken at the present day by banks. These include the payment, discounting and collection of bills; money transfers; the issue of letters of credit and performance bonds; the operation of credit and cash card systems; the issue of certificates of deposit and other commercial paper; the custody of valuables; and the issue of travellers' cheques. See PARA 832 et seq.

7 *Brandao v Barnett* (1846) 3 CB 519, HL. See PARA 860 et seq.

816. Meaning of 'customer'. A customer is someone who has an account with a bank or who is in such relationship with the bank that the relationship of banker and customer exists, even though at this stage he has no account[1]. An occasional or even regular encashment of a cheque is not sufficient to establish the relationship of banker and customer[2]. At the same time, the duration of the relationship is not of the essence[3]. It is usual for banks to make inquiries as to prospective customers to ensure that they are suitable persons with whom to enter into relations; and failure to do so may be a factor in a subsequent claim against the bank for conversion of a cheque collected for the customer's account[4]. The inquiries the bank should make depend upon current banking practice related to the particular circumstances of the case[5].

1 *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414 at 420–421, HL, per Lord Davey, and at 422–423 per Lord Brampton; *Woods v Martins Bank Ltd* [1959] 1 QB 55, [1958] 3 All ER 166. See PARA 883. See also *Koh Kim Chai v Asia Commercial Banking Corpn Ltd* [1984] 1 WLR 850, PC, where a distinction was made between a customer and a third party giving security in support of an advance.

2 *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414, HL.

3 *Taxation Comrs v English, Scottish and Australian Bank Ltd* [1920] AC 683, PC.

4 *Turner v London and Provincial Bank Ltd* (1903) 2 Legal Decisions Affecting Bankers 33; *Ladbroke and Co v Todd* [1914] WN 165. The inquiries which a bank must undertake are now largely determined by the money laundering regulations: see PARA 831.

5 *Marfani & Co Ltd v Midland Bank Ltd* [1968] 2 All ER 573 at 579, [1968] 1 WLR 956 at 972, CA, per Diplock LJ. See also *Stoney Stanton Supplies (Coventry) Ltd v Midland Bank Ltd* [1966] 2 Lloyd's Rep 373, CA; *Architects of Wine Ltd v Barclays Bank plc* [2007] EWCA Civ 239, [2007] 2 All ER (Comm) 285.

817. Relation of banker and customer. The receipt of money[1] by a banker from or on account of his customer constitutes him the debtor of the customer[2]. The banker is normally liable to repay only the person from whom he received the money[3]. The bank borrows the money and undertakes to repay it or any part of it[4] at the branch of the bank where the account is kept[5], during banking hours, and upon payment being demanded[6]. Moreover, the bank undertakes to pay any part of the amount due against the written orders of the customer[7], the relationship here being one of agent and principal, a cheque being the principal's order to his agent to pay the amount of the cheque to the payee[8]. The customer, on his part, undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or facilitate forgery and, if he becomes aware that forged cheques are being presented, to inform the bank[9]. The contract between banker and customer cannot be unilaterally varied[10], though there may be terms implied into the contract[11].

The banker is not a trustee for the customer[12], who has no right to inquire into, or question the use of, the money by the banker[13]; but the position is

otherwise if the banker assumes the office of trustee[14]. Moreover, a banker is affected by the existence of a trust where an account is opened by a customer acting in the capacity of trustee[15], or where the banker is on notice that a payment into or out of the account is in breach of trust[16], or where money is paid to a banker for a particular purpose in circumstances such as to impress the payment with a trust[17].

The receipt of money on deposit account constitutes the banker a debtor to the depositor[18] but not a trustee of the money for him[19]. No new contract is created every time there is a fresh deposit: the account is a continuing one[20]. The debt is repayable either on demand or on conditions agreed with the depositor. Specified notice may be stipulated for, and the return of the deposit book (or receipt) made a condition of repayment, or the deposit may be for a fixed period. If the return of the deposit book is a condition precedent, no actual debt arises until its return[21]. In case of the loss of the book, however, a court would exercise its equitable jurisdiction, and not allow the absence of the receipt to stand in the way of the depositor reclaiming his money[22]. Nor would the court require the depositor to give an indemnity, the deposit book or receipt not being a negotiable instrument[23]. However, for the purpose of satisfying High Court or county court judgments for the payment of money, a sum standing to a person's credit in a deposit account in a bank is deemed to be a sum due or accruing due to that person, and is attachable accordingly[24].

The receipt of rent by a banker into a customer's account does not make the banker the agent of the owner for the purposes of the Public Health Act 1936[25].

The banker owes his customer a contractual duty of secrecy[26]. The relation of banker and customer may also give rise to a contractual or tortious duty of care or a fiduciary duty where the banker gives his customer advice[27]; but where the parties are in a contractual relationship, it is not to the advantage of the law's development to search for liability in tort, particularly in a commercial relationship[28].

The relation of banker and customer is not one which ordinarily gives rise to a presumption of undue influence; in the ordinary course of banking business a banker can explain the nature of a proposed transaction without laying himself open to a charge of undue influence[29].

The banker has at law a right of lien[30] and a right to combine accounts[31].

It is unlawful for any person concerned with the provision of banking services and facilities to the public or a section of the public to discriminate against a disabled person in refusing to provide, or deliberately not providing, those services or facilities, or in the standards or terms of those services or facilities[32]. It is also unlawful to discriminate on the grounds of sex, race, colour, ethnic or national origins, religion or belief or sexual orientation[33].

1 Ie in so far as the receipt of money on current account consists in the collection of cheques and similar instruments: see PARA 881 et seq (bank as customer's agent for collection).

2 *Foley v Hill* (1848) 2 HL Cas 28. This rule has been confirmed on numerous occasions: see eg *Duggan v Governor of Full Sutton Prison* [2004] EWCA Civ 78, [2004] 2 All ER 966. As to the factors relevant to the proper law of the contract between banker and customer see *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728, [1989] 3 All ER 252, where it was held that there was one contract governed in part by the law of England and in part by the law of New York; *Sierra Leone Telecommunications Co Ltd v Barclays Bank plc* [1998] 2 All ER 821, [1998] 15 LS Gaz R 32.

3 *Stoney Stanton Supplies (Coventry) Ltd v Midland Bank Ltd* [1966] 2 Lloyd's Rep 373, CA.

4 *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 127, CA, per Atkin LJ.

5 *Clare & Co v Dresdner Bank* [1915] 2 KB 576; *Richardson v Richardson* [1927] P 228; cf *Joseph Leete & Sons v Direction der Disconto Gesellschaft* (1915) 85 LJKB 281.

6 *Isaacs v Barclays Bank Ltd and Barclays Bank (France) Ltd* [1943] 2 All ER 682 at 685 per Tucker J; *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 127, CA, per Atkin LJ; *Libyan Arab Foreign Bank v Bankers Trust Co* [1988] 1 Lloyd's Rep 259 at 272 per Staughton J. The presentation of a cheque is a demand. The balance on a current account also becomes due when the relationship of banker and customer is ended: see *Re Russian Commercial and Industrial Bank* [1955] Ch 148, [1955] 1 All ER 75. A credit balance on current account is a liquidated sum of money, and the right of an enemy customer to payment is suspended and not abrogated on the outbreak of war: see *Arab Bank Ltd v Barclays Bank (Dominion, Colonial and Overseas) Ltd* [1952] 2 TLR 920; affd [1953] 2 QB 527, [1953] 2 All ER 263, CA; affd [1954] AC 495, [1954] 2 All ER 226, HL. See WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 573 et seq.

7 *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 127, CA, per Atkin LJ. As to the banker's contractual duty of care not, without inquiry, to continue honouring cheques in certain circumstances see PARA 832. A bank which receives and acknowledges an irrevocable instruction from its customer to transfer funds owes no tortious duty of care to the intended beneficiary of the payment and will not be liable to him should the bank fail to execute the payment instruction: *Wells v First National Commercial Bank* [1998] PNLR 552, CA.

8 *Westminster Bank Ltd v Hilton* (1926) 43 TLR 124 at 126, HL, per Lord Atkinson; *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073 at 1107, [1968] 1 WLR 1555 at 1594 per Ungoed-Thomas J. See also *Agip (Africa) Ltd v Jackson* [1991] Ch 547, [1992] 4 All ER 451, CA.

9 *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 127, CA, per Atkin LJ; *Greenwood v Martins Bank Ltd* [1932] 1 KB 371 at 381, CA, per Scrutton LJ (affd [1933] AC 51, HL). The customer's duty to inform the bank of any forged payment arises where the customer has actual, not constructive, knowledge of the forgery: see *Price Meats Ltd v Barclays Bank plc* [2000] 2 All ER (Comm) 346. See also PARA 829.

10 *Burnett v Westminster Bank Ltd* [1966] 1 QB 742, [1965] 3 All ER 81 (notice on cheque book cover restricting use of cheques to a particular account held to be ineffective).

11 There is no implied term in a contract between a bank and its customer requiring the bank to inform the customer of a new type of facility: *Suriya & Douglas (a firm) v Midland Bank plc* [1999] 1 All ER (Comm) 612, CA. Nor is there an implied term in a banking facility that the bank will give reasonable notice of termination: *Socomex Ltd, De Bolton and Socomex Futures Ltd v Banque Bruxelles Lambert SA* [1996] 1 Lloyd's Rep 156. See also *Barclays Bank plc v Green* (13 November 1995, unreported); *Cunnington v Barclays Bank plc* (3 April 1996, unreported).

12 See *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 127, CA, per Atkin LJ. See also *Re I* [2007] EWHC 2025 (Admin), [2007] All ER (D) 45 (Jul) (where the operator of a money transfer service, who transferred funds in various currencies around the world, in accordance with agreed exchange rate, was considered to be in position more analogous to that of a banker than of a trustee).

13 *Foley v Hill* (1848) 2 HL Cas 28; *Re Agra and Masterman's Bank, ex p Waring* (1866) 36 LJ Ch 151.

14 In general a bank acting as trustee is under like duties to those of any other trustee. Where a trustee, such as a bank trust corporation, holds itself out as having the skill and expertise to carry on the specialised business of trust management, the duty of care of such a trustee is higher than the standard of care of the ordinary prudent man of business (as demanded of a trustee without specialised knowledge): see *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515, [1980] 1 All ER 139; *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515, [1980] 2 All ER 92. Where a trust corporation fills the double capacity of trustee and banker, its successors in the trust are in no worse position as regards the obtaining of information with respect to the trust bank account than they would have been in if a third party had been the banker, although such a case may justify the drawing of a line between mere banking books or documents, and trust books or documents: see *Tiger v Barclays Bank Ltd* [1952] 1 All ER 85 at 88, CA, per Jenkins LJ. If the bank is a trustee and places trust money on deposit with itself, the terms of the charging clause in the trust instrument may be such as to exclude the bank from having to account to the beneficiaries for profit from employing the trust money in its business: see *Re Waterman's Will Trusts, Lloyds Bank Ltd v Sutton* [1952] 2 All ER 1054. See generally TRUSTS.

15 See PARA 824.

16 See PARA 843.

17 See PARA 825.

18 See note 2.

19 *Pearce v Creswick* (1834) 2 Hare 286; *Re Head, Head v Head* [1893] 3 Ch 426; *Re Head, Head v Head (No 2)* [1894] 2 Ch 236, CA.
20 *Hart (Inspector of Taxes) v Sangster* [1957] Ch 329, [1957] 2 All ER 208, CA.
21 Cf *Atkinson v Bradford Third Equitable Benefit Building Society* (1890) 25 QBD 377, CA; *Re Tidd, Tidd v Overell* [1893] 3 Ch 154; *Re Dillon* (1890) 44 ChD 76, CA. See also *Bagley v Winsome and National Provincial Bank Ltd* [1952] 2 QB 236, [1952] 1 All ER 637, CA. As to the attachment of deposit balances see the Supreme Court Act 1981 s 40; and PARA 870. The sterling negotiable certificates of deposit issued since 1968 acknowledge the receipt of a sterling deposit upon terms that it is payable to bearer on surrender of the certificate.
22 *Re Dillon* (1890) 44 ChD 76 at 81, CA, per Cotton LJ.
23 *Re Dillon* (1890) 44 ChD 76 at 83, CA, per Lindley LJ. Even if the deposit receipt had combined with it a form of cheque, and this was filled up and signed by the depositor before the loss, it is apprehended that, as the banker could not be sued on the cheque, he would not be entitled to an indemnity.
24 See PARA 870.
25 *Midland Bank Ltd v Conway Borough Council* [1965] 2 All ER 972, [1965] 1 WLR 1165, DC. As to the meaning of 'owner' for the purposes of the Public Health Act 1936 see s 343(1); and PROTECTION OF ENVIRONMENT AND PUBLIC HEALTH vol 38 (2006 Reissue) PARA 100.
26 See PARA 910 et seq.
27 See PARA 922.
28 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 107, [1985] 2 All ER 947 at 957, PC; and see *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd* [1989] QB 71, [1988] 2 All ER 971, CA; *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665, CA, sub nom *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952, affd [1991] 2 AC 249, [1990] 2 All ER 947, HL.
29 *National Westminster Bank plc v Morgan* [1985] AC 686 at 707, [1985] 1 All ER 821 at 829; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449 at PARA [10] per Lord Nicholls. See further PARA 970.
30 See PARA 860 et seq.
31 See PARA 867.
32 See the Disability Discrimination Act 1995 s 19(1); and DISCRIMINATION vol 13 (2007 Reissue) PARA 585.
33 See the Sex Discrimination Act 1975 s 29; the Race Relations Act 1976 s 20; the Equality Act 2006 Pt 2 (ss 44–80); the Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263; and DISCRIMINATION vol 13 (2007 Reissue) PARAS 382, 461, 691 et seq, 753.

818. Customers opening accounts. Anyone may be a customer of a bank[1]. An account may be opened by a married woman[2], a minor[3], a trustee, an executor, a local authority, an unincorporated body or a company or corporation formed under the Companies Acts, royal charter or otherwise[4]. None of these customers except the minor is under any contractual disability in this connection[5]. Accounts may be opened for special purposes, as, for instance, in the case of 'wages' accounts intended to preserve a binding banker's priority in a winding up of the company[6].

1 As to what gives rise to the relation of banker and customer see PARA 817.
2 As to married women see PARA 819; and MATRIMONIAL LAW vol 29(3) (Reissue) PARA 161 et seq.
3 As to minors see PARA 820; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 3 et seq.
4 As to companies and corporations see PARA 822; and COMPANIES; CORPORATIONS.
5 As to the contractual capability of minors see PARA 820; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 12 et seq; CONTRACT vol 9(1) (Reissue) PARA 630.
6 See the Insolvency Act 1986 ss 175, 386, Sch 6 paras 9–15; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARAS 763, 769.

819. Married women. A current account may be opened with a married woman in her own name. Opening it constitutes a binding contract with the married woman who contracts as a feme sole[1]. She has power to draw cheques

and give a sufficient discharge[2]; and bona fide dealings with the account cannot subsequently be questioned to the prejudice of the banker[3].

1 See the Law Reform (Married Women and Tortfeasors) Act 1935 ss 1, 2; the Married Women (Restraint upon Anticipation) Act 1949 s 1(1), (2); and MATRIMONIAL LAW vol 29(3) (Reissue) PARA 161.
2 Bills of Exchange Act 1882 s 22(1). See also PARAS 1465, 1466.
3 *Re Montague, ex p Ward v London and South Western Bank* (1897) 76 LT 203.

820. Minors. A minor is a person who has not reached the age of 18 years[1]. A current account may be opened with a minor so long as it is not allowed to be overdrawn; for a minor may be a creditor[2]. The recoverability of money lent to a minor by way of overdraft is governed by the rules of common law[3]. A bill drawn or indorsed by a minor entitles the holder to receive payment, and to enforce it against any other party to it[4]. A minor cannot reclaim money paid out to him or to others on his cheques[5]. In the case of joint deposit accounts in the name of an adult and a minor, the contract depends upon the terms on which the deposit is made[6].

Where a guarantee is given in respect of an obligation of a party to a contract made on or after 9 June 1987[7] and the obligation is unenforceable against him, or he repudiates the contract, because he was a minor when the contract was made, the guarantee is not for that reason alone unenforceable against the guarantor[8].

1 See the Family Law Reform Act 1969 s 1; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 3.
2 Cf *Nottingham Permanent Benefit Building Society v Thurstan* [1903] AC 6, HL; and see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 23, 42. 49.
3 The Infants Relief Act 1874 s 1, which rendered 'absolutely void' all contracts entered into by infants for the repayment of money lent or to be lent, was repealed by the Minors' Contracts Act 1987 ss 1(a), 4(2), 5(2) as regards contracts made on or after 9 June 1987. As to the rules of common law see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 12. Where a person (the 'claimant') on or after 9 June 1987 enters into a contract with another (the 'defendant') and the contract is unenforceable against the defendant, or he repudiates it, because he was a minor when the contract was made, the court may, if it is just and equitable to do so, require the defendant to transfer to the claimant any property acquired by the defendant under the contract, or any property representing it: ss 3(1), 5(2). This power is without prejudice to any other remedy available to the claimant (s 3(2)), including presumably the remedy of tracing (see PARA 857).
4 Bills of Exchange Act 1882 s 22(2). See also PARA 1471.
5 The disability of minority goes no further than is necessary for the protection of the minor: *Burnaby v Equitable Reversionary Interest Society* (1885) 28 ChD 416 at 424 per Pearson J; *Valentini v Canali* (1889) 24 QBD 166; *Pearce v Brain* [1929] 2 KB 310. See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 37, 46, 50.
6 *McEvoy v Belfast Banking Co Ltd* [1935] AC 24, HL. See also PARA 823.
7 Ie the date on which the Minors' Contracts Act 1987 came into force: see s 5(2). See also note 3.
8 Minors' Contracts Act 1987 s 2. This reversed the position at common law, as to which see *Coutts & Co v Browne-Lecky* [1947] KB 104, [1946] 2 All ER 207, not following *Wauthier v Wilson* (1912) 28 TLR 239, CA; and see *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294, [1961] 1 WLR 828, CA (where a third party's undertaking to indemnify against any loss arising out of a hire-purchase agreement with a minor was held valid as a contract of indemnity).

821. Persons lacking capacity. Where a person is mentally disabled or disordered or lacks capacity and the banker knows of it, he has no mandate on which to act; though if he collects a cheque for the person, it is likely that the banker could claim that he collected for a 'customer'; otherwise any balances and securities the person may have with the bank are tied, to be dealt with on the directions of the Court of Protection or by the depositor if he recovers and again

becomes capable of contracting[1]. Money lent by a bank to meet necessaries for such a person's household and estate may be recovered by right of subrogation; but claims for interest and charges do not lie[2].

1 See generally MENTAL HEALTH vol 30(2) (Reissue) PARAS 596 et seq, 641 et seq.

2 See *Re Beavan, Davies, Banks & Co v Beavan* [1912] 1 Ch 196; *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48; *Scarth v National Provincial Bank Ltd* (1930) 4 LDAB 241.

822. Companies and corporations. In the absence of an express power, companies and corporations, whether trading or non-trading, ordinarily have implied power to open current and deposit accounts and to draw valid cheques and make withdrawals[1].

1 See *Serrell v Derbyshire, Staffordshire and Worcestershire Junction Rly Co* (1850) 9 CB 811 at 820 (where it was conceded that the directors had implied power to draw cheques for the lawful purposes of the company); *Bateman v Mid-Wales Rly Co* (1866) LR 1 CP 499 at 506 (distinguishing cheques from bills). As to the capacity of corporations to incur liability on negotiable instruments see PARA 1466.

823. Joint accounts. Unless the contract otherwise provides, a sum standing to the credit of a joint account is a debt owed to the creditors jointly and is not enforceable by either on his own[1]. Where the mandate provides for both account holders to sign, the bank impliedly undertakes to each of them severally not to honour orders for payment without his or her signature[2]. A claim for breach of such an undertaking may be brought without joining the other account holder, and the measure of damages is prima facie equal to the value of the claimant's interest in the moneys wrongfully paid away[3].

Where a person deposits money with a bank in the names of himself and another with instructions that it is to be payable to either person or the survivor, the other's right at common law against the bank depends on whether the depositor purported to make the other a party to the contract; if the depositor did so, then he must have had authority to act as the other's agent. If there was no such authority, the bank would not be under obligation to the other party unless the latter ratified the contract[4].

If on the death of either party the current account is overdrawn, the survivor will be liable for the whole debt. Where the money is in the name of husband and wife, the position on the husband's death may depend upon the reason for setting up the joint account[5].

1 *Brewer v Westminster Bank Ltd* [1952] 2 All ER 650; *Catlin v Cyprus Finance Corpn (London) Ltd (Catlin, third party)* [1983] QB 759, [1983] 1 All ER 809.

2 *Catlin v Cyprus Finance Corpn (London) Ltd (Catlin, third party)* [1983] QB 759, [1983] 1 All ER 809, following *Jackson v White and Midland Bank Ltd* [1967] 2 Lloyd's Rep 68 (where it was held that, by the mandate, the bank had made an agreement with both customers jointly that it would honour cheques signed by them jointly, and also separate agreements with each of them severally that it would not honour any cheques unless the customer had signed, so that, having honoured cheques not signed by the plaintiff but forged by the other customer, the bank was liable to the plaintiff for breach of the separate agreement). Cf *Brewer v Westminster Bank Ltd* [1952] 2 All ER 650 (where two executors opened a joint bank account and the mandate authorised the bank to honour any drawings on the account signed by both executors, and one executor forged the other's signature; it was held that the executors' right to have cheques honoured by the bank only if signed by both of them was a right owed to them jointly, and it could only be enforced in an action brought either by both executors joining as plaintiffs or by one as plaintiff joining the other as defendant (this being merely a procedural matter), neither of which was possible because several persons cannot sue at law jointly unless each one is in a position to sue). See further PARA 849.

3 *Twibell v London Suburban Bank* [1869] WN 127; *Catlin v Cyprus Finance Corpn (London) Ltd (Catlin, third party)* [1983] QB 759, [1983] 1 All ER 809, not following *Brewer v Westminster Bank Ltd* [1952] 2 All ER 650.

4 See *McEvoy v Belfast Banking Co Ltd* [1935] AC 24, HL, in relation to joint deposits with a minor. A joint account holder is not prevented from succeeding to the joint account by survivorship on the ground that he has not contributed to the account where it is established that the deceased, the other account holder, intended that he should so succeed: *Aroso v Coutts & Co* [2002] 1 All ER (Comm) 241. The other named account holder may be able to invoke the Contracts (Rights of Third Parties) Act 1999 s 1(1)(b), which permits a third party to enforce a term of a contract if the term purports to confer a benefit on him, but not if on a true construction of the contract it appears that the parties did not intend the term to be enforceable by the third party (see s 1(2)). See CONTRACT.

5 Where the customers are husband and wife and the latter survives the former, the rule permitting the survivor to draw any balance standing to a joint account may not apply. The position depends on whether the wife was joined in the account as a matter of convenience or whether the husband intended to provide for her in the event of his death: see *Husband v Davis* (1851) 10 CB 645; *Re Williams, Williams v Davies* (1864) 3 Sw & Tr 437; *Marshal v Crutwell* (1875) LR 20 Eq 328; *Hall v Hall* [1911] 1 Ch 487; *Re Bishop, National Provincial Bank Ltd v Bishop* [1965] Ch 450, [1965] 1 All ER 249. In the case of a joint account between a husband and wife no restriction is implied into a mandate unless there is an express provision which limits a bank's freedom to honour a cheque drawn by one account-holder without reference to the other: *Fielding v Royal Bank of Scotland plc* [2004] EWCA Civ 64, [2004] All ER (D) 183 (Feb).

824. Trust accounts. A trust account is an account opened by a customer acting as a trustee or fiduciary and designated as a trust account or in some other way to indicate its fiduciary nature[1]. The ordinary relation between a banker and a customer acting as trustee or fiduciary is that of debtor and creditor[2]. Strictly speaking, it is inaccurate to refer to the credit balance on a trust account as 'trust moneys'. Money so paid into a bank ceases altogether to be money of the customer, the subject matter of the trust being the right to repayment. The designation of an account as a trust account or in some equivalent way fixes the banker with notice of the existence of a trust, which limits the banker's right to combine accounts[3] and establishes a necessary element in any claim to render the banker liable as constructive trustee[4].

1 For an example of an account headed in some other way see *Re Gross, ex p Adair* (1871) 24 LT 198; affd sub nom *Re Gross, ex p Kingston* (1871) 6 Ch App 632, where an account heading 'Police Account' was held to be as clear and distinct a statement that the moneys paid into it were trust moneys belonging to the county, as if the moneys had been put into a strong box labelled 'County Moneys'.

2 *Foley v Hill* (1848) 2 HL Cas 28; and see *Rowlandson v National Westminster Bank Ltd* [1978] 3 All ER 370 at 378, [1978] 1 WLR 798 at 803 per John Mills QC.

3 As to the banker's right to combine accounts see PARA 867.

4 As to the banker as constructive trustee see PARA 843.

825. Money paid for a special purpose. The legal relation of debtor and creditor does not exclude the implication of a trust enforceable in equity, there being no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies[1].

An arrangement for the payment of a person's creditors by a third party may give rise to a relationship of a fiduciary character or trust in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third party[2]. The lender acquires an equitable right to see that the payment is applied for the primary designated purpose, and when this purpose has been carried out, the lender has his remedy against the borrower in debt; if the primary purpose cannot be carried out and a secondary purpose has been agreed, expressly or by implication, the remedies of equity may be invoked to give effect to it[3].

Where the debtor is a customer of the bank and the bank receives such a payment in circumstances where it is on notice that the arrangement includes a secondary trust, the bank may not, if the primary purpose fails, apply the payment to discharge a debt owed to it by the debtor[4]; and the money so paid will not form part of the debtor's assets so as to fall within the assets charged to the bank under a floating charge[5].

1 *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 at 581, [1968] 3 All ER 651 at 656, HL, per Lord Wilberforce. For an analysis of the Quistclose trust, see the dissenting speech of Lord Millett in *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 All ER 377.

2 *Toovey v Milne* (1819) 2 B & Ald 683; *Edwards v Glyn* (1859) 2 E & E 29; *Re Rogers, ex p Holland and Hannen* (1891) 8 Morr 243; *Re Drucker, ex p Basden* [1902] 2 KB 237, CA; *Re Hooley, ex p Trustee* (1915) 84 LJKB 1415; *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, [1968] 3 All ER 651, HL. As to whether such an arrangement gives rise to a trust see further *Re Chelsea Cloisters Ltd* (1980) 41 P & CR 98, CA; *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207, [1985] 1 All ER 155; *Re Multi Guarantee Co Ltd* [1987] BCLC 257; *Re EVTR, Gilbert v Barber* [1987] BCLC 646, CA.

3 *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 at 581, [1968] 3 All ER 651 at 656, HL, per Lord Wilberforce. See further EQUITY.

4 *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, [1968] 3 All ER 651, HL.

5 *Re EVTR, Gilbert v Barber* [1987] BCLC 646, CA.

826. Solicitors' client and trust accounts. With the concurrence of the Master of the Rolls, the Council of the Law Society[1] must make rules:

(1) as to the opening and keeping by solicitors of accounts at banks[2] or with building societies for clients' money;

(2) as to the keeping by solicitors of accounts containing particulars and information as to money received or held or paid by them for or on behalf of their clients; and

(3) empowering the Council to take such action as may be necessary to enable it to ascertain whether or not the rules are being complied with,

and the rules may specify the location of the branches at which the accounts are to be kept[3].

With the concurrence of the Master of the Rolls, the Council must also make rules:

(a) as to the opening and keeping by solicitors of accounts at banks or with building societies for money comprised in controlled trusts[4];

(b) as to the keeping by solicitors of accounts containing particulars and information as to money received or held or paid by them for or on account of any such trust; and

(c) empowering the Council to take such action as may be necessary to enable it to ascertain whether or not the rules are being complied with,

and the rules may specify the location of the branches at which the accounts are to be kept[5].

The rules must make provision for requiring a solicitor, in such cases as may be prescribed by the rules, either:

(i) to keep on deposit in a separate account at a bank or with a building society for the benefit of the client money received for or on account of a client; or

(ii) to make good to the client out of the solicitor's own money a sum equivalent to the interest which would have accrued if the money so received had been so kept on deposit[6].

Where a solicitor keeps an account with a bank or a building society, the bank or society does not incur any liability, nor is it under any obligation to make any

inquiry, nor is it deemed to have any knowledge of any right of any person to any money paid or credited to the account, which it would not incur or be under or be deemed to have in the case of an account kept by a person entitled absolutely to all the money paid or credited to it; and the bank or society does not have any recourse or right against money standing to the credit of the account, in respect of any liability of the solicitor to the bank or society, other than a liability in connection with the account[7]. The purpose of the provisions of head (i) above is not to give the bank a special advantage but to ensure that it suffers no special disadvantage; their purpose is not to put a solicitor's client account in some special category in which constructive trusteeship can never arise[8].

Money paid into a client account is a debt owing from the banker to the solicitor[9]; but it may also be, in effect, trust money to the banker's knowledge[10]. It will be attached by a third party debt order served on the bank[11].

1 As to the constitution of the Council of the Law Society see SOLICITORS vol 44(1) (Reissue) PARA 13. As to the Master of the Rolls see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 303; COURTS vol 10 (Reissue) PARA 515.

2 Except where the context otherwise so requires, 'bank' means the Bank of England, a person (other than a building society) who has permission under the Financial Services and Markets Act 2000 Pt IV (ss 40–55) (see PARA 348 et seq) to accept deposits, or an EEA firm of the kind mentioned in Sch 3 para 5(b) which has permission under Sch 3 para 15 (as a result of qualifying for authorisation under Sch 3 para 12) to accept deposits (see PARA 315): Solicitors Act 1974 s 87(1) (definition substituted by SI 2001/3649). A body comprised in the new TSB group (see PARA 809 note 3) is a bank for the purposes of the Solicitors Act 1974: Trustee Savings Banks Act 1985 s 3(9), Sch 1 para 11(2)(b).

3 Solicitors Act 1974 s 32(1) (amended by the Building Societies Act 1986 Sch 18 para 11(1), (2), Sch 19 Pt I). The rules that have been made are the Solicitors' Accounts Rules 1998 (dated 22 July 1998): see SOLICITORS vol 44(1) (Reissue) PARA 26.

4 Except where the context otherwise requires, 'controlled trust', in relation to a solicitor, means a trust of which he is a sole trustee or co-trustee only with one or more of his partners or employees: Solicitors Act 1974 s 87(1).

5 Solicitors Act 1974 s 32(2) (amended by the Building Societies Act 1986 Sch 18 para 11(1), (2), Sch 19 Pt I). The rules that have been made are the Solicitors' Trust Accounts Rules 1986 (dated 11 December 1986): see SOLICITORS vol 44(1) (Reissue) PARA 26.

6 Solicitors Act 1974 s 33(1) (amended by the Building Societies Act 1986 Sch 18 para 11(1), (3)). The rules that have been made are the Solicitors' Accounts (Deposit Interest) Rules 1988 (dated 21 July 1988): see SOLICITORS vol 44(1) (Reissue) PARA 26.

7 Solicitors Act 1974 s 85 (amended by the Building Societies Act 1986 Sch 18 para 11(1), (4)).

8 *Lipkin Gorman v Karpnale Ltd* [1987] 1 WLR 987 at 997 per Alliott J; revsd on appeal without affecting this point [1992] 4 All ER 409, [1989] 1 WLR 1340, CA.

9 *Plunkett v Barclays Bank Ltd* [1936] 2 KB 107 at 118, [1936] 1 All ER 653 at 659 per du Parcq J.

10 *Plunkett v Barclays Bank Ltd* [1936] 2 KB 107 at 117, [1936] 1 All ER 653 at 657 per du Parcq J.

11 See *Plunkett v Barclays Bank Ltd* [1936] 2 KB 107 at 118, [1936] 1 All ER 653 at 659 per du Parcq J; *Roberts v Death* (1881) 8 QBD 319, CA; and PARA 869. See also ENFORCEMENT vol 17(1) (Reissue) PARA 251 et seq.

827. Dispositions by customer. Money on current account is subject to many of the legal incidents of a debt. It passes under a bequest by the customer of 'money owing to me at the time of my decease'[1], though it equally falls within a bequest of 'ready money'[2]. It is payable to the legal representatives of a deceased customer on production of probate or letters of administration[3]. It is repayable on demand, the drawing of a cheque not being a condition precedent[4]. It may be legally assigned[5], but probably only as a whole, by a single assignment[6]. In England a cheque is not an assignment[7].

On the bankruptcy of the customer, any balance to his credit vests in his trustee in bankruptcy[8], and the banker may be summarily compelled to pay it over[9]. Where, whether before or after the service of written notice by the trustee claiming for the bankrupt's estate any property which has been acquired by, or has devolved upon, a bankrupt since the commencement of the bankruptcy[10], a banker enters into a transaction in good faith and without notice of the bankruptcy, the trustee is not in respect of that transaction entitled[11] to any remedy against that banker, or any person whose title to any property derives from him[12].

1 *Re Derbyshire, Webb v Derbyshire* [1906] 1 Ch 135.

2 *Stein v Ritherdon* (1868) 37 LJ Ch 369. As to the meaning of 'money' and other testamentary descriptions of property see WILLS vol 50 (2005 Reissue) PARAS 577 et seq, 584.

3 *Tarn v Commercial Bank of Sydney* (1884) 12 QBD 294.

4 *Foley v Hill* (1848) 2 HL Cas 28 at 36, 43; *Pott v Clegg* (1847) 16 M & W 321; *Walker v Bradford Old Bank Ltd* (1884) 12 QBD 511; *Re Tidd, Tidd v Overell* [1893] 3 Ch 154. However, the obligation to repay only rises upon demand: *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110, CA.

5 Law of Property Act 1925 s 136(1); *Walker v Bradford Old Bank Ltd* (1884) 12 QBD 511. As to the assignment of deposit accounts see PARA 858. See further CHOSES IN ACTION vol 6 (2003 Reissue) PARA 12 et seq.

6 *Re Steel Wing Co Ltd* [1921] 1 Ch 349; *Bank of Liverpool and Martins Ltd v Holland* (1926) 43 TLR 29. But see, contra, *Schroeder v Central Bank of London Ltd* (1876) 34 LT 735; *Skipper and Tucker v Holloway and Howard* [1910] 2 KB 630 (revsd [1910] 2 KB 635n, CA, upon the facts). In *Williams v Atlantic Assurance Co Ltd* [1933] 1 KB 81 at 100, CA, Greer LJ held that an assignee of part of a debt was a mere equitable assignee.

7 Bills of Exchange Act 1882 s 53(1). See also PARA 1453.

8 See the Insolvency Act 1986 ss 283(1), 306, 385(1); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 216.

9 See the Insolvency Act 1986 s 312(3); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 396.

10 Ie pursuant to the Insolvency Act 1986 s 307: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 445 et seq.

11 Ie by virtue of the Insolvency Act 1986 s 307.

12 See the Insolvency Act 1986 s 307(4); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 446. As to the effect of a bankruptcy order on dispositions on and after the day of presentation of the petition see PARA 835.

828. Customer's title to money paid in. A banker is not entitled to refuse his customer's demand for repayment on grounds of mere suspicion or curiosity[1]. Similarly, where a banker takes money from his customer in discharge of a debt, he is not bound to inquire into the manner in which the person so paying the debt acquired the money with which he pays it[2].

A banker is, however, not only entitled but bound to refuse payment if he has, or a reasonable banker would have, grounds for believing that the authorised signatories on an account are misusing their authority for the purpose of defrauding their principal or otherwise defeating his true intentions[3]; or if he is on notice that the payment is in breach of trust[4].

Where the customer's title to money or cheques paid into the account is defective, the banker may become exposed to a tracing claim[5], a claim in conversion, or a claim for money had and received[6].

1 *Gray v Johnston* (1868) LR 3 HL 1 at 11, HL, per Lord Cairns, and at 14 per Lord Westbury; *Bank of New South Wales v Goulburn Valley Butter Co Pty* [1902] AC 543, PC; *Backhouse v Charlton* (1878) 8 ChD 444; *Coleman v Bucks and Oxon Union Bank* [1897] 2 Ch 243; *Bhogal v Punjab National Bank* [1988] 2 All ER 296 at 300, CA, per Dillon LJ. See also *Tassell v Cooper* (1850) 9 CB 509. Note however that the money laundering legislation may affect the

bank's approval in cases of suspicion: see eg the situation which arose in *Tayeb v HSBC Bank plc* [2004] EWHC 1529, [2004] 4 All ER 1024, [2004] 2 All ER (Comm) 880: see also PARA 831.

2 *Thomson v Clydesdale Bank Ltd* [1893] AC 282, HL. See also *Bodenham v Hoskins* (1852) 21 LJ Ch 864.

3 See PARA 832.

4 As to the circumstances in which a banker will be held liable as constructive trustee see PARA 843.

5 As to tracing claims see PARA 857.

6 See PARA 889.

829. Customer's duty in operating current account. In operating his current account the customer owes to his bank two duties of care: (1) to refrain from drawing a cheque in such a manner as to facilitate fraud or forgery[1]; and (2) to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as he, the customer, becomes aware of it[2].

The customer does not owe any wider duty of care in the operation of his current account; and in particular he does not owe a duty of care: (a) to take reasonable precautions in the management of his business with the bank to prevent forged cheques being presented to it; or (b) to take such steps to check his periodic bank statements as a reasonable customer in his position would take to enable him to notify the bank of any debit items in the account which he has not authorised[3].

Mere silence, without resulting injury to the banker, does not operate as an estoppel or constitute adoption[4].

The alteration in the position of the banker necessary to support adoption is not confined to payment of the cheque. Loss of opportunity of protecting himself against subsequent forgeries, if any, by the same person, and loss of the chance of taking proceedings, civil or criminal, against the forger, as by his escaping out of the jurisdiction, constitute sufficient alteration in the position of, and prejudice to, the banker[5]. It appears immaterial whether civil proceedings against the forger would have resulted in recovering any money or not[6].

Where this principle of adoption applies, it covers all previous forgeries by the same person if, notified on the last occasion when the customer or other person had knowledge of the forgery, the bank might have taken steps to recover from the forger all money previously obtained by him[7].

1 *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777, HL (amount in words filled in and figures altered by confidential clerk after signature), approving *Young v Grote* (1827) 4 Bing 253. In view of this judgment the statements in the judgment of the Privy Council to a contrary effect in *Colonial Bank of Australasia Ltd v Marshall* [1906] AC 559, PC, have lost their authority, as have also the dicta in *Baxendale v Bennett* (1878) 3 QBD 525, CA, questioning the authority of *Young v Grote* above. See also *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 101, [1985] 2 All ER 947 at 952–953, PC; *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110, CA; *Lumsden & Co v London Trustee Savings Bank* [1971] 1 Lloyd's Rep 114; *Price Meats Ltd v Barclays Bank plc* [2000] 2 All ER (Comm) 346; *Yorkshire Bank plc v Lloyd's Bank plc* [1999] 2 All ER (Comm) 153.

While the customer should not, for example, sign a blank cheque leaving the amount in words to be filled in by a clerk (see *London Joint Stock Bank Ltd v Macmillan and Arthur* above), there is no duty to fill in a blank between the name of the payee and 'or order' (see *Slingsby v District Bank Ltd* [1932] 1 KB 544, CA).

2 *Greenwood v Martin's Bank Ltd* [1932] 1 KB 371, CA (affd [1933] AC 51, HL); *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, [1985] 2 All ER 947, PC. See also *M'Kenzie v British Linen Co* (1881) 6 App Cas 82, HL, which was not in fact the case of a customer, but of a stranger, as appears from the report. It is, however, treated as the case of a customer and explained on that ground in *Ogilvie v West Australian Mortgage and Agency Corpn* [1896] AC 257, PC. In *William Ewing & Co v Dominion Bank* (1904) 24 SCR 133, the

Supreme Court of Canada by a majority expressly extended the doctrine to the case of a businessman, not a customer, on the ground of moral and commercial obligation. Special leave to appeal was refused by the Judicial Committee on the ground that no important question of law was involved, and that the question was one essentially for the dominion courts (*William Ewing & Co v Dominion Bank* [1904] AC 806, PC). See also *Brown v Westminster Bank Ltd* [1964] 2 Lloyd's Rep 187 (in which it was held that the customer's behaviour estopped her from denying the validity of payments by the bank made both before as well as after the representation). See also *National Westminster Bank plc v Somer International (UK) Ltd* [2001] EWCA Civ 970 at [44]–[45], [2002] QB 1286, [2002] 1 All ER 198, considering *Greenwood v Martin's Bank* above and *Ogilvie v West Australian Mortgage and Agency Corpn* above.

3 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 101, [1985] 2 All ER 947 at 952–953, PC.

4 *M'Kenzie v British Linen Co* (1881) 6 App Cas 82, HL.

5 *Ogilvie v West Australian Mortgage and Agency Corpn Ltd* [1896] AC 257 at 270, PC; *Greenwood v Martin's Bank Ltd* [1933] AC 51, HL. See also the Scottish cases quoted in *M'Kenzie v British Linen Co* (1881) 6 App Cas 82 at 110, HL.

6 See the cases cited in note 5. Cf *Knights v Wiffen* (1870) LR 5 QB 660. See, however, *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49 at 57, PC.

7 See *Brown v Westminster Bank Ltd* [1964] 2 Lloyd's Rep 187.

830. Closing of account. A banker is not entitled arbitrarily to close a current account in credit[1]. He must give the customer reasonable notice[2] and make satisfactory provision for outstanding cheques.

A customer's instruction to his bank to close his account and transfer the balance to a third party does not end the relationship of banker and customer[3], the instructions being revocable until the transferee is notified of the transfer[4].

1 *Agra and Masterman's Bank Ltd v Hoffman* (1864) 5 New Rep 214; *Thomas v Howell* (1874) LR 18 Eq 198 at 202 per Malins V-C; *Buckingham & Co v London and Midland Bank Ltd* (1895) 12 TLR 70; and cf *Cumming v Shand* (1860) 5 H & N 95; and *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 127, CA, per Atkin LJ. See also *Johnston v Commerical Bank* (1858) 20 D 790 (a South African decision).

2 See the cases cited in note 1. See also *Berry v Halifax Commercial Banking Co* [1901] 1 Ch 188; *Prosperity Ltd v Lloyds Bank Ltd* (1923) 39 TLR 372.

3 See *Rekstin v Severo Sibirsko, Gosudarstvennoe Akcionernoe Obschestvo Komseverputj Co and Bank for Russian Trade* [1933] 1 KB 47, CA.

4 *Rekstin v Severo Sibirsko, Gosudarstvennoe Akcionernoe Obschestvo Komseverputj Co and Bank for Russian Trade* [1933] 1 KB 47 at 62, CA, per Lord Hanworth MR. Quaere whether the transferee's assent is necessary: see *Rekstin v Severo Sibirsko, Gosudarstvennoe Akcionernoe Obschestvo Komseverputj Co and Bank for Russian Trade* above at 57 per Talbot J.

831. Money laundering. Regulations have been made in order to prevent the use of the financial system for the purposes of money laundering and terrorist financing[1]. Relevant persons[2] must, when undertaking certain activities in the course of business, apply customer due diligence measures[3] where they establish a business relationship, carry out an occasional transaction, suspect money laundering or terrorist finance or doubt the accuracy of customer identification information[4]. Relevant persons also have to undertake ongoing monitoring of their business relationships[5]. There is a general rule on the timing of the verification of the customer's identity subject to certain exceptions[6]. The regulations have specific measures on record-keeping, procedures and training[7]; and also provisions on supervision and registration[8]. There are enforcement powers[9] for certain supervisors, including powers to obtain information and enter and inspect premises[10]. Civil penalties may be imposed by these supervisors on persons who fail to comply with the regulations' requirements[11]. Miscellaneous matters[12] include provision for the recovery of penalties and

charges through the court[13], the imposition of an obligation on certain public authorities to report suspicions of money laundering or terrorist financing[14] and transitional provisions[15].

The Financial Services Authority[16] has as one of its objectives the reduction of financial crime[17] and the Authority may make rules in relation to the prevention and detection of money laundering[18].

There are also statutory provisions penalising those who assist in the retention of the proceeds of drug trafficking or criminal conduct and requiring banks and their employees to report suspicions or beliefs of money laundering to the police[19]. Anti-terrorism legislation has been enacted to prevent the retention or control of terrorist property, including money[20].

1 See the Money Laundering Regulations 2007, SI 2007/2157; and PARA 539 et seq. The Regulations revoke and replace earlier regulations (the Money Laundering Regulations 2003, SI 2003/3075) and implement in part European Parliament and EC Council Directive 2005/60 (OJ L309, 25.11.2005, p 15) on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. As to the commencement of the Money Laundering Regulations 2007, SI 2007/2157, see reg 1 which provides that the regulations are in force from 15 December 2007.

As to the action to be taken where an investigation into money laundering creates conflicts between the public interest in combating crime and the entitlement of a private body to obtain redress from the courts see *Bank of Scotland v A Ltd* [2001] EWCA Civ 52, [2001] 3 All ER 58, [2001] 1 All ER (Comm) 1023, [2001] 1 All ER (Comm) 1023; *Amalgamated Metal Trading Ltd v City of London Police Financial Investigation Unit* [2003] EWHC 703 (Comm), [2003] 4 All ER 1225, [2003] 1 All ER (Comm) 900; *Squirrell Ltd v National Westminster Bank plc* [2005] EWHC 664 (Ch), [2005] 2 All ER 784, [2005] 1 All ER (Comm) 749. See also *Tayeb v HSBC Bank plc* [2004] EWHC 1529, [2004] 4 All ER 1024, [2004] 2 All ER (Comm) 880, [2004] 2 All ER (Comm) 880.

2 See the Money Laundering Regulations 2007, SI 2007/2157, reg 3 and as to exclusions see reg 4 (see PARA 540). 'Relevant persons' include credit institutions (including most banks and branches), financial institutions, auditors, accountants, tax advisers and insolvency practitioners, independent legal professionals, trust or company service providers, estate agents, high value dealers and casinos.

3 See the Money Laundering Regulations 2007, SI 2007/2157, reg 5; and PARA 542. As to customer due diligence see Pt 2 (regs 5–18). The measures consist of identifying and verifying the identity of the customer and any beneficial owner (see reg 6; and PARA 542) of the customer, and obtaining information on the purpose and intended nature of the business relationship.

Aspects of customer due diligence include a general rule on the timing of the verification of the customer's identity (part of which relates specifically to banks) with certain exceptions (see reg 9; and PARA 543); and when casinos must identify and verify their customers (see reg 10; and PARA 544). Failure to apply such measures means that a person cannot establish or continue a business relationship with the customer concerned or undertake an occasional transaction: see reg 11; and PARA 545 (and see also reg 12; and PARA 542 as to an exception from the requirement to identify the beneficial owner for debt issues held in trust). Relevant persons may apply simplified customer due diligence measures for certain products, customers or transactions (listed in reg 13: see PARA 542) and must apply enhanced measures in four situations (one of which relates specifically to banking): see reg 14; and PARA 546. There are obligations on relevant persons in respect of their overseas branches and subsidiaries: see reg 15; and PARA 547. There are also specific obligations in respect of shell banks and anonymous accounts: see reg 16; and PARA 548. The regulations provide a list of persons on whom relevant persons can rely to perform customer due diligence measures: see reg 17; and PARA 549.

4 See the Money Laundering Regulations 2007, SI 2007/2157, reg 7; and PARA 542.

5 See the Money Laundering Regulations 2007, SI 2007/2157, reg 8; and PARA 543.

6 See the Money Laundering Regulations 2007, SI 2007/2157, reg 9; and PARA 543.

7 See the Money Laundering Regulations 2007, SI 2007/2157, Pt 3 (regs 19–21). As to obligations in respect of record-keeping see reg 19; and PARA 551. As to obligations in respect of policies and procedures see reg 20; and PARA 552. As to obligations in respect of staff training see reg 21; and PARA 552.

8 See the Money Laundering Regulations 2007, SI 2007/2157, Pt 4 (regs 22–35). As to the allocation of supervisory authorities for different relevant persons see reg 23; and PARA 553. As to the duties of supervisors see reg 24; and PARA 553. Money service businesses, high value

dealers and trust or company service providers which are not otherwise registered are subject to a system of mandatory registration: see regs 25–30; and PARA 555. Money service businesses and trust or company service providers must not be registered unless the business, its owners, its nominated officer and senior managers are fit and proper persons: see reg 28; and PARA 555. Other sectors are only required to register if the supervisor decides to maintain a register: see regs 33, 34; and PARA 557. Supervisors are able to impose charges on persons they supervise: see reg 35; and PARA 558.

9 As to enforcement see the Money Laundering Regulations 2007, SI 2007/2157, Pt 5 (regs 36–47).

10 See the Money Laundering Regulations 2007, SI 2007/2157, regs 37–41; and PARAS 559–562.

11 See the Money Laundering Regulations 2007, SI 2007/2157, reg 42; and PARA 563. The requirements are those under Pts 2, 3 and 4. Provision is made for reviews of and appeals against such penalties: see regs 43, 44; and PARA 564. Relevant persons who fail to comply with the requirements of Pts 2, 3 and 4 are also guilty of a criminal offence (see regs 45–47; and PARAS 565, 566) although persons convicted of a criminal offence may not also be liable to a civil penalty.

12 See the Money Laundering Regulations 2007, SI 2007/2157, Pt 6 (regs 48–51).

13 See the Money Laundering Regulations 2007, SI 2007/2157, reg 48; and PARAS 544, 563.

14 See the Money Laundering Regulations 2007, SI 2007/2157, reg 49; and PARA 554.

15 See the Money Laundering Regulations 2007, SI 2007/2157, reg 50; and PARA 555.

16 As to the Financial Services Authority see PARAS 792; and PARAS 4, 6 et seq. As to the Bank of England see PARA 793 et seq.

17 See the Financial Services and Markets Act 2000 s 2(2); and PARA 8.

18 See the Financial Services and Markets Act 2000 s 146; and PARA 30.

19 See the Proceeds of Crime Act 2002 Pt 7 (ss 327–340); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 789 et seq.

20 See the Terrorism Act 2000; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 390 et seq.

(ii) Payment of Cheques etc; Protection and Duties of Paying Banker

832. Paying banker. A banker is bound to pay cheques drawn on him by a customer in legal form provided he has in his hands at the time sufficient and available funds for the purpose[1], or provided the cheques are within the limits of an agreed overdraft[2], and may so pay them within a reasonable period after the bank's advertised closing time[3]. Where he pays in accordance with specific statutory provisions, he may claim protection against claims of the true owner[4]. He must either pay cheques or refuse payment at once; a request to re-present amounts to dishonour[5]. A banker must not continue to pay cheques without inquiry if a reasonable and honest banker with knowledge of the relevant facts would have considered that there was a serious or real possibility, albeit not amounting to a probability, that the customer was being defrauded or that moneys were being misappropriated[6]. Failure to inquire is not excused merely because of a conviction that the answer would be false[7].

Post-dated cheques are not invalid[8], but the banker should not pay such a cheque if presented before the date it bears[9]. If, therefore, a cheque dated on a Sunday is presented on the previous business day, it should be returned with the answer 'post-dated'[10]. A post-dated cheque, however, if presented at or after its ostensible date, should be paid though the banker knows it to be post-dated, and even if it has been presented before the date and refused payment[11]. A cheque is not payable on a non-business day[12].

The Treasury has power, by order made by statutory instrument, to suspend financial dealings in the national interest for such time as may be specified in the order[13]. An obligation on a person to do a thing on a day on which he is prevented from doing it by such an order, or is unable to do it by reason of such an order, is deemed to be complied with if he does it as soon as practicable thereafter[14].

A banker is justified in refusing payment of a cheque which is ambiguous in form[15]. He may be liable if he pays a cheque which is irregularly indorsed[16] in circumstances in which the absence of, or irregularity in, indorsement is not covered by statute[17].

Bankers habitually refuse payment of what are called stale cheques, that is, cheques which have been outstanding for a period varying from 6 months in some banks to 12 months in others; but the practice has never received judicial sanction[18].

Bankers usually refuse payment of an undated cheque, or one on which the date is incomplete, and it has been held that a banker is not bound to honour an undated cheque[19]. The date is a material particular, and the prima facie authority[20] of the person in possession to fill in the date must be exercised within a reasonable time[21]. Any alteration of the date of a cheque appears to be a material alteration[22], and a banker should therefore refuse to pay a cheque on which the date appears to have been altered.

It is submitted that a banker should not pay a cheque to a payee he knows to be an undischarged bankrupt[23]. The validity of payment to a payee who is a minor has never been questioned[24].

1 *Foley v Hill* (1848) 2 HL Cas 28; *Whitaker v Bank of England* (1835) 1 Cr M & R 744 at 750; *Marzetti v Williams* (1830) 1 B & Ad 415; *London Joint Stock Bank v Macmillan and Arthur* [1918] AC 777 at 789, HL, per Lord Finlay LC; *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 127, CA, per Atkin LJ. As to funds available see PARA 834.

2 See *Rouse v Bradford Banking Co Ltd* [1894] AC 586 at 596, HL, per Lord Herschell LC.

3 *Baines v National Provincial Bank* (1927) 96 LJKB 801. Cf PARA 836 note 11.

4 As to open cheques see the Bills of Exchange Act 1882 s 60; the Cheques Act 1957 s 1; and PARA 1552. As to crossed cheques see the Bills of Exchange Act 1882 s 80; the Cheques Act 1957 s 1; and note 17.

5 *Bank of England v Vagliano Bros* [1891] AC 107 at 141, HL, per Lord Bramwell, and at 157 per Lord Macnaghten (dissenting from dictum of Maule J in *Robarts v Tucker* (1851) 16 QB 560 at 578). See also PARA 836 note 11; and cf PARA 846.

6 *Lipkin Gorman v Karpnale Ltd* [1992] 4 All ER 409, [1989] 1 WLR 1340, CA; following *Barclays Bank plc v Quincecare Ltd and Unichem Ltd* [1992] 4 All ER 363; and not following *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073 at 1118, [1968] 1 WLR 1555 at 1609 per Ungoed-Thomas J; *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 All ER 1210 at 1231, [1972] 1 WLR 602 at 609 per Brightman J. See also *Groves-Raffin Construction Ltd v Bank of Novia Scotia* [1976] 1 Lloyd's Rep 373, Can SC; *Rowlandson v National Westminster Bank Ltd* [1978] 3 All ER 370, [1978] 1 WLR 798; *Royal Products Ltd v Midland Bank Ltd* [1981] 2 Lloyd's Rep 194.

7 *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073 at 1118–1119, [1968] 1 WLR 1555 at 1608–1609 per Ungoed-Thomas J.

8 Bills of Exchange Act 1882 s 13(2). See also PARA 1415. A post-dated cheque is not invalid even in the hands of a holder who has taken it before the ostensible date: *Carpenter v Street* (1890) 6 TLR 410.

9 *Da Silva v Fuller* (1776) Bayley on Bills (5th Edn) 326; *Morley v Culverwell* (1840) 7 M & W 174 at 178 per Parke B.

10 A cheque dated on Sunday is not invalid: Bills of Exchange Act 1882 s 13(2). See also PARA 1415. The making of any payment on a day following a bank holiday is equivalent to payment on the holiday, and the same applies to the performance of other acts: see the Banking and Financial Dealings Act 1971 s 1(4).

11 In *Emanuel v Robarts* (1868) 9 B & S 121, the bankers were held justified under a custom of London bankers in refusing payment of a post-dated cheque so re-presented. The ground of decision was the then existing doubt as to the legality of post-dated cheques; that legality is now established (see the text and note 8) and the custom could not obtain at the present day.

12 As to non-business days see the Bills of Exchange Act 1882 s 92 (amended by the Banking and Financial Dealings Act 1971 ss 3(1), 4(4)); and the Banking and Financial Dealings Act 1971 s 1(1), Sch 1. See also PARA 1437.

13 See the Banking and Financial Dealings Act 1971 s 2(1), (2) (s 2(1) amended by the Finance Act 1981 s 136(2); the Finance Act 1987 s 69(a); and by the Building Societies Act 1986 s 120,

Sch 18 Pt I para 8(2); and the Banking and Financial Dealings Act 1971 s 2(1), (2) amended by SI 2001/1149). As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq. A person who knowingly or recklessly contravenes a direction given by such an order is guilty of an offence and is liable on summary conviction to a fine of not more than the prescribed sum, or on conviction on indictment to imprisonment for not more than two years or a fine, or to both: Banking and Financial Dealings Act 1971 s 2(4) (amended by the Magistrates' Courts Act 1980 s 32(2)). Consenting or conniving directors or officers of bodies corporate, or members of a body corporate managed by its members, have a personal criminal liability: see the Banking and Financial Dealings Act 1971 s 2(5). As to the prescribed sum see PARA 56 note 24.

14 Banking and Financial Dealings Act 1971 s 2(3).

15 He has no responsibility to the payee; he is not bound to decide legal questions, or to run unusual risks: see *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777 at 814, HL, per Lord Haldane; *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 127, CA, per Atkin LJ. Cf *Emanuel v Robarts* (1868) 9 B & S 121; *Bank of England v Vagliano Bros* [1891] AC 107, HL. However, he is under a duty of care: see the text and note 6.

16 *Slingsby v District Bank Ltd* [1932] 1 KB 544, CA; and see *Arab Bank Ltd v Ross* [1952] 2 QB 216, [1952] 1 All ER 709, CA.

17 Protection is given to bankers paying unindorsed or irregularly indorsed cheques and certain other instruments not technically bills of exchange by the Cheques Act 1957 s 1: see PARA 836; and PARA 1552. Before the Cheques Act 1957, paying bankers required indorsement of order cheques for their own protection, since a banker would have had no defence had he paid an order cheque which was unindorsed or irregularly indorsed to a person who had no title to it: cf PARA 836. The regularity of the indorsement depended upon mercantile custom, and books on practical banking contained pages of examples. Little attention was paid to the question of whether the indorsement, which was, generally speaking, in blank, was made or not made *animo indorsandi* or was merely a receipt. As to statutory provisions protecting paying bankers see also the Bills of Exchange Act 1882 ss 60, 80; and PARAS 836, 838. An irregular indorsement may yet be sufficient to pass title: see *Arab Bank Ltd v Ross* [1952] 2 QB 216 at 226, [1952] 1 All ER 709 at 715, CA, per Denning LJ.

18 Save in case of damage by non-presentation within a reasonable time, the drawer remains liable until discharged by lapse of time: *Robinson v Hawksford* (1846) 9 QB 52; *Laws v Rand* (1857) 3 CBNS 442; *King and Boyd v Porter* [1925] NI 107, CA. See LIMITATION OF ACTIONS vol 28 (Reissue) PARA 869. In the notes to *Serle v Norton* (1841) 2 Mood & R 401, it is suggested that the practice is justified by the custom of bankers. In any event, the customer's credit would not be damaged by the cheque being returned marked with this ground of refusal.

19 *Griffiths v Dalton* [1940] 2 KB 264. A bill is not invalid by reason of its being undated: Bills of Exchange Act 1882 s 3(4)(a). See also PARA 1415.

20 Cf *Smith v Prosser* [1907] 2 KB 735, CA; *Foster v Driscoll* [1929] 1 KB 470, CA.

21 *Griffiths v Dalton* [1940] 2 KB 264.

22 Bills of Exchange Act 1882 s 64(2). See also PARA 1560.

23 It is the banker's duty, as far as possible, to obtain a good discharge for his customer. This prima facie the bankrupt cannot give, his estate having vested in the trustee: see the Insolvency Act 1986 ss 283(1), 306, 385(1); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 216. The banker cannot know whether or not the cheque represents after-acquired property and, even if it does, payment may not be protected: see s 307; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 445 et seq. See also *Cohen v Mitchell* (1890) 25 QBD 262, CA; *Re Clarke, ex p Beardmore* [1894] 2 QB 393, CA; *Re Bennett, ex p Official Receiver* [1907] 1 KB 149.

24 As to the extent of the disability of minority see PARA 820.

833. Authority to draw as condition of payment. The cheque must be drawn by a person having authority express or implied[1]. A per pro signature puts the banker on inquiry as to the authority of the person so signing[2]. Where the account is not that of an individual, it is customary to take a mandate setting out the parties authorised to draw and the form in which they are to sign; the mandate must be strictly observed.

Apart from agreement[3], cheques on ordinary joint accounts should be drawn by all the parties in whose name the account stands[4]. However, the banker is justified, in case of death, in allowing the survivor to draw any balance standing

to the joint account, except, as in the case of husband and wife, when the object with which the account was opened requires refusal[5].

During partnership, and in the absence of instructions to the contrary[6], any partner has the right to draw on the partnership account in the firm name[7]. The death of one or more partners does not absolutely preclude the surviving partner or partners from drawing on the firm account[8], but the modern and preferable method is that, where to the knowledge of the banker a partner dies, the old account should be operated only for the purpose of winding up the partnership, and arrangements should be made for a new account, carrying over to it any balance remaining[9]. In the absence of agreement to the contrary, the bankruptcy of one partner involves the dissolution of the firm[10]; but this does not prevent the other partner or partners from drawing on the firm account for purposes of the partnership.

An account of a deceased person cannot be drawn upon or the money transferred until probate or letters of administration have been granted and registered with the banker. In the absence of special arrangement, one of several executors or administrators may draw on an account opened with the deceased, or with them as executors or administrators[11]. Trustees cannot delegate the drawing of cheques to one of their number, but a trustee may, by power of attorney, delegate this power for up to 12 months; the statutory power of delegation is strictly construed[12].

1 Theoretically a cheque need not be drawn by a customer. Cf *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL, where protection was awarded under the Stamp Act 1853 s 19 to bankers' drafts, as being 'drawn upon a banker', which words are similar to those in the definition of a cheque contained in the Bills of Exchange Act 1882 s 73 (see further PARA 848). However, a banker is under no obligation to pay a cheque drawn by someone other than a customer, though he may place himself under such an obligation, as in the case of a demand draft drawn on him by a beneficiary under a letter of credit.

2 Bills of Exchange Act 1882 s 25. See also PARA 1474. For example, an executor cannot as a rule delegate his powers, though one of several executors may sign for all, and a cheque signed per pro an executor ought not to be paid without inquiry and satisfactory explanation. As to per pro indorsements see PARA 892.

3 See eg *Marshal v Crutwell* (1875) LR 20 Eq 328.

4 *Husband v Davis* (1851) 10 CB 645 at 650 per Maule J; and cf *Brandon v Scott* (1857) 7 E & B 234. As to the determination by one of the joint customers of the authority to pay see PARA 847. The common form of bank mandate relating to joint accounts embodies the authority of the signatories to the bank to honour cheques drawn by either or both, as the case may be, or the survivor. It may in addition give similar authority in respect of bills of exchange, the withdrawal of securities and property held for safe custody, the taking of advances, and the pledging and deposit of securities for advances. The effect of such a mandate is usually considered to be no more than an indication of the intention of the parties, because the mandate becomes ineffective on the death of either party, though it does not affect the rule of survivorship where this would otherwise apply: see *Husband v Davis* (1851) 10 CB 645; *Williams v Davies* (1864) 3 Sw & Tr 437; *Marshal v Crutwell* (1875) LR 20 Eq 328. See further PARA 823.

5 *Marshal v Crutwell* (1875) LR 20 Eq 328; *Re Harrison, Day v Harrison* (1920) 90 LJ Ch 186. See PARA 823.

6 For an example of the effect of such instructions see *Twibell v London Suburban Bank* [1869] WN 127.

7 Partnership Act 1890 ss 5, 8. Opening an account in the firm name is evidence of authority in each partner to draw.

8 *Backhouse v Charlton* (1878) 8 ChD 444.

9 See the Partnership Act 1890 s 38; *Re Bourne, Bourne v Bourne* [1906] 2 Ch 427, CA; *Dickson v National Bank of Scotland* 1917 SC (HL) 50. The rights inter se of partners and the representatives of a deceased partner do not normally affect the banker.

10 See the Partnership Act 1890 s 33; and PARTNERSHIP vol 35 (Reissue) PARA 166.

11 As to the devolution of trust powers to the surviving trustee or trustees see the Trustee Act 1925 s 18; and PARA 847. As to the administration of a deceased's estate generally see EXECUTORS AND ADMINISTRATORS.

12 See the Trustee Act 1925 s 25(1), (2) (substituted by the Trustee Delegation Act 1999 s 5(1), (2)); and cf *Green v Whitehead* [1930] 1 Ch 38 (affd on different grounds [1930] 1 Ch 38 at 46, CA). See further TRUSTS vol 48 (2007 Reissue) PARA 984.

834. Funds to be available. There must be sufficient funds to cover the whole amount of the cheque presented, for, in the absence of special arrangement, there is no obligation on the banker to pay any part of a cheque for an amount exceeding the available balance[1]. A cheque is not an assignment of funds in the banker's hands[2].

Cheques must be paid in the order in which they are presented, whether by post or otherwise[3]. If two cheques are presented simultaneously, for example through the same clearing, and there are funds sufficient to pay only one, it is doubtful whether both may be returned[4].

The funds must be not only sufficient, but available. Even in the case of notes, the banker is entitled to reasonable time between the paying in and drawing against in which to carry out the necessary book-keeping entries[5]. In the case of cheques and other documents, he is entitled to a reasonable time for clearing or collection according to their respective nature[6].

Mere crediting as cash is not sufficient to entitle the customer to draw against the cheque before clearing. There must be an agreement, express or implied, to permit the customer to draw[7].

Where a bank is required by a client's standing order to pay a sum on a particular day of each month to a payee until further order, and there are insufficient funds in the client's account on the material date to satisfy the standing order, the bank is under no duty to review the account to meet the order as and when sufficient funds become available[8].

1 The banker contracts with the customer to honour cheques only when he has 'sufficient' funds in hand: see *Carew v Duckworth* (1869) LR 4 Exch 313; *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 127, CA, per Atkin LJ.

2 Bills of Exchange Act 1882 s 53(1). See also PARA 1453.

3 *Kilsby v Williams* (1822) 5 B & Ald 815; *Sednaoni, Zariffa, Nakes & Co v Anglo-Austrian Bank* (1909) 2 Legal Decisions Affecting Bankers 208.

4 Unnecessary damage would be caused to the customer's credit. It is hard to say which is the preferable course, but the smaller the amount of the cheque, the greater the damage may be.

5 *Marzetti v Williams* (1830) 1 B & Ad 415; *Whitaker v Bank of England* (1835) 1 Cr M & R 744; *Bransby v East London Bank* (1866) 14 LT 403.

6 *Forman v Bank of England* (1902) 18 TLR 339 (where a city cheque was passed through the country clearing and was not credited in time to meet a cheque drawn against it).

7 *Re Farrow's Bank Ltd* [1923] 1 Ch 41, CA; *AL Underwood Ltd v Bank of Liverpool and Martin's* [1924] 1 KB 775, CA; and see *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465; *Bevan v National Bank* (1906) 23 TLR 65. In *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL, there was in fact an agreement entitling the customer to draw against the uncleared cheque. See further *Westminster Bank Ltd v Zang* [1966] AC 182, [1966] 1 All ER 114, HL; and PARA 891.

8 *Whitehead v National Westminster Bank Ltd* (1982) 10 Legal Decisions Affecting Bankers 364.

835. When funds not available. A balance at one branch of a bank does not entitle a customer to draw on another branch where he has no account or is overdrawn[1], for different branches of a bank are for this purpose separate entities, though the bank may apply funds which it holds at one branch to meet an overdraft of the customer at another[2]. If the customer has, in the same capacity, accounts at two or more branches, the bank is entitled to combine

them, in the absence of agreement or course of business suggesting otherwise, and to treat the ultimate credit balance, if any, as alone available for drawing purposes[3].

A third party debt order founded on a judgment against the customer and served on the banker prevents any credit balance being available irrespective of the relative amounts of the judgment and the balance[4], unless the order requires the attachment of the balance up to a stated sum only.

The fact that bills discounted for the customer are not yet due does not render a credit balance on current account not available[5].

If a banker has marked cheques[6] at the instance of the customer, he is entitled to retain funds to meet them. Where he does so at the instance of another banker, for clearing purposes, he binds himself to pay. While marking does not make the banker an acceptor, it may amount to a representation by him that the cheque will be paid if presented within a reasonable time[7].

The presentation of a bankruptcy petition against a customer, and the making of a bankruptcy order, render money standing to his credit not available[8]; the same consequence flows from the presentation of a petition for the winding up of a corporate customer[9].

1 *Woodland v Fear* (1857) 7 E & B 519; cf *Garnett v M'Kewan* (1872) LR 8 Exch 10; *Prince v Oriental Bank Corpn* (1878) 3 App Cas 325, PC; *Union Bank of Australia Ltd v Murray-Aynsley* [1898] AC 693, PC; *McNaghten v Cox & Co* (1921) Times, 11 May. It must be noted that the ability to access account details via a computer system has effectively rendered this rule obsolete.

2 *Garnett v M'Kewan* (1872) LR 8 Exch 10. As in note 1, the ability to access account details via a computer system has effectively rendered this rule obsolete.

3 *Garnett v M'Kewan* (1872) LR 8 Exch 10, approved in *Prince v Oriental Bank Corpn* (1878) 3 App Cas 325, PC; *Buckingham & Co v London and Midland Bank Ltd* (1895) 12 TLR 70 (course of business precluding combination). See also *Re EJ Morel (1934) Ltd* [1962] Ch 21, [1961] 1 All ER 796 (applying a dictum of Scrutton LJ in *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833 at 847, CA); *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL. See further PARA 867.

4 See *Rogers v Whiteley* [1892] AC 118, HL; *Yates v Terry* [1901] 1 KB 102 (revsd on another ground [1902] 1 KB 527, CA). See PARA 869.

5 *Bower v Foreign and Colonial Gas Co Ltd, Metropolitan Bank, Garnishees* (1874) 22 WR 740, distinguishing *Bolland v Bygrave* (1825) Ry & M 271; *Jeffryes v Agra and Masterman's Bank* (1866) LR 2 Eq 674. In the event of a customer's insolvency, however, apart from any determination of the authority to pay cheques, the banker could hold a credit balance as against such bills: see *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL; *Baker v Lloyds Bank Ltd* [1920] 2 KB 322. See further PARA 867.

6 Cheques can be marked by bankers, at the instance of their own customers, as an indication to persons taking them that at the time the bankers hold sufficient funds on the drawer's account to meet the cheques. See PARA 847. Marking does not amount to an acceptance: *Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] AC 176, [1944] 2 All ER 83, PC. As to the effect of marking a post-dated cheque see *Bank of Baroda Ltd v Punjab National Bank Ltd.*

7 See also PARA 847.

8 As to restrictions on disposition of property between the day of presentation of the petition and the vesting of the bankrupt's estate in a trustee see the Insolvency Act 1986 s 284; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 217. As to the vesting of a bankrupt's estate in a trustee see also s 306; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 391.

9 See the Insolvency Act 1986 s 127; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARAS 700–702. As to voluntary winding up see ss 87, 103; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 939 et seq. However, the honouring of a company's cheques does not involve a disposition to the paying bank for the purposes of s 127: *Hollicourt (Contracts) Ltd v Bank of Ireland* [2001] Ch 555, [2001] 1 All ER 289, CA.

836. Payment of order cheques in good faith in ordinary course of business. A banker who in good faith and in the ordinary course of business pays a cheque[1] payable to order[2] drawn on him, to which the person in possession has no title by reason of the indorsement being forged, is protected from liability, and may debit his customer with the amount so paid[3]. A banker who in good faith and in the ordinary course of business pays a cheque drawn on him which is not indorsed or is irregularly indorsed does not incur any liability by reason only of the absence of, or irregularity in, indorsement[4]. A thing is done in good faith if it is done honestly, whether it is done negligently or not[5].

Apart from the statutory provisions relating to crossed cheques[6], payment contrary to the crossing would not be in the ordinary course of business[7]. Omission to ascertain that the ostensible indorsement was in proper form, for example, where one indorsement is 'placed to account of payee', would, prior to the passing of the Cheques Act 1957, have been a departure from the ordinary course of business[8]; but now a payment may be in good faith and in the ordinary course of business notwithstanding that the instrument bears no indorsement or an irregular indorsement and the banker will be deemed to have paid in due course[9]. Payment over the counter of a cheque for a large amount to a suspicious-looking person might be a departure from the ordinary course of business[10].

Payment need not be in actual cash to the person presenting[11]. The banker's obligation to pay is during business hours[12], but he is entitled to make a payment outside the usual banking hours and such payment seems to be within the ordinary course of business[13].

1 It is of the nature of a cheque that it is payable on demand: see the Bills of Exchange Act 1882 s 73. See also PARAS 1405, 1410.

2 As to the meaning of 'order cheque', or cheque payable to order, see PARA 879. A cheque payable to order is negotiated by the indorsement of the holder and completed by delivery: Bills of Exchange Act 1882 s 31(3). See also PARA 1489. Indorsement of cheques is now largely a matter of theory since printed forms carrying the words 'account payee' or 'a/c payee' are no longer transferable and are only valid between the parties: see s 81A; and PARAS 895, 1500.

3 Bills of Exchange Act 1882 s 60. See also PARA 1552. It is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority: s 60. Section 60 does not apply to drafts between branch and head office (see PARA 896) or to documents payment of which is made conditional on the signature of an annexed receipt or on presentation within a limited time (see PARA 898). Payment in the ordinary course of business includes payment of order cheques not indorsed or irregularly indorsed: see the Cheques Act 1957 s 1(1); and the text to note 4.

If the banker is both paying and collecting banker, he must also show himself not to have been negligent within s 4 (see PARA 882): *Carpenters' Co v British Mutual Banking Co* [1938] 1 KB 511, [1937] 3 All ER 811, CA (decided in relation to negligence within the Bills of Exchange Act 1882 s 82 (repealed)). See also PARA 882.

4 Cheques Act 1957 s 1(1). See note 9. See also PARA 1552.

5 Bills of Exchange Act 1882 s 90. See also PARA 1401.

6 Ie the Bills of Exchange Act 1882 ss 76–81; and the Cheques Act 1957 s 4: see PARA 880.

7 *Smith v Union Bank of London* (1875) 1 QBD 31, CA (in which the cheque was paid in disregard of its crossing).

8 In *Slingsby v District Bank Ltd* [1931] 2 KB 588 (affd [1932] 1 KB 544, CA), the court held that the Bills of Exchange Act 1882 s 60 afforded no protection as the cheque, having been altered, was defective, apart from the indorsement.

9 See the Cheques Act 1957 s 1. As to the requirement of indorsement of order cheques by bankers before the passing of the Cheques Act 1957 see PARA 832 note 17.

10 Cf *Bank of England v Vagliano Bros* [1891] AC 107 at 117, HL, per Lord Halsbury LC; *Auchteroni & Co v Midland Bank Ltd* [1928] 2 KB 294. See further PARA 846.

11 'Payment' within the meaning of the Bills of Exchange Act 1882 is broadly interpreted: see *Glasscock v Balls* (1889) 24 QBD 13 at 16, CA, per Lord Esher MR. A cheque drawn on one branch of a bank, paid in at another, and appearing as an item in balancing accounts between the branches, has been held to be paid: *Bissell & Co v Fox Bros & Co* (1885) 53 LT 193, CA; *Capital and Counties Bank v Gordon* [1903] AC 240, HL. Where payment was made by the paying banker by cheque, this was held to be payment within the Bills of Exchange Act 1882 s 79(2) (see PARA 839): see *Meyer & Co Ltd v Sze Hai Tong Banking and Insurance Co Ltd* [1913] AC 847, PC.

12 *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 127, CA, per Atkin LJ.

13 *Baines v National Provincial Bank* (1927) 96 LJKB 801 (where Lord Hewart CJ held that a bank is entitled to deal with a cheque within a reasonable business margin after its advertised time of closing).

Many banks have automatic teller machines installed which dispense cash. Most systems involve the issue by the bank to its customer of a plastic card which is inserted into the machine to withdraw cash. Unless the system is directly linked to the bank's central computer account files so that the customer's account is debited immediately the withdrawal is made, the card is probably a credit token within the meaning of the Consumer Credit Act 1974 s 14 (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 88). Automatic teller machines are capable of performing most other functions of a cashier (eg accepting deposits, giving the balance of a customer's account, and transferring funds). See further PARA 906.

837. Payment of bearer cheques in good faith and without negligence. A banker who in good faith and without negligence[1] pays a bearer cheque[2] on presentation is free from all liability[3], and may debit his customer[4], though the holder had no title or a defective title to the cheque[5]. If the cheque has reached the payee actually or constructively, payment in due course by the banker discharges the customer (the drawer) both as to the cheque and as to the consideration[6].

1 *Bellamy v Marjoribanks* (1852) 7 Exch 389; *Carlon v Ireland* (1856) 5 E & B 765; and see *Westminster Bank Ltd v Hilton* (1926) 136 LT 315. As to crossed cheques paid in good faith and without negligence see the Bills of Exchange Act 1882 s 80; and PARA 844.

2 A bearer cheque is one expressed to be payable to bearer or to a particular person or bearer: see PARA 879. As to cheques generally see PARAS 879–880.

3 *Charles v Blackwell* (1877) 2 CPD 151, CA (not liable to true owner).

4 *Charles v Blackwell* (1877) 2 CPD 151, CA.

5 This is referred to as discharge by payment in due course: see the Bills of Exchange Act 1882 s 59(1). See also PARA 1550. 'Holder' means the payee or indorsee of a bill or note who is in possession of it, or the bearer of it; and 'bearer' means the person in possession of a bill or note which is payable to bearer: s 2. See also PARA 1407. The definition of 'holder' merely requires possession without in any way limiting it to lawful possession. Neither definition involves any question of title.

6 *Charles v Blackwell* (1877) 2 CPD 151, CA. As to crossed cheques see the Bills of Exchange Act 1882 s 80; and PARA 838.

838. Payment of crossed cheques in accordance with the crossing. A banker is protected if he pays a cheque, in good faith and without negligence, in accordance with its ostensible crossing[1], notwithstanding that it may have been obliterated, or added to or altered otherwise than as authorised by the Bills of Exchange Act 1882[2]. 'Addition' means a material addition, effective under the provisions relating to crossed cheques; the addition of a memorandum such as 'account payee' would not justify the banker in refusing to pay the cheque, or in itself deprive him of protection in paying[3]. The 'opening' of a crossing, by writing 'pay cash' and initialling, is a patent alteration not authorised by the Act, and a banker pays such a cheque over the counter at the risk that the opening may prove unauthorised[4]. A banker paying in good faith and without negligence a cheque which at the time of presentation appears not to be crossed does not incur liability by reason only that the cheque was in fact or had been crossed[5].

A banker paying a crossed cheque in good faith, without negligence[6], and in accordance with the crossing, is protected, and may debit his customer, notwithstanding any defect of title in the collecting banker or the person from whom he received it[7]. If the cheque had come to the hands of the payee[8], the drawer is discharged both on the cheque and on the consideration[9].

Protection under the provisions relating to crossed cheques might be doubtful in the case of an open cheque crossed by a person having no authority to cross, such as an innocent person in possession under a forged indorsement, but the banker would be otherwise protected[10].

The addition of 'not negotiable' to the crossing has no effect whatever on the paying banker, except to prevent his being a holder in due course[11]. 'Not negotiable' by itself, however, does not constitute a crossing[12].

The banker's identification stamp may or may not be a crossing. If impressed on an open cheque by the collecting banker, it probably is. Similarly, the collecting banker's stamp on a cheque crossed generally would probably constitute it a cheque crossed specially to that banker[13].

A banker paying a document, ostensibly a crossed cheque, to which his customer's name is forged as drawer is not protected; the instrument is not a cheque[14].

1 Bills of Exchange Act 1882 s 80 (amended by the Cheques Act 1992 s 2). See also PARA 1575. The practice of bankers may be relevant to negligence: see *Arab Bank Ltd v Ross* [1952] 2 QB 216 at 222, [1952] 1 All ER 709 at 713, CA, per Somervell LJ. As to negligence in relation to the practice of collecting bankers see PARA 884.

2 See the Bills of Exchange Act 1882 s 79(2) proviso. See also PARA 1575. The proviso is defectively drawn. The wording 'added to or altered' etc grammatically refers to the cheque, not the crossing, but the words are intended to apply to the latter: *Slingsby v District Bank Ltd* [1932] 1 KB 544, CA.

3 See *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465 at 472 per Bigham J; and see PARA 895. The paying banker could, as a rule, have no knowledge for whose account the cheque was being collected. The only doubtful case would be where the cheque bore indorsements after that of the payee, and one was forged. Quaere whether payment in such case would be 'in the ordinary course of business' or 'without negligence'. The 'provisions relating to crossed cheques' are the Bills of Exchange Act 1882 ss 76–81; and the Cheques Act 1957 s 4: see PARA 880.

4 The practice of banks is not to recognise the opening of cheques unless signed by the drawer and presented for payment by him or his known agent: see Questions on Banking Practice (11th Edn) no 344; and see also *Smith and Baldwin v Barclays Bank Ltd* (1944) 5 Legal Decisions Affecting Bankers 370, in which Stable J said, in relation to a cheque crossed 'not negotiable' over which were written the words 'please pay cash', that the alteration to the printed form did not make the instrument any the less a crossed cheque. The crossed cheque provisions of the Bills of Exchange Act 1882 (ss 76–81A) have effect in relation to the instruments, other than cheques, to which the Cheques Act 1957 s 4 (see PARA 882) applies as they have effect in relation to cheques: see s 5; and PARA 880. As to the Bills of Exchange Act 1882 s 81A see also PARA 836 note 2; and PARAS 895, 1500.

5 Bills of Exchange Act 1882 s 79(2) proviso.

6 Payment on an irregular indorsement is negligence (*Slingsby v District Bank Ltd* [1932] 1 KB 544, CA), except as provided by the Cheques Act 1957 s 1, the protection of which is additional to that given by the Bills of Exchange Act 1882 s 80: see PARA 836. If the banker is both paying and collecting banker, he must also show himself not to have been negligent within the Cheques Act 1957 s 4: see PARAS 836, 882.

7 See the Bills of Exchange Act 1882 s 80 (as amended: see note 1).

8 It is presumed that 'constructive' coming to the payee's hands would be sufficient.

9 See the Bills of Exchange Act 1882 s 80 (as amended: see note 1).

10 Cf *Simmons v Taylor* (1857) 2 CBNS 528 at 539 per Cresswell J; affd (1858) 4 CBNS 463. However, if the cheque is an order cheque, the banker is protected under the Bills of Exchange Act 1882 s 60 (see PARA 836); if a bearer cheque, by having paid to bearer. As to the meanings of 'order cheque' and 'bearer cheque' see PARA 879.

11 Bills of Exchange Act 1882 s 81. See also PARA 1499. See *Algemene Bank Nederland NV v Happy Valley Restaurant Pte Ltd* [1991] 2 MLJ 289.
12 See the Bills of Exchange Act 1882 s 76. See also PARA 1411.
13 A collecting banker may specially cross to himself: Bills of Exchange Act 1882 s 77(6). See also PARA 1411. Transverse lines are not necessary to constitute crossing where a banker's name is put across the face of the cheque: s 76(2). Bankers habitually stamp all cheques collected by them, whether crossed or not, and the stamp is frequently horizontal, not transverse or 'across' the face of the cheque. The latter point would probably not be considered material.
14 It is not a cheque, but a mere piece of paper: *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49, PC; and see PARA 850.

839. Payment in contravention of the crossing. The Bills of Exchange Act 1882 does not, as the earlier crossed cheques legislation did, directly prohibit a banker from paying in contravention of the crossing, except in the case of a cheque crossed to more than one banker, none of whom is an agent for collection[1]. However, a banker so doing[2] is liable to the true owner for any loss the latter may sustain as a result[3]. In the case of a forged indorsement, he would also lose the protection afforded by statute[4], payment contrary to the crossing not being in the ordinary course of business[5].

Notwithstanding the absence of the direct prohibition, a banker cannot charge his customer with the amount of a crossed cheque paid in contravention of the crossing[6], even, it would seem, though payment was made to the true owner[7].

The fact that a crossed cheque has been refused payment does not make it an open cheque for the purpose of re-presentation[8]; nor does the fact that a crossing has been opened or obliterated render it an uncrossed cheque[9].

1 See the Bills of Exchange Act 1882 s 79(1). See also PARA 1575.
2 Payment by means of the bank's own cheque is sufficient payment: *Meyer & Co Ltd v Sze Hai Tong Banking and Insurance Co Ltd* [1913] AC 847, PC.
3 Bills of Exchange Act 1882 s 79(2). But see *Meyer & Co Ltd v Sze Hai Tong Banking and Insurance Co Ltd* [1913] AC 847, PC (where the bank was protected by estoppel).
4 Ie under the Bills of Exchange Act 1882 s 60: see PARA 836.
5 *Smith v Union Bank of London* (1875) 1 QBD 31, CA. See also the Bills of Exchange Act 1882 s 80; and PARA 838.
6 *Smith v Union Bank of London* (1875) 1 QBD 31, CA. In that case, there was a direct prohibition; but the disability to debit the customer was apparently based on disobedience to mandate (*Bobbett v Pinkett* (1876) 1 ExD 368). Such payments would clearly be made negligently. See also the Bills of Exchange Act 1882 s 79(2) proviso; the provision that, in the circumstances covered by the proviso, the payment 'shall not be questioned' implies that the customer may normally repudiate payment contrary to the crossing. See PARA 838.
7 Payment had been made to the true owner, the bona fide holder, in *Smith v Union Bank of London* (1875) 1 QBD 31, CA. Possibly, however, the court would apply the doctrine laid down in *Reid v Rigby & Co* [1894] 2 QB 40, *Bevan v National Bank Ltd* (1906) 23 TLR 65, and *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48, as to adoption of a payment by taking the benefit of it. Contrast *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA.
8 It remains a crossed cheque: cf Questions on Banking Practice (11th Edn) no 345.
9 *Smith and Baldwin v Barclays Bank Ltd* (1944) 5 Legal Decisions Affecting Bankers 370.

840. Domiciled bill. Where a customer accepts a domiciled bill payable at his bank[1], it constitutes an authority to the banker to pay it at maturity[2] and, if no funds are available, amounts to a request for an overdraft to the amount of the bill; but, in the absence of previous arrangement, the banker is under no obligation to pay the bill, even though he has sufficient funds in hand[3]. Where such an obligation exists, the banker, in the absence of special terms, is under a duty to identify the person to whom he makes payment with the person named as payee[4]. There is no statutory protection in regard to the payment of a domiciled bill.

A banker who in good faith and without negligence pays a bill payable to bearer, so accepted, to the bearer of it may charge his customer with the amount[5].

1 A bill is said to be domiciled when it is accepted payable at a bank or by another paying agent.
2 *Kymer v Laurie* (1849) 18 LJQB 218.
3 *Robarts v Tucker* (1851) 16 QB 560; *Bank of England v Vagliano Bros* [1891] AC 107 at 157, HL, per Lord Macnaghten.
4 *Bank of England v Vagliano Bros* [1891] AC 107 at 131, HL, per Lord Watson, and at 157 per Lord Macnaghten.
5 See the Bills of Exchange Act 1882 ss 2, 8(3), 59. See further *Bank of England v Vagliano Bros* [1891] AC 107, HL; *Auchteroni & Co v Midland Bank Ltd* [1928] 2 KB 294.

841. Cheques drawn in breach of trust. It is not the banker's business or right to set up the title of persons other than his customer, and mere suspicion that a breach of trust is involved or intended in the drawing of a cheque on trust funds may not be sufficient to entitle the banker to refuse payment[1]. However, it is hardly conceivable that a court would award damages against the banker to a customer who had to admit, or against whom it was proved, that he drew the cheque for the purpose of defrauding the trust[2].

1 *Gray v Johnston* (1868) LR 3 HL 1; and see further PARA 828. A paying banker may be liable as a constructive trustee: see PARA 843.
2 *Gray v Johnston* (1868) LR 3 HL 1 at 11 per Lord Cairns; *Hunt v Maniere* (1864) 34 Beav 157.

842. Breach of trust designed to benefit banker. A banker may not retain any benefit to himself from wrongful dealing with any fund he knows to be affected with a trust where such benefit has been designed or stipulated for by him[1]. A banker cannot assert his right of combination over an account known to be a trust account, whether so described or not[2]. A banker may, however, refuse to accept an account in any form which implies that it is affected by a trust[3], but he is not at liberty to disregard intimations conveyed to him by the title or character in which the account is opened, or otherwise[4].

1 *Gray v Johnston* (1868) LR 3 HL 1. In *Foxton v Manchester and Liverpool District Banking Co* (1881) 44 LT 406, Fry J appears to have held that the fact that the bank indirectly derived benefit from such dealing invalidated the transaction. In *Coleman v Bucks and Oxon Union Bank* [1897] 2 Ch 243, Byrne J shows that, to come within *Gray v Johnston* above, there must at least be an ascertained debt due to the bank, which on pressure by the bank is satisfied or reduced by payment from the trust account. Cf *Shields v Governor & Co of Bank of Ireland* [1901] 1 IR 222; *John v Dodwell & Co* [1918] AC 563, PC; *Reckitt v Barnett, Pembroke and Slater Ltd* [1929] AC 176, HL; *Imperial Bank of Canada v Begley* [1936] 2 All ER 367, PC; *Midland Bank Ltd v Reckitt* [1933] AC 1, HL.
2 *Re Gross, ex p Kingston* (1871) 6 Ch App 632; cf *Union Bank of Australia v Murray-Aynsley* [1898] AC 693, PC; *Bank of New South Wales v Goulburn Valley Butter Co Pty Ltd* [1902] AC 543, PC. As to the banker's right to combine accounts see PARA 867.
3 *Re Gross, ex p Kingston* (1871) 6 Ch App 632 at 640 per Mellish LJ.
4 *Bodenham v Hoskins* (1852) 21 LJ Ch 864; *Re Gross, ex p Adair* (1871) 24 LT 198 (affd sub nom *Re Gross, ex p Kingston* (1871) 6 Ch App 632); *Bridgman v Gill* (1857) 24 Beav 302. Cf *Bank of New South Wales v Goulburn Valley Butter Co Pty Ltd* [1902] AC 543, PC; *British America Elevator Co v Bank of British North America* [1919] AC 658, PC; *Cunningham v Northern Banking Co Ltd* [1928] NI 112, CA; *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, [1968] 3 All ER 651, HL. As to money paid for a special purpose see PARA 825.

843. The banker as constructive trustee. Banks have been held liable as constructive trustees in circumstances wider than those of wrongfully obtaining by design or stipulation a benefit from a fund known to be affected by a trust[1]; and a constructive trust has been imposed upon a paying bank in circumstances

where it has obtained no benefit for itself at all[2]. A bank may be held liable as constructive trustee even in respect of a payment made in accordance with its customer's mandate[3]. In relation to the category of constructive trusteeship known as dishonest assistance[4], it is necessary to establish that the bank acted dishonestly[5]. The position is not as clear in relation to the other category of constructive trusteeship known as knowing receipt[6], and the authorities conflict as to whether the bank will be liable when the relevant knowledge is merely of circumstances which would indicate the facts to an honest and reasonable person or would put an honest and reasonable person on inquiry or whether actual knowledge is required[7].

1 As to the liability of a bank in such a case see PARA 842.

2 See *Selangor United Rubber Estates Ltd v Craddock (No 3)* [1968] 2 All ER 1073, [1968] 1 WLR 1555; *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 All ER 1210, [1972] 1 WLR 602; *Rowlandson v National Westminster Bank Ltd* [1978] 3 All ER 370, [1978] 1 WLR 798; *Baden, Delvaux and Lecuit v Société General pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1992] 4 All ER 161, [1983] BCLC 325; *Lipkin Gorman v Karpnale Ltd* [1992] 4 All ER 409, [1989] 1 WLR 1340, CA. See also *Barclays Bank plc v Quincecare and Unichem Ltd* [1992] 4 All ER 363, where claims of constructive trusteeship failed. In certain cases, e g *Lipkin Gorman v Karpnale Ltd* above, the facts are such that a claim of constructive trusteeship must fail if a contractual claim based on the same facts is unsuccessful.

3 *Selangor United Rubber Estates Ltd v Craddock (No 3)* [1968] 2 All ER 1073 at 1119, [1968] 1 WLR 1555 at 1609 per Ungoed-Thomas J; *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 All ER 1210 at 1231, [1972] 1 WLR 602 at 629 per Brightman J. The status of these authorities is now somewhat doubtful: see *Lipkin Gorman v Karpnale Ltd* [1992] 4 All ER 409, [1989] 1 WLR 1340, CA.

4 See TRUSTS vol 48 (2007 Reissue) PARA 704.

5 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, [1995] 3 All ER 97, PC. This case set new criteria for dishonest assistance and did not follow the previous guidelines set out by Lord Selborne LC in *Barnes v Addy* (1874) 9 Ch App 244. See Paget's Law of Banking (12th Edn, 2003) pp 459–465. The defendant must have acted dishonestly by the ordinary standards of reasonable and honest people, and he must have been aware that by those standards he was acting dishonestly: *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164, [2002] 2 All ER 377, HL.

6 See TRUSTS vol 48 (2007 Reissue) PARA 701.

7 Compare *Baden, Delvaux and Lecuit v Société General pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1992] 4 All ER 161, [1983] BCLC 325, with *Re Montagu's Settlement Trusts* [1987] Ch 264, [1992] 4 All ER 308; *Barclays Bank plc v Quincecare and Unichem Ltd* [1992] 4 All ER 363; and *Lipkin Gorman v Karpnale Ltd* [1992] 4 All ER 409, [1989] 1 WLR 1340, CA. See TRUSTS vol 48 (2007 Reissue) PARA 704. See also Paget's Law of Banking (12th Edn, 2003) pp 493–500.

844. Banker paying without authority. Subject to questions of statutory protection, estoppel or adoption, a banker who has paid a cheque drawn without authority[1] or who has paid one in contravention of his customer's order, or, probably, negligently[2], cannot debit the customer's account with the amount[3]. However, if such a cheque is paid in discharge of the customer's debts, the banker is entitled to take credit for it[4].

The banker's duty in regard to the payment of cheques under a valid mandate is not necessarily fulfilled by his compliance with the mandate; he is under a contractual duty of care which may require him to question payment[5].

When a company mandate authorises its bank to honour cheques if signed by any two signatories, but the board confers authority upon a single person to direct the transfer of a particular sum, the bank is entitled to act upon a cheque drawn on that person's single signature if he was acting within his authority[6]. If the bank fails to observe the discrepancy between the cheque and the mandate,

or if it does so but makes no inquiries, it takes a risk in honouring the cheque that the sole signatory may not in fact be authorised[7].

1 As to determination of authority to pay see PARA 847.
2 See the Bills of Exchange Act 1882 s 80 (protection to banker) which uses the words 'without negligence' (see PARA 838); *Bellamy v Marjoribanks* (1852) 7 Exch 389; *Carlon v Ireland* (1856) 5 E & B 765 at 770 per Crompton J. See also PARA 1575. The Bills of Exchange Act 1882 s 60 does not mention negligence: see PARA 836. If, therefore, payment on a forged indorsement is in the ordinary course of business, it may be protected, though negligent: see *Brighton Empire and Eden Syndicate v London and County Bank* (1904) Times, 24 March.
3 As to when the limitation period runs for a claim based on the wrongful debit of an account see *National Bank of Commerce v National Westminster Bank* [1990] 2 Lloyd's Rep 514, applying *Limpgrange Ltd v BCCI SA* [1986] FLR 36.
4 *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48. A bank which, without authority, pays out funds from its customer's account to a judgment creditor, in purported compliance with a third party debt order, which has not been made absolute, cannot claim the benefit of such payment: *Crantrave Ltd v Lloyd's Bank plc* [2000] QB 917, [2000] 4 All ER 473, CA. As to third party debt orders see PARA 869.
5 See PARA 828.
6 *London Intercontinental Trust Ltd v Barclays Bank Ltd* [1980] 1 Lloyd's Rep 241.
7 *London Intercontinental Trust Ltd v Barclays Bank Ltd* [1980] 1 Lloyd's Rep 241.

845. Wrongful dishonour. If, without justification, a banker dishonours his customer's cheque, he is liable to the customer in damages for injury to credit[1]; but he is not liable to the holder except where, as only rarely happens, he holds funds appropriated to the particular cheque and has so informed the holder[2]. Proof of actual injury to credit is not necessary to secure substantial damages, either for a business customer[3] or for personal customers[4]. The answer on a cheque dishonoured on presentation by a third person[5] may constitute libel, but such cases are rare[6]; in such cases general damages may be awarded.

1 *Marzetti v Williams* (1830) 1 B & Ad 415. Where a bank wrongly dishonoured a cheque and marked it 'not sufficient', the bank could not rely on qualified privilege as a defence against the alleged libel: *Davidson v Barclays Bank Ltd* [1940] 1 All ER 316. See LIBEL AND SLANDER vol 28 (Reissue) PARA 54.
2 *Boyd v Emmerson* (1834) 2 Ad & El 184. See also *Auchteroni & Co v Midland Bank Ltd* [1928] 2 KB 294.
3 Cf *Wilson v United Counties Bank Ltd* [1920] AC 102 at 112, HL, per Lord Birkenhead LC; *Evans v London and Provincial Bank Ltd* (1917) 3 Legal Decisions Affecting Bankers 152; *Cox v Cox & Co* (1921) Times, 18 March. See however *Rolin v Steward* (1854) 14 CB 595; *Summers v City Bank* (1874) LR 9 CP 580.
4 *Kpohraror v Woolwich Building Society* [1996] 4 All ER 119, [1996] 01 LS Gaz R 22, CA, distinguishing *Gibbons v Westminster Bank Ltd* [1939] 2 KB 882, [1939] 3 All ER 577 and *Rae v Yorkshire Bank Ltd* [1988] BTLC 35, CA.
5 There is no libel in the case of a customer presenting a cheque payable to self: *Kinlan v Ulster Bank Ltd* [1928] 1 IR 171.
6 See *Frost v London Joint Stock Bank Ltd* (1906) 22 TLR 760, CA (words 'reason assigned—not stated' held not libellous); *Flach v London and South-Western Bank Ltd* (1915) 31 TLR 334 (words 'refer to drawer' held not libellous, although Grantham J left these words to the jury in *Szek v Lloyds Bank Ltd* (1908) 2 Legal Decisions Affecting Bankers 159); *Plunkett v Barclays Bank Ltd* [1936] 2 KB 107, [1936] 1 All ER 653 (adopting the view taken in *Flach v London and South-Western Bank Ltd*). However see *Pyke v Hibernian Bank Ltd* [1950] IR 195 (words 'refer to drawer, present again' and 'refer to drawer' held libellous by court of first instance; judges of appeal court being equally divided, the judgment was affirmed). In *Jayson v Midland Bank Ltd* [1967] 2 Lloyd's Rep 563 (on appeal [1968] 1 Lloyd's Rep 409, CA), while the jury found that the words 'refer to drawer' were libellous, the point was immaterial in the sense that the statement that there were no funds to meet the charges was true. As to 'present again' see *Baker v Australia and New Zealand Bank Ltd* [1958] NZLR 907.

846. Time for payment. If the bill is ostensibly in order, the banker must pay or refuse to pay at once. He is not entitled to time in which to decide whether he

may safely pay[1]. Some doubt has, however, been cast on this view[2]. Where presentment is made through a clearing house, the banker is probably entitled to the time allowed by the rules of that establishment for deciding whether to pay or not.

1 *Bank of England v Vagliano Bros* [1891] AC 107 at 157, HL, per Lord Macnaghten (dissenting from the dictum of Maule J in *Robarts v Tucker* (1851) 16 QB 560 at 577–578). See also *Bank of England v Vagliano Bros* above at 116–117 per Lord Halsbury, and at 141 per Lord Bramwell (dissenting on other grounds); and see *Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] AC 176 at 184, [1944] 2 All ER 83 at 87, PC. Cf *Momm (t/a Delbrueck & Co) v Barclays Bank International Ltd* [1977] QB 790, [1976] 3 All ER 588. As to when payment by funds transfer may be deemed complete see *Tenax Steamship Co Ltd v Reinante Transoceanica Navegacion SA, The Brimnes* [1973] 1 WLR 386; affd [1975] QB 929, CA; *Sutherland and Sutherland v Royal Bank of Scotland plc* [1997] 6 Bank LR 132; and Paget's Law of Banking (12th Edn, 2003) p 351 et seq.

2 *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 All ER 1210 at 1231, [1972] 1 WLR 602 at 629 per Brightman J.

847. Determination of authority to pay. The duty and authority to pay a cheque drawn by a customer are determined:

(1) by countermand of payment, commonly known as stopping a cheque[1];
(2) by notice of the customer's death[2];
(3) by notice of the customer's mental disorder or lack of capacity, where it is of a degree preventing his understanding the transaction[3];
(4) by notice of the presentation of a bankruptcy petition against the customer[4] or the making of a bankruptcy order against him[5];
(5) by notice of the presentation of a winding-up petition where the customer is a limited company[6], or of the passing of a resolution for voluntary winding-up[7].

The duty and authority of a bank to pay money from a client's account may also be established by a direct debit mandate. It has been suggested that failure to implement a properly concluded mandate might be breach of an implied term of a contract between the bank and its customer[8], but such a mandate does not confer on a creditor any rights of the debtor against his own bank[9]. It has been held that cancelling a direct debit mandate is equivalent to countermanding a payment by cheque[10].

1 Bills of Exchange Act 1882 s 75; *Mclean v Clydesdale Banking Co* (1883) 9 App Cas 95, HL. See also PARA 1403. As between separate branches of a bank there is a right to separate notice of countermand: *London Provincial and South-Western Bank v Buszard* (1918) 35 TLR 142. As to payment contrary to instructions see *Twibell v London Suburban Bank* [1869] WN 127; *Bale v Parr's Bank Ltd* (1909) 25 TLR 549; *Reade v Royal Bank of Ireland Ltd* [1922] 2 IR 22, CA. As to the authority of a principal to stop payment on an account, which he has opened in favour of an agent, see *Société Coloniale Anversoise v London and Brazilian Bank Ltd* [1911] 2 KB 1024. As to countermand addressed to a branch substituted by alteration, the cheque being magnetically lettered to the original branch addressee, see *Burnett v Westminster Bank Ltd* [1966] 1 QB 742, [1965] 3 All ER 81; and see also *Andrews v Andrews* 1967 SLT 14. As to joint accounts see PARA 823. Apart from any question of mandate, one partner has power to stop a cheque issued in the firm name, and one executor has power to stop a cheque signed by another: *Gaunt v Taylor* (1843) 2 Hare 413.

Stopping by teletransmission is sufficient: see *Curtice v London City and Midland Bank Ltd* [1908] 1 KB 293, CA (where it was held that, though a telegram countermanding a cheque might reasonably be acted upon by a banker, an unauthenticated telegram was not sufficient authority for refusing payment). See also *Reade v Royal Bank of Ireland Ltd* above; *Westminster Bank Ltd v Hilton* (1926) 136 LT 315. See further the Uniform Customs and Practice for Documentary Credits (1993 and 2007 Revisions), which uses the expression 'teletransmission' (see art 11; and PARA 932).

Where a banker has marked a cheque at the instance of the customer, the customer probably cannot countermand payment of the cheque after issue. By so marking (see PARA 835), the

banker probably becomes bound to pay to any other banker presenting it: cf *Goodwin v Robarts* (1875) LR 10 Exch 337; *Gaden v Newfoundland Savings Bank* [1899] AC 281, PC; *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49, PC. See also *Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] AC 176, [1944] 2 All ER 83, PC, in which English law and practice are considered. The Bills of Exchange Act 1882 s 75 does not include the case as an exception, but the banker is in the position of an agent with an interest: see further generally AGENCY. Even if the cheque is not crossed, it might be presented through a banker, or be subsequently crossed.

2 Bills of Exchange Act 1882 s 75. Cf *Rogerson v Ladbroke* (1822) 1 Bing 93. Where one of two or more partners or customers on joint account dies, the survivors or survivor may, as a rule, still draw on the account (see PARA 833); but, on the death of one of several trustees, the banker may not honour cheques on the trust account drawn by the survivor or survivors unless satisfied of his or their power so to draw under the terms of the trust, or in exercise of statutory authority (see the Trustee Act 1925 s 18; PARA 833; and TRUSTS vol 48 (2007 Reissue) PARAS 817, 981, 983).

3 *Drew v Nunn* (1879) 4 QBD 661, CA; *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599, CA; *Bradford Old Bank Ltd v Sutcliffe* (1918) 34 TLR 299 (affd on other grounds [1918] 2 KB 833, CA) (a guarantee).

4 Bills of Exchange Act 1882 s 97(1); Insolvency Act 1986 s 284. See also PARA 1608. The right and duty to refuse payment in such case arise not so much from the actual determination of the customer's authority as from the provisions of the bankruptcy legislation: see further BANKRUPTCY AND INDIVIDUAL INSOLVENCY. As to restrictions on the disposition of property between the day of presentation of a petition and the vesting of the bankrupt's estate in a trustee see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 217.

5 Insolvency Act 1986 ss 283(1), 306, 385(1). See further BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 216 et seq.

6 As to the avoidance of property disposition etc see the Insolvency Act 1986 s 127; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARAS 700–702. As to the meaning of 'disposition' in this context see *Hollicourt (Contracts) Ltd v Bank of Ireland* [2001] Ch 555, [2001] 1 All ER 289, CA, not applying *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814 at 820, [1980] 1 WLR 711 per Buckley LJ.

7 See the Insolvency Act 1986 ss 87, 103; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 997.

8 *Weldon v GRE Linked Life Assurance Ltd* [2000] 2 All ER (Comm) 914.

9 *Mercedes-Benz Finance Ltd v Clydesdale Bank plc* 1997 SLT 905, [1997] CLC 81, OH.

10 *Esso Petroleum Co Ltd v Milton* [1997] 2 All ER 593, [1997] 1 WLR 938, CA. But this decision is questioned in Paget's Law of Banking (12th Edn, 2003) at p 335.

848. Cheque not drawn by customer. It would appear that a cheque, being a bill of exchange drawn on a banker, payable on demand, need not be drawn by a customer[1], although payment of such a cheque would hardly be in the ordinary course of banking business. The protection extends to an instrument carrying a per pro indorsement[2].

1 See *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL, where protection was accorded to banker's drafts (see PARA 896) under the Stamp Act 1853 s 19 (see PARA 896), in which the words 'drawn on a banker' are the same as in the Bills of Exchange Act 1882 s 60 (see PARA 836). The history of the legislation given in *Charles v Blackwell* (1877) 2 CPD 151 at 156, CA, and in *Capital and Counties Bank Ltd v Gordon* above at 250 per Lord Lindley should, however, be considered. There is nothing about 'ordinary course of business' in the Stamp Act 1853 s 19, but s 19 has been held to have been impliedly repealed by the Bills of Exchange Act 1882 s 60 as regards bills and cheques: see *Carpenters' Co v British Mutual Banking Co* [1938] 1 KB 511, [1937] 3 All ER 811, CA. See also PARA 833.

2 *Charles v Blackwell* (1877) 2 CPD 151, CA, decided in relation to the Stamp Act 1853 s 19, but applicable to the Bills of Exchange Act 1882 s 60 (see PARA 836). As to per pro indorsements see PARA 892.

849. Cheques materially altered. Whether a material alteration of a cheque precludes the banker from debiting his customer with the whole or part of the cheque appears to depend on the character and effect of the alteration[1]. If, despite the alteration, the customer's mandate has been substantially complied

with, it is submitted that the banker may charge the customer[2]. If the alteration is in the amount, it would seem that the banker may be entitled to debit the customer with the amount originally inserted[3].

1 The cases do not agree. The decision in *Simmons v Taylor* (1857) 2 CBNS 528 at 539, 541 (affd (1858) 4 CBNS 463) implies that any material alteration would absolutely debar the banker from debiting, for the cheque must be the customer's cheque in all respects. Other cases point the other way, as only the excess amount seems to have been treated as disputable: see *Hall v Fuller* (1826) 5 B & C 750 (date and amount altered); *Young v Grote* (1827) 4 Bing 253 (amount altered); *Halifax Union v Wheelwright* (1875) LR 10 Exch 183; *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49, PC (amount altered; in this case the cheque was described as good for the original amount). See also *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777, HL; and PARA 829 note 1. The alteration of an amount of money in the old currency to the equivalent decimal amount is not a material alteration for the purposes of the Bills of Exchange Act 1882 s 64(1) (by which a bill materially altered is avoided except against a party who has made, authorised or assented to the alteration, and subsequent indorsers: see PARA 1559): see the Decimal Currency Act 1969 s 3(2).

2 The paying banker, not being a holder, cannot avail himself of the Bills of Exchange 1882 s 64(1) proviso (by which a material alteration which is not apparent does not prevent a holder in due course from availing himself of a bill: see PARA 1559). It is submitted that that provision avoids the bill only as between the parties. Cf the common law rule as stated by Brett LJ in *Suffell v Bank of England* (1882) 9 QBD 555 at 568, CA, where he limited the avoidance to a party suing on the bill or setting it up as a direct defence. This is not the banker's position; he sets it up as an authority, not a bill. The ground alleged for the rule, namely that the bill must have been altered with the privity or by the neglect of the holder (see *Davidson v Cooper* (1843) 11 M & W 778, Ex Ch), is inapplicable to the banker. Alteration of the date of a cheque is a material alteration (Bills of Exchange Act 1882 s 64(2); *Vance v Lowther* (1876) 1 ExD 176), but it would be unreasonable if the alteration to an earlier date debarred the banker from debiting the customer, if paid after the original date. A bank collecting a stolen cheque or paying a draft which has been materially altered by the payee's name being fraudulently changed is not liable in conversion because the instrument is avoided under the Bills of Exchange Act 1882 s 64(1) (see PARA 1559): *Smith v Lloyds TSB Group plc, Harvey Jones Ltd v Woolwich plc* [2001] QB 541, [2001] 1 All ER 424, [2000] 2 All ER (Comm) 693, CA.

3 See the cases cited in note 1.

850. Payment on forged cheque. A document in cheque form on which the customer's name as drawer is forged or placed without authority is not a cheque but a nullity; and, unless the banker can establish adoption or estoppel, he may not debit the customer with any payment made on it[1].

The common aphorism that a banker is under a duty to know his customer's signature is in fact incorrect, even as between the banker and his customer; the principle is simply that a banker may not debit his customer's account on the basis of a forged signature, since he has in that event no mandate from the customer for doing so[2].

1 *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49, PC; *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654, [1974] 3 All ER 834; and see *Smith v Mercer* (1815) 6 Taunt 76; *Cocks v Masterman* (1829) 9 B & C 902; *Hart v Frontino and Bolivia South American Gold Mining Co Ltd* (1870) LR 5 Exch 111 at 115 per Bramwell B; *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188 at 196 per Lindley J; *Sheffield Corpn v Barclay* [1903] 2 KB 580 at 590, CA, per Vaughan Williams LJ (on appeal [1905] AC 392, HL). In the context of a fraudulently drawn bill of exchange, see *Kreditbank Cassel GmbH v Schenkers* [1927] 1 KB 826, CA.

2 *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654 at 666, [1974] 3 All ER 834 at 844 per Kerr J; and see *London and River Plate Bank v Bank of Liverpool* [1896] 1 QB 7. As to the position where there is a forged signature on a cheque card see *First Sport Ltd v Barclays Bank plc* [1993] 3 All ER 789, [1993] 1 WLR 1229, CA.

851. Payment of bill on forged acceptance or indorsement. A banker who has paid a bill on a forged acceptance may not charge his customer with the amount, unless the customer is precluded by estoppel or adoption from disputing his signature[1].

A banker who has paid a bill on a forged indorsement may not charge his customer unless the customer is estopped from disputing the payment[2]. Negligence on the part of the customer directly leading to or enabling the loss, or a representation made to the banker by the customer on a material point on which the banker acted by paying money which he would not otherwise have paid, might constitute such estoppel[3]. Acceptance of a bill on which the payee's indorsement has been forged does not, however, stop the customer from refusing to be debited[4].

If, however, the payee is a fictitious or non-existent person, the bill may be treated as payable to bearer[5], and the banker may charge his customer, notwithstanding the forged indorsement.

Where a banker has paid a bill on a forged indorsement, he is liable for the amount to the true owner in conversion or for money had and received[6].

1 *Bank of England v Vagliano Bros* [1891] AC 107, HL.

2 *Smith v Mercer* (1815) 6 Taunt 76; *Robarts v Tucker* (1851) 16 QB 560, Ex Ch; *Bank of England v Vagliano Bros* [1891] AC 107, HL. There is no protection in such a case for the banker similar to that given by the Bills of Exchange Act 1882 s 60 (see PARAS 836, 1552) with regard to demand drafts or cheques, or by the Stamp Act 1853 s 19 (see PARA 896) with regard to drafts or orders payable to order on demand drawn on a banker. As to forged or unauthorised signatures see also the Bills of Exchange Act 1882 s 24 (and see PARA 1425).

3 See *Bank of England v Vagliano Bros* [1891] AC 107, HL. The banker acts as agent for the customer in paying domiciled bills, and as such is entitled to the protection and consideration usually accorded to an agent. As to domiciled bills see PARA 840.

4 *Robarts v Tucker* (1851) 16 QB 560, Ex Ch.

5 Bills of Exchange Act 1882 s 7(3). See also PARA 1431. The bill may be so treated by anyone to whose interest it is so to treat it, which includes the paying banker: *Bank of England v Vagliano Bros* [1891] AC 107, HL. As to when the payee is fictitious see *Vinden v Hughes* [1905] 1 KB 795; *North and South Wales Bank Ltd v Macbeth* [1908] AC 137, HL; and PARA 855.

6 *Smith v Union Bank of London* (1875) LR 10 QB 291; affd 1 QBD 31, CA (cheque; but the same principle applies to a bill, except that there is no protection); *Smith v Lloyds TSB Group plc, Harvey Jones Ltd v Woolwich plc* [2001] QB 541, [2001] 1 All ER 424, [2000] 2 All ER (Comm) 693, CA. Quaere, however, whether the banker could not escape this liability by returning the bill, if still in his possession, to the true owner, the cancellation of the acceptance being treated as made under a mistake within the Bills of Exchange Act 1882 s 63(3) (see PARA 1556). See *Castrique v Imrie* (1870) LR 4 HL 414 at 435 per Blackburn J, referring to *Novelli v Rossi* (1831) 2 B & Ad 757. This course seems suggested by *Charles v Blackwell* (1877) 2 CPD 151, CA. The acceptor would still be liable to the true owner, the bill not being discharged by the payment to the person wrongfully in possession of it.

852. The principle in Cocks v Masterman. The claim of a bank to recover money paid on a document which is a bill or cheque, and not a nullity ab initio, has been defeated[1] by a defence founded on the need to give notice of dishonour[2]. It seems that the principle which applies[3] is that, if the claimant fails to give notice on the day of payment that the bill contains a forged signature, and the money, having been paid in ignorance of that fact, is being claimed back, the defendant is deprived of the opportunity of giving notice of dishonour on the day when the bill falls due, and so is deemed to have changed his position and has a good defence to the claim on that ground[4]. The principle has been described as stringent[5] and very technical[6] and it is unlikely to be extended.

The defence appears to be available to a payee of a bill or cheque held under genuine indorsements following forged ones, since the holder's remedy against

the indorsers subsequent to the forgery is on the instrument by estoppel and dependent on giving notice of dishonour in due time[7]. Where a person holds immediately under a forged indorsement, the banker is prima facie entitled to recover the money from him if demanded within a reasonable time after payment.

The principle mentioned above has no application where notice of dishonour is dispensed with[8], as where the drawer of a cheque countermands payment[9]. The principle is not founded upon estoppel by representation, and the mere honouring of an undetectably forged cheque does not amount to a representation by the bank that the cheque is genuine, whether the cheque is presented for special collection or cleared in the normal way[10].

1 The authorities are analysed by Kerr J in *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654, [1974] 3 All ER 834.

2 For cases which adopt this analysis of the true foundation of the defence see *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49 at 58, PC; *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654 at 668, [1974] 3 All ER 834 at 846 per Kerr J; *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 701, [1979] 3 All ER 522 at 541 per Robert Goff J. It may be noticed that in the leading case (*Cocks v Masterman* (1829) 9 B & C 902) the prejudice to the holder was defined as being the loss of his right to take steps against other parties to the bill the same day as it is dishonoured. This must refer to his immediate right of recourse on dishonour (Bills of Exchange Act 1882 s 47(2)) or the equally immediate right to give notice (s 49(12)) (see also PARAS 1525, 1531). There is no right of action until the next day (*Kennedy v Thomas* [1894] 2 QB 759, CA), and the right to give notice would hardly ever be lost until the next day (Bills of Exchange Act 1882 s 49(12)). This would seem to point to deprivation of the immediate right, not loss of the power to give notice, as the test. See also *Smith v Mercer* (1815) 6 Taunt 76 at 87 per Gibbs LJ ('The defendants, while the bill continued paid, could not have given notice to him (the indorser), for the bill was not then dishonoured'); and *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* above at 702 and 541–542 per Robert Goff J.

3 Ie the principle in *Cocks v Masterman* (1829) 9 B & C 902.

4 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 702, [1979] 3 All ER 522 at 541–542 per Robert Goff J.

5 *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49 at 57, PC.

6 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 703, [1979] 3 All ER 522 at 542 per Robert Goff J.

7 The remedy is not based on warranty, which applies only to a transferor by delivery: see the Bills of Exchange Act 1882 s 58; and PARA 1581. As to the estoppel of the indorser from denying the genuineness of previous indorsements see s 55(2)(b); and as to his liability to compensate the holder, subject to notice of dishonour being duly given, see s 55(2)(a). See also PARA 1577, 1578. Although the person in possession is not strictly a holder in due course, or even a holder, he is entitled by estoppel against indorsers subsequent to the forgery. See also generally ESTOPPEL.

8 As to the circumstances in which notice of dishonour is dispensed with see the Bills of Exchange Act 1882 s 50(2); and PARA 1535.

9 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 703, [1979] 3 All ER 522 at 542 per Robert Goff J.

10 *National Westminster Bank Ltd v Barclays International Ltd* [1975] QB 654, [1974] 3 All ER 834, explaining *Price v Neal* (1762) 3 Burr 1354 and *London and River Plate Bank Ltd v Bank of Liverpool Ltd* [1896] 1 QB 7.

853. Mistake of fact or law; recovery of money paid. If a person pays money to another under a mistake[1] which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake[2]. A payment is made under a mistake of fact if it is so made honestly, notwithstanding that the payer has means, of which he did not avail himself, of knowing the true facts[3]. His claim may, however, fail if: (1) the payer intends that the payee is to have the money at all events, whether the fact be true or false, or is deemed in law so to intend[4]; or (2) the payment is made for good consideration, in particular if the

money is paid to discharge, and does discharge, a debt owed to the payee, or a principal on whose behalf he is authorised to receive the payment, by the payer or by a third party by whom he is authorised to discharge the debt[5]; or (3) the payee has changed his position in good faith[6] or is deemed in law to have done so[7]. However, it is not necessary, in order to ground recovery, for the mistake: (a) to have induced the payer to believe that he was liable to pay the money to the payee or his principal; or (b) to be 'as between' the payer and the payee[8].

Where a bank pays a cheque drawn on it by a customer, the bank's entitlement to recover the payment on the ground that it was paid under a mistake depends on whether the payment was effected with or without mandate[9]. Where the bank pays within its mandate, it has a right of recourse against its customer and its customer's obligation to the payee is discharged; the payee having given consideration for the payment, the money is irrecoverable unless the transaction itself is set aside. Where the bank pays without mandate, it has no recourse against its customer, the customer's debt to the payee is not discharged, and prima facie the bank may recover payment[10].

If payment is made to a bank acting as agent for a person as to whose identity there is a mistake of fact, and, before the mistake is discovered, the money has been paid by the bank to its principal, the payer cannot recover the amount from the bank[11]. Wherever money is received by an agent who, without knowledge of the mistake, pays it over to his principal, it cannot be recovered[12].

Where money is paid on a negotiable instrument to a person innocent of any knowledge of mistake, it cannot be recovered if the payee's position might, but not necessarily would, be affected if he had to refund[13]. A mistake of fact in relation to negotiable instruments must be as to the instrument itself[14].

Where the money has been received in bad faith, it may be recovered by the payer[15].

1 The former rule of law that money was not recoverable if paid under a mistake of law (as distinct from a mistake of fact) was abrogated by the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL. See further MISTAKE vol 32 (2005 Reissue) PARA 11.

2 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 695, [1979] 3 All ER 522 at 535 per Robert Goff J; *Kleinwort, Sons & Co v Dunlop Rubber Co* (1907) 97 LT 263, HL; *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJKB 465, HL; *Holt v Markham* [1923] 1 KB 504, 92 LJKB 406; *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL.

The principles enunciated in this paragraph were formulated on the basis of the former rule that the mistake had to be one of fact; as to the abolition of that rule see note 1.

3 *Kelly v Solari* (1841) 9 M & W 54; *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49 at 56, PC; *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL. The property in the money given in payment of a cheque passes, and the payment is complete, as soon as the money is placed on the bank counter: *Chambers v Miller* (1862) 13 CBNS 125; cf *Pollard v Bank of England* (1871) LR 6 QB 623.

4 *Kelly v Solari* (1841) 9 M & W 54; *Morgan v Ashcroft* [1938] 1 KB 49, [1937] 3 All ER 92, CA.

5 *Aiken v Short* (1856) 1 H & N 210; *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJKB 465, HL. See also *Lloyds Bank plc v Independent Insurance Co Ltd* [2000] QB 110, [1999] 1 All ER (Comm) 8, CA (restitution of a payment made by electronic transfer, under the mistaken belief that funds for the payment have cleared, will not be ordered where the payment is made to discharge a debt); *Customs and Excise Comrs v National Westminster Bank plc* [2002] EWHC 2204 (Ch), [2003] 1 All ER (Comm) 327 (there is no general rule that a bank could claim to be so authorised simply because it held an account for the client).

6 *Kleinwort, Sons & Co v Dunlop Rubber Co* (1907) 97 LT 263, HL.

7 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 695, [1979] 3 All ER 522 at 535 per Robert Goff J.

8 See *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 696, [1979] 3 All ER 522 at 536, where Robert Goff J described the propositions that the conditions set out in heads (a) and (b) in the text are necessary as 'inconsistent with the simple principle of recovery established in the authorities'.

9 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 700, [1979] 3 All ER 522 at 539 per Robert Goff J. The two typical situations which exemplify payment, with or without mandate, arise: (1) where the bank pays in the mistaken belief that there are sufficient funds or overdraft facilities to meet the cheque (with mandate); and (2) where the bank overlooks notice of countermand given by the customer (without mandate). See also *Lloyds Bank plc v Independent Insurance Co Ltd* [2000] QB 110, [1999] 1 All ER (Comm) 8, CA.

10 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 700, [1979] 3 All ER 522 at 539 per Robert Goff J. As to the position where a bank mistakenly credits a customer's account see PARA 873.

11 *Gowers v Lloyds and National Provincial Foreign Bank Ltd* [1938] 1 All ER 766 at 773, CA, per Sir Wilfrid Green MR, citing *Kleinwort Sons & Co v Dunlop Rubber Co* (1907) 97 LT 263 at 265, HL, per Lord Atkinson. See AGENCY vol 1 (2008) PARA 162.

12 See *Kleinwort Sons & Co v Dunlop Rubber Co* (1907) 97 LT 263, HL; *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJKB 465, HL; *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL.

13 *Cocks v Masterman* (1829) 9 B & C 902; *London and River Plate Bank v Bank of Liverpool* [1896] 1 QB 7; but see *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49, PC. See also PARA 852.

14 *Gowers v Lloyds and National Provincial Foreign Bank Ltd* [1938] 1 All ER 766, CA.

15 *Kendal v Wood* (1870) LR 6 Exch 243.

854. Estoppel, ratification and adoption. Mere silence or inaction cannot amount to a representation unless there is a duty to disclose or to act[1]. The customer owes his bank a duty to inform it of any forgery of a cheque purportedly drawn on the account as soon as he, the customer, becomes aware of it[2] or has reasonable grounds for believing it[3]. If he fails to do so within a reasonable time, and the bank alters its position for the worse, he is estopped from setting up the forgery[4].

Ratification of a forged signature on a bill is not possible[5]. Adoption of such a signature requires valuable consideration[6].

1 *Greenwood v Martin's Bank Ltd* [1933] AC 51 at 57, HL, per Lord Tomlin; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 110, [1985] 2 All ER 947 at 959, PC. See generally ESTOPPEL.

2 *M'Kenzie v British Linen Co* (1881) 6 App Cas 82, HL; *Greenwood v Martin's Bank Ltd* [1933] AC 51, HL; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, [1985] 2 All ER 947, PC. Constructive knowledge does not appear to be sufficient: see *Price Meats Ltd v Barclays Bank plc* [2000] 2 All ER (Comm) 346; *Patel v Standard Chartered Bank* [2001] Lloyd's Rep Bank 229.

3 *M'Kenzie v British Linen Co* (1881) 6 App Cas 82 at 92, 95, HL per Lord Selborne.

4 See the cases cited in note 2. For examples of cases where the bank failed to set up an estoppel see *M'Kenzie v British Linen Co* (1881) 6 App Cas 82, HL; *Ogilvie v West Australian Mortgage and Agency Corpn Ltd* [1896] AC 257, PC; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, [1985] 2 All ER 947, PC. An estoppel was upheld in *London Intercontinental Trust Ltd v Barclays Bank Ltd* [1980] 1 Lloyd's Rep 241, but this ground of the decision may be open to doubt in the light of the decision in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* above. A person who allows his banker to pay a cheque to which his name has been forged is not estopped from disputing a subsequent forgery by the same hand unless the repetition of such payment establishes a course of business authorising the use of his name: *Morris v Bethell* (1869) LR 5 CP 47.

5 See the Bills of Exchange Act 1882 s 24. See also PARA 1425. See also *Brook v Hook* (1871) LR 6 Exch 89; *Greenwood v Martin's Bank Ltd* [1932] 1 KB 371 at 379, CA, per Scrutton LJ, and at 385 per Greer LJ (on appeal [1933] AC 51, HL, where the decision in the Court of Appeal was affirmed without dealing with this point); *Brown v Westminster Bank Ltd* [1964] 2 Lloyd's Rep 187. The decision in *Brook v Hook* above was made at a time when a person who remained silent when he knew that a forgery had been committed was guilty of the offence of misprision

of felony. The modern equivalent (concealing an offence) is not committed if the only consideration for remaining silent is the making good of the loss caused or the making of reasonable compensation for it: see the Criminal Law Act 1967 s 5(1); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 734. Quaere whether this affects the principle of *Brook v Hook* above. For an example of ratification of a merely unauthorised signature see *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356, CA; and see also *M'Kenzie v British Linen Co* (1881) 6 App Cas 82 at 99, HL, per Lord Blackburn.

6 *Greenwood v Martin's Bank Ltd* [1933] AC 51 at 57, HL, per Lord Tomlin. In *Cairncross v Lorimer* (1860) 3 Macq 827 at 830, HL, Lord Campbell appeared to consider actual knowledge necessary for adoption.

855. Fictitious payee. A cheque of which the payee is a fictitious or non-existent person may be treated as payable to bearer[1], though ostensibly payable to that payee or order[2]. Where the payee is a real person known to the drawer and intended by him to have the benefit of the cheque, although the drawer is induced to insert the name and draw by fraudulent representations of a third party, the ostensible payee could never enforce payment of the cheque[3]. In such case, however, the paying banker would usually be protected as having paid on a forged indorsement[4]. It would appear that documents made payable to an impersonal payee or order (for example, 'wages or order' or 'petty cash or order') are not within the statutory rule[5]; they are not bills of exchange, since these require payment to a specified person[6].

1 As to the meaning of 'bearer cheque' see PARA 879. An order cheque on which the last or only indorsement is an indorsement in blank is equally payable to bearer: Bills of Exchange Act 1882 ss 8(3), 73. As to cheques generally see PARAS 879–880. See also PARAS 1405, 1410, 1428.

2 Bills of Exchange Act 1882 s 7(3); *Bank of England v Vagliano Bros* [1891] AC 107, HL; *Robinson v Midland Bank Ltd* (1924) 41 TLR 402, CA. See also PARA 1431. A bank has been held not entitled to rely on provisions corresponding to the Bills of Exchange Act 1882 s 7(3) where the name of the fictitious payee had been inserted in the cheque by an employee of the drawer with intent to defraud the drawer, and the cheque was marked 'not negotiable; account payee only': *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd* 1972 (2) SA 703.

3 *Vinden v Hughes* [1905] 1 KB 795, distinguishing *Bank of England v Vagliano Bros* [1891] AC 107, HL, and *Clutton v Attenborough & Son* [1897] AC 90, HL. See also *North and South Wales Bank v Macbeth* [1908] AC 137, HL; *Town and County Advance Co Ltd v Provincial Bank of Ireland* [1917] 2 IR 421; *Goldman v Cox* (1924) 40 TLR 744, CA.

4 See PARA 836.

5 Ie the Bills of Exchange Act 1882 s 7(3). See *Grant v Vaughan* (1764) 3 Burr 1516 at 1523 per Lord Mansfield ('There was no person originally named as the payee. It runs, 'Pay to ship *Fortune* or bearer"), and at 1528 per Wilmot J ('No person at all is named. It is 'Pay to ship *Fortune* or bearer"). Cf the Bills of Exchange Act 1882 s 2 (definition of 'person'); *Bank of England v Vagliano Bros* [1891] AC 107 at 129, HL, per Lord Selborne (but see the judgment of Lord Herschell at 153).

6 *North and South Insurance Corpn Ltd v National Provincial Bank Ltd* [1936] 1 KB 328 (where it was held that a document could not be a cheque because it was not a bill of exchange within the statutory definition, for the word 'cash' cannot be a specified person; and a document made out in the form 'pay cash or order' was construed as a document requiring payment of cash to bearer); and see *Cole v Milsome* [1951] 1 All ER 311; *Orbit Mining and Trading Co Ltd v Westminster Bank Ltd* [1963] 1 QB 794, [1962] 3 All ER 565, CA. As to bills of exchange generally see PARA 1400 et seq.

856. Indorsement at request of banker. Where a person claims payment of an open order cheque over the counter, alleging that he is the payee of it, and only signs his name on the back at the request of the banker, it is submitted that the banker does not obtain protection[1]. The signature probably represents only a receipt[2].

1 This view is supported by Lord Haldane LC in *Gerald McDonald & Co v Nash & Co* [1924] AC 625 at 633–634, HL. 'Indorsement' means an indorsement completed by delivery: Bills of Exchange Act 1882 s 2. See also PARA 1407. There can be no delivery to the drawee. The terms

of the Bills of Exchange Act 1882 s 60 (see PARA 836 note 3; see also PARA 1552) as to 'indorsement of the payee or any subsequent indorsement' point to the indorsement being for negotiation, or at least collection; and those as to the banker being deemed to have paid the bill in due course, notwithstanding the forged indorsement, imply payment made to an ostensible holder under the indorsement: see *Keene v Beard* (1860) 8 CBNS 372 at 382, where Byles J held such signature a receipt, not an indorsement. Cf the Finance Act 1895 s 9 (repealed), treating such signature as a receipt. See *Charles v Blackwell* (1877) 2 CPD 151 at 157, CA, per Cockburn CJ. As to the meaning of 'order cheque' see PARA 879.

2 See note 1. Whether the Cheques Act 1957 s 1 (see PARA 836; and also PARA 1552) affords protection if the cheque is paid in good faith and in the ordinary course of business is yet to be determined; although presumably it does. The point will now rarely arise since banks will not normally pay a cheque in cash except for the account holder himself.

857. Following money in equity. Equity will intervene to prevent a defendant from acting in an unconscionable manner; and money, or the credit which results from a customer paying in a cheque[1], may be followed into the hands of a banker, being a volunteer, by any person who has equal or superior right in equity to the money or the chose or thing in action[2].

Where executors mistakenly paid a legacy to a charity which was not entitled to it, and the amount of the legacy was credited to the charity by the bank of which the charity was the customer, and the means of identifying the money or disentangling it remained, the true beneficial owner was entitled to follow the testator's property into the hands of the bank and obtain repayment[3]. If the amount of the legacy has been mixed with the customer's own money in his bank account, the customer and the true beneficiary, having equal equities, are entitled to share the fund (that is to say, the amount credited by the bank to the customer), for, if both the customer and the true beneficial owner are innocent, equity will not regard it as unconscionable for the customer to put forward a claim to retain his own money[4]; although, if the banking account was an active account, money first paid into it would prima facie be treated as having been first paid out[5]. If, however, the customer is in a fiduciary capacity towards the true owner, it will be unconscionable for the customer to advance his own claim and accordingly the true owner will have priority[6]. Further, if the customer is not a volunteer, but is a purchaser for value without notice in respect of the cheque or money which he pays into his banking account, the title of the true owner will neither prevail over nor rank equally with that of the customer and the money will not be able to be followed into the customer's banking account[7]. Equity does not permit tracing into an overdrawn account[8].

Mere payment under a mistake[9] does not found an equitable relationship nor give the payer an equitable interest in the funds[10].

1 *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 521–522, [1948] 2 All ER 318 at 347, CA, per Lord Greene MR, where the use of the term 'following money' is discussed in relation to cheques and negotiable instruments and the collection of cheques by bankers. See also EQUITY vol 16(2) (Reissue) PARA 861 et seq.

2 *Sinclair v Brougham* [1914] AC 398, HL (overruled on a different point in *Westdeutshe Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL), as explained in *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 532, [1948] 2 All ER 318 at 353, CA, per Lord Greene MR. See also *Banque Belge Pour l'Etranger v Hambrouck* [1921] 1 KB 321, CA; *Agip (Africa) Ltd v Jackson* [1991] Ch 547, [1992] 4 All ER 451, CA; *Bank Tejarat v Hong Kong and Shanghai Banking Corpn (CI) Ltd and Hong Kong and Shanghai Bank Trustee (Jersey) Ltd* [1995] 1 Lloyd's Rep 239; *Boscawen v Bajwa* [1995] 4 All ER 769, [1996] 1 WLR 328, CA; *Bank of America v Arnell* [1999] Lloyd's Rep Bank 399. As to choses or things in action see generally CHOSES IN ACTION.

3 *Re Diplock, Diplock v Wintle* [1948] Ch 465, [1948] 2 All ER 318, CA (where this right was held to be a right in rem, and was distinguished from a right in personam against the payee); affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL. The

right of an underpaid legatee to claim directly against an overpaid legatee is subject to the qualification that he must first exhaust his remedies against the executor who made the wrongful payment: see *Ministry of Health v Simpson* [1951] AC 251 at 271, [1950] 2 All ER 1137 at 1142, HL, per Lord Simonds.

4 *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 539, [1948] 2 All ER 318 at 357, CA, per Lord Greene MR.

5 *Re Diplock, Diplock v Wintle* [1948] Ch 465, [1948] 2 All ER 318, CA; *Re Diplock's Estate, Simpson v Lilburn* [1948] Ch 559, [1948] 2 All ER 429 (money was wrongly paid to a charity which placed it into its banking account, to the account of its general fund; on a claim for recovery of the money, the charity withdrew sums to the same amount and placed them with what was then the Post Office Savings Bank; it was held that there had been no earmarking of the money and that no right to trace existed).

6 *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 539, [1948] 2 All ER 318 at 357, CA, per Lord Greene MR.

7 *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 539, [1948] 2 All ER 318 at 356, CA, per Lord Greene MR.

8 *Bishopsgate Investment Management v Homan* [1995] Ch 211, [1995] 1 All ER 347, CA.

9 As to the right to recover money paid under a mistake of fact or law see PARA 853.

10 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL, disapproving *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, [1979] 3 All ER 1025.

858. Assignment and transfer of deposit account. A deposit account, being a chose or thing in action, may be assigned as a whole under the Law of Property Act 1925[1], but the mere transfer of a deposit receipt does not constitute such an assignment[2].

A deposit receipt, even if in terms it is expressed to be transferable, has never been recognised as a negotiable instrument, or as giving the transferee a right to sue in his own name[3]. It is possible that a bank, having issued the document in a transferable form, might be estopped from disputing its character as such. Where a form of cheque is printed on the back of a deposit receipt, and any conditions imposed, such as previous notice, have been fulfilled, the bank cannot, as between itself and the depositor, refuse to pay the holder[4]. Payment to a person wrongfully dealing with even a signed deposit receipt is no discharge to the bank, unless the depositor is estopped by his conduct from disputing such payment[5].

A deposit receipt[6] or deposit account books of a bank[7], being essential indications of title, may be the subject of a *donatio mortis causa* although they may not contain all the material terms of the contract with the bank[8], and the court will compel the legal representatives of the deceased to facilitate the receipt of the money by the donee[9]. Where a document combining the features of a deposit receipt and a cheque is so given, the validity of the gift will depend on which is the predominant characteristic[10].

A deposit may be the subject of attachment by a third party debt order[11].

1 Ie under the Law of Property Act 1925 s 136: see CHOSES IN ACTION vol 6 (2003 Reissue) PARA 12. See *Re Westerton Public Trustee v Gray* [1919] 2 Ch 104. See also PARA 827. As to choses or things in action generally see CHOSES IN ACTION.

2 *Moore v Ulster Banking Co* (1877) IR 11 CL 512. It may be a good equitable assignment and, though incomplete, be perfected after the death of the assignor by the appointment of the assignee as his executor: *Re Griffin, Griffin v Griffin* [1899] 1 Ch 408.

3 *Re Dillon* (1890) 44 ChD 76, CA; *Moore v Ulster Banking Co* (1877) IR 11 CL 512.

4 *Re Mead, Austin v Mead* (1880) 15 ChD 651; *Re Dillon* (1890) 44 ChD 76, CA.

5 *Evans v National Provincial Bank of England* (1897) 13 TLR 429; and see *Pearce v Creswick* (1843) 2 Hare 286; *Wood v Clydesdale Bank Ltd* 1914 SC 397, Ct of Sess.

6 *Re Mead, Austin v Mead* (1880) 15 ChD 651; *Re Dillon* (1890) 44 ChD 76, CA.

7 This includes the National Savings Bank: see PARA 810.

8 *Birch v Treasury Solicitor* [1951] Ch 298, [1950] 2 All ER 1198, CA.

9 *Re Dillon* (1890) 44 ChD 76, CA; *Re Mead, Austin v Mead* (1880) 15 ChD 651.

10 See *Re Dillon* (1890) 44 ChD 76, CA.
11 See PARA 869.

859. Payment in by third persons. Money may be paid into a customer's current account by a third person[1], and, in ordinary cases, the banker is bound to accept it. However, where a cheque for an amount larger than the available balance is presented for payment, it has been said that the banker should not allow the holder to pay in the deficit, and then pay the cheque[2]. The receipt of rent by a bank into the owner's banking account does not change the relationship between the two from that of banker and customer[3].

1 This is common practice in the operation of the bank giro system, whereby a person may pay money into any bank to the credit of the current account of any person at any branch of any bank operating the system.
2 To do so would be unjustifiable disclosure of the customer's affairs, and, if followed by receipt of the difference and payment of the cheque, might constitute a fraud on other creditors of the customer: *Foster v Bank of London* (1862) 3 F & F 214; *Hardy v Veasey* (1868) LR 3 Exch 107.
3 Ie so as to render the bank the agent of the owner within the meaning of the Public Health Act 1936 s 343(1): see PARA 817 note 25.

(iii) Banker's Lien

860. Banker's lien. The general lien of bankers is part of the law merchant as judicially recognised[1]; it connotes the right of a banker to retain the subject matter of the lien until an indebtedness of the customer is paid or discharged. It attaches to all securities[2] deposited with a banker as a banker by a customer, or by a third party on a customer's account, to instruments paid in for collection[3], and to money held to the account of a customer[4], unless there is an express or implied contract between the banker and the customer which is inconsistent with the lien[5]. In the case of money, the banker's right is often a right of set-off; it arises only in relation to the customer's money and does not apply to money paid in under a mistake of fact[6].

Where there is a contract inconsistent with the lien, it determines when the relationship of banker and customer ends, as on the liquidation of a company which is a customer[7].

The lien is not limited to fully negotiable securities[8], but has been held to cover share certificates[9], an order to pay a particular person a sum of money[10], and an insurance policy[11].

1 *Brandao v Barnett* (1846) 12 Cl & Fin 787; *Misa v Currie* (1876) 1 App Cas 554 at 569, HL, per Lord Hatherley. As to the law merchant see PARAS 1400, 1610; CUSTOM AND USAGE vol 12(1) (Reissue) PARA 662 et seq. As to lien generally see LIEN.
2 See eg *Baker v Lloyd's Bank Ltd* [1920] 2 KB 322.
3 *Thompson v Giles* (1824) 2 B & C 422 at 431; *Misa v Currie* (1876) 1 App Cas 554, HL. Cf *Great Western Rly Co v London and County Banking Co Ltd* [1900] 2 QB 464, CA. In *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465, Bigham J treated collection as a special purpose excluding lien, but this is clearly not the case: see *Re Keever (a bankrupt), ex p Trustee of the Property of the Bankrupt v Midland Bank Ltd* [1967] Ch 182, [1966] 3 All ER 631; *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719.
4 *Roxburghe v Cox* (1881) 17 ChD 520, CA; *Misa v Currie* (1876) 1 App Cas 554, HL. Money is, however, not usually the subject of lien, not being capable of being earmarked; the banker's claim in such cases is probably more rightly referred to as set-off: see *Roxburghe v Cox* above. It has been held that a bank has no lien but only a right of set-off in respect of a customer's account: *Re Morris, Coneys v Morris* [1922] 1 IR 136, CA. On the question whether the bank's rights may be properly described as an aspect of lien see *Halesowen Presswork and Assemblies Ltd v Westminster Bank Ltd* [1971] 1 QB 1, [1970] 1 All ER 33; on appeal [1971]

1 QB 25, [1970] 3 All ER 473, CA; revsd sub nom *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL. As to set-off see PARAS 868, 1012.

5 *Brandao v Barnett* (1846) 12 Cl & Fin 787 at 806 per Lord Campbell; *Bock v Gorrissen* (1860) 2 De GF & J 434, CA; *British Guiana Bank v Official Receiver* (1911) 104 LT 754, PC. A banker has no recourse or right, whether by way of set-off or otherwise, against a solicitor's client account: see the Solicitors Act 1974 s 85(b); and PARA 826.

6 Cf *Scottish Metropolitan Assurance Co Ltd v P Samuel & Co* [1923] 1 KB 348; *Kerrison v Glyn Mills Currie & Co* (1911) 81 LJKB 465, HL.

7 *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL.

8 *Wylde v Radford* (1863) 33 LJ Ch 51 at 53 per Kindersley V-C.

9 *Re United Service Co, Johnston's Claim* (1871) 6 Ch App 212 at 217 per James LJ.

10 *Misa v Currie* (1876) 1 App Cas 554, HL.

11 *Re Bowes, Earl of Strathmore v Vane* (1886) 33 ChD 586.

861. Lien over bills. A banker has a lien on a bill handed to him by a customer for collection, if the customer is or becomes indebted to him[1]. If the customer has indorsed the bill, the banker has a remedy on it against the customer to the extent of such indebtedness[2]. Mere indorsement for collection, without indebtedness, gives no such title or remedy[3], nor does indorsement necessarily imply parting with the entire property in the bill[4]. Whether the customer parts with the entire property depends on the nature of the dealing between him and the banker. Entering as cash before receipt of the money has been held evidence only of the banker's having taken the bill in his own right[5]. Whether it has greater effect now is doubtful[6]. It would seem to constitute an undertaking by the banker to honour cheques to the amount of the bill[7].

In the case of an unindorsed order cheque, the banker has the same rights as if the holder had indorsed in blank[8].

1 *Giles v Perkins* (1807) 9 East 12; *Re Firth, ex p Schofield* (1879) 12 ChD 337; *Dawson v Isle* [1906] 1 Ch 633; *Re Harrison, ex p Barkworth* (1858) 2 De G & J 194; *Re Keever (a bankrupt), ex p Trustee of the Property of the Bankrupt v Midland Bank Ltd* [1967] Ch 182, [1966] 3 All ER 631; *Bank of New South Wales v Ross, Stuckey and Morawa* [1974] 2 Lloyd's Rep 110. As to lien generally see LIEN.

2 Cf *Giles v Perkins* (1807) 9 East 12 at 14.

3 There is no consideration: *Re Firth, ex p Schofield* (1879) 12 ChD 337 at 343 per Brett LJ.

4 *Re Firth, ex p Schofield* (1879) 12 ChD 337; *Re Harrison, ex p Barkworth* (1858) 2 De G & J 194. The indorsement may be merely by way of additional security.

5 *Giles v Perkins* (1807) 9 East 12; *Re Harrison, ex p Barkworth* (1858) 2 De G & J 194 (bills not due); *Thompson v Giles* (1824) 2 B & C 422. Cf *Gaden v Newfoundland Savings Bank* [1899] AC 281 at 286, PC; *Dawson v Isle* [1906] 1 Ch 633.

6 As to the position in relation to cheques see PARA 890.

7 *Thompson v Giles* (1824) 2 B & C 422 at 429, 431.

8 *Midland Bank Ltd v Harris* [1963] 2 All ER 685, [1963] 1 WLR 1021; and see *Westminster Bank Ltd v Zang* [1966] AC 182, [1966] 1 All ER 114, HL. As to the meaning of 'order cheque' see PARA 879.

862. When lien attaches. Whatever the nature of the securities, the lien attaches only when they have come to the banker's hands in his capacity as a banker, that is to say, in the way of his business[1]. The common example is cheques paid in for collection, where the customer paying in has an overdraft or loan, or is entitled or permitted to draw against the cheques before they are cleared or then and there borrows against them[2].

Either because the receipt of securities or valuables for safe custody is not part of the ordinary business of banking, or because receipt for such purposes involves an implied contract inconsistent with the assertion of lien, the lien does not attach to securities or articles in the banker's hands for safe custody[3]. Nor

does the lien attach to any money or security known to the banker to be affected by a trust or not to be the actual property of the customer[4], or to money paid in by a third person under mistake of fact[5]. Where securities are deposited which involve the collection of coupons or interest, the question is which component part is received for safe custody, and which is for the exercise thereon of the banker's business[6].

Bills or money paid in to meet specific cheques or bills accepted payable at the bank are not subject to the lien[7]. Whether securities deposited to cover a specific advance, and, after repayment of that advance, remaining in the banker's hands, are subject to a general lien for a balance due to the banker, seems somewhat doubtful[8].

Where, however, the security has been realised and produces more than enough to cover the specific advance, the banker's lien attaches to the surplus proceeds[9].

The banker's lien extends to bills of a customer of another bank transmitted by that bank for collection, unless the receiving banker has notice that the bills are the property of that customer[10].

Where bills, notes or cheques pass from a customer to a bank who takes them for collection, the banker is holder for value to the extent of any lien he may have[11], and has full beneficial interest to that extent[12], and may sue for the full amount, holding any surplus over the customer's indebtedness as trustee for him[13]. Where he holds as transferee, lien is excluded, but he has the ordinary rights of a holder for value, and may sue for the full amount irrespective of the customer's indebtedness, and without having to account for any balance received by him in excess of such indebtedness[14].

1 *Brandao v Barnett* (1846) 12 Cl & Fin 787 at 808 per Lord Campbell; *Lucas v Dorrien* (1817) 7 Taunt 278. As to lien generally see LIEN.

2 See *Re Keever (a bankrupt), ex p Trustee of the Property of the Bankrupt v Midland Bank Ltd* [1967] Ch 182, [1966] 3 All ER 631; *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719; *National Westminster Bank Ltd v Halesowen Pressworks and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL.

3 *Brandao v Barnett* (1846) 12 Cl & Fin 787 at 808 per Lord Campbell; *Leese v Martin* (1873) LR 17 Eq 224.

4 *Re Gross, ex p Kingston* (1871) 6 Ch App 632; *Cuthbert v Robarts, Lubbock & Co* [1909] 2 Ch 226, CA. See PARA 842.

5 *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJKB 465, HL. As to mistake of fact see PARA 853.

6 Where bonds are deposited with a banker for him to cut off the coupons and collect them, the lien probably attaches to the bonds and coupons. However, if the bonds and coupons are deposited merely for safe keeping and the customer cuts off the coupons and hands them to the banker to collect, the lien attaches to the coupons when handed to the banker, but not to the bonds.

7 *Farley v Turner* (1857) 26 LJ Ch 710. See also PARA 865.

8 This was doubted in *Jones v Peppercorne* (1858) John 430. In *Wilkinson v London and County Banking Co* (1884) 1 TLR 63, the House of Lords assumed that the customer was entitled to have back the securities in such a case independent of the state of account. In *Re Bowes, Earl of Strathmore v Vane* (1886) 33 ChD 586, North J held an agreement that a policy of insurance was to be security for £2,000 inconsistent with a general lien for a further balance of £1,000. However, in *Re London and Globe Finance Corpn Ltd* [1902] 2 Ch 416, Buckley J held that securities deposited as cover for specified advances remaining after discharge in a banker's hands were liable to general lien. Cf *Wolstenholm v Sheffield Union Banking Co Ltd* (1886) 54 LT 746, CA. It would seem that, where securities are jointly deposited to cover a joint liability, one of the depositors, on paying his share of the liability, is not entitled to the return of a proportionate amount of the securities: *Coats v Union Bank of Scotland* 1929 SC (HL) 114. In view of the terms of forms of charge now used this question is probably academic.

9 *Jones v Peppercorne* (1858) John 430; *Re Bowes, Earl of Strathmore v Vane* (1886) 33 ChD 586 (where the right is attributed to set-off); *Baker v Lloyds Bank Ltd* [1920] 2 KB 322. Cf *Inman v Clare* (1858) John 769.
10 See PARA 887.
11 Bills of Exchange Act 1882 s 27(3). See also PARA 1487.
12 See the judgment of the Court of Appeal in *Great Western Rly Co v London and County Banking Co* [1900] 2 QB 464 (not affected on this point by its reversal in the House of Lords [1901] AC 414).
13 See *Barclays Bank Ltd v Aschaffenburger Zellstoffwerke AG* [1967] 1 Lloyd's Rep 387, CA.
14 See *Great Western Rly Co v London and County Banking Co* [1900] 2 QB 464 at 473 per Vaughan Williams LJ.

863. Sale by virtue of lien. The banker's lien is something more than an ordinary lien; it is an implied pledge[1]. The distinction is not material in the case of bills, notes and cheques, the position of holder for value enabling the banker to deal with these when due; but, in the case of other negotiable instruments, such as bearer bonds, coming into the banker's hands in circumstances rendering them liable to the lien, his character of pledgee enables the banker to sell on default if a fixed time is appointed for repayment of the advance, or, where no time is fixed, after request for repayment and reasonable notice of intention to sell[2].

1 See *Brandao v Barnett* (1846) 12 Cl & Fin 787 at 806 per Lord Campbell. As to lien generally see LIEN; and as to pledge generally see PLEDGES AND PAWNS.
2 *Burdick v Sewell* (1884) 13 QBD 159 at 174, CA, per Bowen LJ in a dissenting judgment which was upheld on appeal sub nom *Sewell v Burdick* (1884) 10 App Cas 74, HL; *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222, CA; *Re Richardson, Shillito v Hobson* (1885) 30 ChD 396 at 403, CA, per Fry LJ; *Deverges v Sandeman, Clark & Co* [1902] 1 Ch 579, CA. It is desirable to give notice of intention to sell, even when a time is fixed for repayment. The statement by Lord Herschell in *North Western Bank v John Poynter, Son and Macdonalds* [1895] AC 56 at 69, HL, that a pledge gives no right of sale, must either have reference to Scots law, or to the absolute and immediate right of sale given in that case.

864. Banker's duty in respect of bills etc subject to lien. The fact that the banker holds bills, notes or cheques under a lien does not affect his duty as holder to present them for acceptance where necessary, and for payment in due course, and to give notice of dishonour[1]. Although there is some authority for saying that a banker who holds indorsed bills under a lien is entitled to negotiate them when the state of the customer's account renders such a course reasonable[2], it would be very unusual to do so[3].

1 This course is equally obligatory on him either as agent or holder for value. As to the duties of a holder see the Bills of Exchange Act 1882 ss 39–52 (ss 41, 45, 49, 51 as amended); and PARA 1509 et seq. As to the duties of an agent see AGENCY vol 1 (2008) PARA 74 et seq. As to lien generally see LIEN.
2 See PARA 888.
3 However, if he holds them as transferee for value, he may, of course, deal with them in any way he likes.

(iv) Appropriation of Payments; Combining Accounts; Third Party Debt Orders

865. Repayment and appropriation. The Limitation Act 1980 imposes time limits for the bringing of proceedings[1]. The balance on a current banking account is not actionable until the customer has demanded it or part of it, and time under that Act begins to run only from the date of the demand[2]. After a lapse of time the circumstances of the case may raise a presumption of repayment[3].

On a current account, the earlier drawings out are, in the absence of appropriation, attributed to the earlier payments in[4]; and, where the money of several beneficiaries has been wrongfully mixed with a private account, their respective rights in any balance will be adjusted in accordance with this rule[5]. There are, however, exceptions to this rule; thus, where a trustee or other person in a fiduciary position has mixed sums of trust money in his private account, all drawings out are attributed to his own money so far as it will go[6], and the rule may be excluded by the terms of a guarantee[7], or, it seems, by sums being earmarked as particular property, such as a legacy[8]. The person paying the money has the primary right to say to what account it is to be appropriated; if the debtor makes no appropriation, the creditor has the right to appropriate; and, if neither exercises the right of appropriation, one may look on the matter as one of account and see how the creditor has dealt with the payment in order to ascertain how in fact he did appropriate it. If there is nothing more than a current account kept by the creditor or a particular account kept by the creditor, and he carries the money to that particular account, then the court concludes that the appropriation has been made; and, having been made, it is made once for all, and it does not lie in the mouth of the creditor afterwards to seek to vary that appropriation[9]. Money paid into a current account to meet a particular bill or cheque must be applied accordingly[10].

1 See LIMITATION OF ACTIONS. As to when the limitation period runs for a claim based on the wrongful debit of an account see *National Bank of Commerce v National Westminster Bank* [1990] 2 Lloyd's Rep 514, applying *Limpgrange Ltd v BCCI SA* [1986] FLR 36.

2 *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110, CA.

3 *Douglass v Lloyds Bank Ltd* (1929) 34 Com Cas 263 (deposit account).

4 *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 529 at 572, 608. As to the operation of the rule in *Devaynes v Noble, Clayton's Case* above in cases of company liquidation see *Re EJ Morel (1934) Ltd* [1962] Ch 21, [1961] 1 All ER 796; *Re James R Rutherford & Sons Ltd* [1964] 3 All ER 137, [1964] 1 WLR 1211; *Re Yeovil Glove Co Ltd* [1965] Ch 148, [1964] 2 All ER 849, CA. As to appropriation of the proceeds of mortgaged property to the non-preferential part of the bank's claim see *Re William Hall (Contractors) Ltd* [1967] 2 All ER 1150, [1967] 1 WLR 948.

5 *Re Stenning, Wood v Stenning* [1895] 2 Ch 433. As to a trustee's liability for mixing trust money with his own see TRUSTS vol 48 (2007 Reissue) PARA 1137 et seq; and as to the duty of an agent to keep separate his principal's property see AGENCY vol 1 (2008) PARA 84.

6 *Re Hallett's Estate, Knatchbull v Hallett* (1880) 13 ChD 696, CA. See further EQUITY vol 16(2) (Reissue) PARA 863; TRUSTS vol 48 (2007 Reissue) PARA 1138.

7 *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60.

8 *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 552, [1948] 2 All ER 318 at 363, CA, per Lord Greene MR; affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL. The principle decided was adhered to on subsequent consideration (see *Re Diplock's Estate, Simpson v Lilburn* [1948] Ch 559, [1948] 2 All ER 429, CA), but the decision reached was that the rule in *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 529 at 572 was not excluded, having regard to new evidence of fact, namely of the system of accounting and of the accounts themselves kept by the charity (the customer).

9 *Deeley v Lloyds Bank Ltd* [1912] AC 756 at 783, HL, per Lord Shaw; cf *The Mecca* [1897] AC 286, HL. It is unclear how far the decision in *Deeley v Lloyds Bank Ltd* has affected *Seymour v Pickett* [1905] 1 KB 715, CA, *Simson v Ingham* (1823) 2 B & C 65 and *London and Westminster Bank v Button* (1907) 51 Sol Jo 466.

10 *Farley v Turner* (1857) 26 LJ Ch 710.

866. Appropriation when account guaranteed. The position and rights of a banker under a guarantee depend on the character and form of the guarantee and the parties to it[1]. A guarantee for a void debt cannot be enforced[2] unless it also takes effect as an unconditional indemnity.

Where there is a mere unbroken current account, part of which is covered by a guarantee, the other part not, as where the guarantee has been determined, there is, in the absence of appropriation, no presumption that money paid in is to be allocated to the unsecured rather than the secured portion or otherwise than in the usual sequence of payments in and out in order of date[3].

Where the guarantee is a continuing one, a guarantor has no right, in the absence of special agreement, to control the appropriation of payments into the principal debtor's account[4], so long as the banker deals with the accounts in the ordinary way of business[5].

Payments in by the principal debtor or any third party may be appropriated to a pre-existing debt of which the surety had no notice or knowledge[6]; but it would be contrary to ordinary business and good faith to open a new account during the currency of the guaranteed one, and carry all payments in to the new account[7]. On the determination of the guarantee, the banker may, however, close the account and open a new one, to which he may carry all payments in, leaving any debit on the old one to be covered by the guarantee[8]. Where an account is guaranteed to a limited extent, the banker is not entitled to split that account during the continuance of the guarantee and attribute all payments in to the unsecured balance[9].

So long as an account is unbroken, a surety ought not to be prejudiced by any departure from the rule of appropriation of items in order of date, unless he has expressly consented to such departure, or his consent may be implied from the character of his engagement[10].

1 As to guarantees see PARA 991 et seq; and see PARA 1013 et seq.

2 The position regarding guarantees of loans to minors is now governed by the Minors' Contracts Act 1987 s 2: see PARA 820.

3 *Deeley v Lloyds Bank Ltd* [1912] AC 756, HL.

4 *Williams v Rawlinson* (1825) 3 Bing 71; *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA.

5 *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA.

6 *Williams v Rawlinson* (1825) 3 Bing 71; cf *Hamilton v Watson* (1845) 12 Cl & Fin 109.

7 *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692 at 706, CA, per Cotton LJ; cf *Mutton v Peat* [1900] 2 Ch 79, CA (where it was said that the method of book-keeping was not to prejudice the real rights of the surety); and *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA. As to the opening of a fresh account without the knowledge of the surety see *National Bank of Nigeria Ltd v Oba MS Awolesi* [1964] 1 WLR 1311, PC.

8 *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA, cited in *Deeley v Lloyds Bank Ltd* [1912] AC 756, HL, for the Lord Chancellor's statement of the principle in *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 529 at 572.

9 *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA.

10 *The Mecca* [1897] AC 286, HL. Cf *City Discount Co Ltd v McLean* (1874) LR 9 CP 692; and see also *National Bank of Nigeria Ltd v Oba MS Awolesi* [1964] 1 WLR 1311, PC.

867. Combination of accounts; banker's right of set-off. Unless precluded by agreement, express or implied from the course of business, the banker is entitled to combine accounts kept by the customer in his own right, even though at different branches of the same bank, and to treat the balance, if any, as the only amount really standing to his credit[1]; but the banker may not arbitrarily combine a current account with a loan account[2]. An agreement not to combine ceases to be effective as soon as the relationship of banker and customer comes to an end[3]. The customer, however, has not the equivalent right, and cannot utilise a credit balance at one branch for the purpose of drawing cheques on another branch where his account is overdrawn[4]. In the absence of agreement or course of

business, and either by right of lien or set-off, the banker may retain enough on an account in credit to satisfy a debit on another kept in the same right[5].

1 *Garnett v M'Kewan* (1872) LR 8 Exch 10; *Buckingham & Co v London and Midland Bank Ltd* (1895) 12 TLR 70 (where the banker was precluded by the course of business); *WP Greenhalgh & Sons v Union Bank of Manchester* [1924] 2 KB 153 (banker precluded by agreement). A dictum of Swift J in *WP Greenhalgh & Sons v Union Bank of Manchester* above at 164, that, if a banker agrees with his customer to open two or more accounts, he has not, without the assent of the customer, any right to move either assets or liabilities from the one account to the other, the very basis of his agreement with his customer being that the two accounts are to be kept separate, was criticised by Lord Denning MR in *Halesowen Presswork & Assemblies Ltd v Westminster Bank Ltd* [1971] 1 QB 1 at 35, [1970] 3 All ER 473 at 478, CA; this criticism was approved by Lord Kilbrandon despite reversal of the judgment by the House of Lords sub nom *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785 at 819, [1972] 1 All ER 641 at 661, HL. It has been held that a bank, in combining a customer's accounts, is not asserting a claim over the money in them, but is merely carrying out an accounting exercise to determine the customer's indebtedness to it or vice versa: *Re K (restraint order)* [1990] 2 QB 298, [1990] 2 All ER 562. See also *Stein v Blake* [1996] AC 243, [1995] 2 All ER 961, HL; *Hong Kong and Shanghai Banking Corpn v Kloeckner & Co AG* [1990] 2 QB 514, [1989] 3 All ER 513.

As to set-off under the Insolvency Act 1986 with regard to companies see the Insolvency Rules 1986, SI 1986/1925, r 4.90; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 790. As to set-off under the Insolvency Act 1986 with regard to individuals see s 323; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 547.

2 *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833 at 847, CA, per Scrutton LJ; applied in *Re EJ Morel (1934) Ltd* [1962] Ch 21, [1961] 1 All ER 796.

3 *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL.

4 *Garnett v M'Kewan* (1872) LR 8 Exch 10; *McNaghten v Cox & Co* (1921) Times, 11 May (branches in the same building). See PARA 835.

5 See PARA 835 note 3.

868. Equitable set-off. Where accounts are maintained in different names so that the requirement of mutuality is prima facie lacking, there may be available an equitable set-off[1] when a credit balance is really and truly the property of one person, in the name of another, who is indebted to the bank on some other account[2]. Equitable set-off will be available in such circumstances only if the court, without any terms or any further inquiry, would oblige the nominee or trustee to transfer the account into the name of the true beneficial owner[3].

1 As to equitable set-off generally see EQUITY vol 16(2) (Reissue) PARA 901 et seq; SET-OFF AND COUNTERCLAIM vol 42 (Reissue) PARA 426 et seq.

2 *Re Willis Percival & Co, ex p Morier* (1879) 12 ChD 491, CA; *Re Hett Maylor & Co Ltd* (1894) 10 TLR 412. For other examples of set-off against a trustee creditor see *Jones v Mossop* (1844) 3 Hare 568; *Cochrane v Green* (1860) 9 CBNS 448; *Jeffs v Day* (1866) LR 1 QB 372; *Agra and Masterman's Bank v Leighton* (1866) LR 2 Exch 56; *Thornton v Maynard* (1875) LR 10 CP 695; *Bankes v Jarvis* [1903] 1 KB 549.

3 *Re Willis Percival & Co, ex p Morier* (1879) 12 ChD 491 at 502, CA, per Brett LJ, and at 503 per James LJ; *Bhogal v Punjab National Bank* [1988] 2 All ER 296 at 301, CA, per Dillon LJ, and at 307 per Bingham LJ. See also *Uttamchandani v Central Bank of India* (1989) 133 Sol Jo 262, CA (bank claimed the customer held the account as a nominee; there was held to be no right of equitable set-off); *Smith v Bridgend County Borough Council* [2001] UKHL 58, [2002] 1 AC 336, [2002] 1 All ER 292 (equitable set-off not permitted if its effect would be to give the party claiming the set-off the same right as if a charge had been registered); *Saudi Arabian Monetary Agency v Dresdner Bank AG* [2003] EWHC 3271 (Ch), [2004] EWCA Civ 1074, [2004] 2 Lloyd's Rep 19.

869. Third party debt orders. The Civil Procedure Rules contain rules which provide for a judgment creditor to obtain an order for the payment to him of money which a third party who is within the jurisdiction owes to the judgment debtor[1]. Third party debt orders were formerly known as garnishee orders.

On the application of a judgment creditor, the court may make a final third party debt order requiring a third party to pay to the judgment creditor: (1) the amount of any debt due or accruing due to the judgment debtor from the third party; or (2) so much of that debt as is sufficient to satisfy the judgment debt and the judgment creditor's costs of the application[2]. The court must first make an interim third party debt order to fix a hearing to consider whether to make a final third party debt order and may direct that until that hearing the third party must not make any payment which reduces the amount he owes the judgment debtor to less than the amount specified in the order[3].

A bank or building society[4] served with an interim third party debt order must carry out a search to identify all accounts held with it by the judgment debtor[5]. The bank or building society must disclose to the court and the creditor within seven days of being served with the order, in respect of each account held by the judgment debtor: (a) the number of the account; (b) whether the account is in credit; (c) if the account is in credit: (i) whether the balance of the account is sufficient to cover the amount specified in the order; (ii) the amount of the balance at the date it was served with the order, if it is less than the amount specified in the order; and (iii) whether the bank or building society asserts any right to money in the account, whether pursuant to a right of set-off or otherwise, and if so giving details of the grounds for that assertion[6]. If the judgment debtor does not hold an account with the bank or building society or the bank or building society is unable to comply with the order for any other reason[7], the bank or building society must inform the court and the judgment creditor of that fact within seven days of being served with the order[8].

If the judgment debtor is an individual and he is prevented from withdrawing money from his account with a bank or building society as a result of an interim third party debt order, and he or his family is suffering hardship in meeting ordinary living expenses as a result, the court may, on an application by the judgment debtor, make an order permitting the bank or building society to make a payment or payments out of the account (a 'hardship payment order')[9]. A hardship payment order may permit the third party to make one or more payments out of the account and specify to whom the payments may be made[10].

If the judgment debtor or the third party objects to the court making a final third party debt order, he must file and serve written evidence stating the grounds for his objections[11]. If the judgment debtor or the third party knows or believes that a person other than the judgment debtor has any claim to the money specified in the interim order, he must file and serve written evidence stating his knowledge of that matter[12]. If the third party has given notice that he does not owe any money to the judgment debtor or that the amount which he owes is less than the amount specified in the interim order, and the judgment creditor wishes to dispute this, the judgment creditor must file and serve written evidence setting out the grounds on which he disputes the third party's case[13].

At the hearing the court may: (A) make a final third party debt order; (B) discharge the interim third party debt order and dismiss the application; (C) decide any issues between the parties and any other person who has a claim to the money specified in the interim order; (D) direct a trial of any such issues and if necessary give directions[14].

A final third party debt order is enforceable as an order to pay money[15]. If the third party pays money to the judgment creditor in compliance with a third party debt order, or the order is enforced against him, the third party, to the extent of the amount paid or realised by enforcement, is discharged from his debt to the

judgment debtor[16]. This applies even if the third party debt order, or the original judgment or order against the judgment debtor, is later set aside[17]. It appears that a bank which receives a third party debt order will not incur liability to the creditor in tort if it negligently released the funds to the debtor himself, although it would obviously be guilty of contempt of court if it flouted the order deliberately[18].

1 See CPR Pt 72; and ENFORCEMENT vol 17(1) (Reissue) PARA 251 et seq. As to the attachment of money standing to the credit of a judgment debtor with the National Savings Bank see *Brooks Associates Inc v Basu* [1983] QB 220, [1983] 1 All ER 508. As to the National Savings Bank see PARA 810 et seq. As to the CPR generally see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 51 et seq.
2 See CPR 72.2. As to applications for third party debt orders see CPR 72.3; *Practice Direction—Third Party Debt Orders* PD 72 PARA 1; and ENFORCEMENT vol 17(1) (Reissue) PARA 257.
3 See CPR 72.4; and ENFORCEMENT vol 17(1) (Reissue) PARA 258. An interim third party debt order becomes binding on a third party when it is served on him: see CPR 72.4(4). As to service of the interim order see CPR 72.5; and ENFORCEMENT vol 17(1) (Reissue) PARA 259.
4 'Bank or building society' includes any person carrying on a business in the course of which he lawfully accepts deposits in the United Kingdom: CPR 72.1. As to the meaning of 'United Kingdom' see PARA 2 note 3.
5 CPR 72.6(1). A bank or building society served with an interim third party debt order is only required, unless the order states otherwise: (1) to retain money in accounts held solely by the judgment debtor (or, if there are joint judgment debtors, accounts held jointly by them or solely by either or any of them); and (2) to search for and disclose information about such accounts: *Practice Direction—Third Party Debt Orders* PD 72 PARA 3.1. The bank or building society is not required, for example, to retain money in, or disclose information about, accounts in the joint names of the judgment debtor and another person or, if the interim order has been made against a firm, accounts in the names of individual members of that firm: *Practice Direction—Third Party Debt Orders* PD 72 PARA 3.2. See *Hirschorn v Evans* [1938] 2 KB 801, [1938] 3 All ER 491, CA.
6 CPR 72.6(2). As to the right of set-off see PARA 867.
7 Eg because the bank or building society has more than one account holder whose details match the information contained in the order, and cannot identify which account the order applies to: see CPR 72.6(3).
8 CPR 72.6(3).
9 See CPR 72.7(1)–(5); and ENFORCEMENT vol 17(1) (Reissue) PARA 263. As to applications for hardship payment orders see *Practice Direction—Third Party Debt Orders* PD 72 PARA 5.
10 See CPR 72.7(6).
11 See CPR 72.8(1); and ENFORCEMENT vol 17(1) (Reissue) PARA 264.
12 CPR 72.8(2). If the court is notified that some person other than the judgment debtor may have a claim to the money specified in the interim order, it must serve on that person notice of the application and hearing: CPR 72.8(5).
13 CPR 72.8(3).
14 CPR 72.8(6).
15 See CPR 72.9(1); and ENFORCEMENT vol 17(1) (Reissue) PARA 265.
16 CPR 72.9(2).
17 CPR 72.9(3).
18 This would appear to follow from *Commissioners for Revenue and Customs v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181, [2006] 4 All ER 256 (although the case in fact related to a freezing order, rather than a third party debt order).

870. Deposit accounts and withdrawable share accounts subject to third party debt orders. In deciding whether, for the purposes of the jurisdiction of the High Court to make third party debt orders, a sum standing to the credit of a person in any deposit account or any withdrawable share account with a deposit taker[1] is a sum due or accruing[2] to that person and, as such, may be made subject to a third party debt order[3], the following conditions are to be disregarded: (1) any condition applying to the account that a receipt for money deposited in the account must be produced before any money is withdrawn; (2) any condition

that notice is required before any money or share is withdrawn; (3) any condition that a personal application must be made before any money or share is withdrawn; (4) any condition that a deposit book or share account book must be produced before any money or share is withdrawn; or (5) any other prescribed condition[4].

The Lord Chancellor may by order[5] make such provision as he thinks fit for all or any of the following purposes: (a) including in, or excluding from, the accounts to which the provisions described above apply accounts of any description specified in the order; (b) excluding from the accounts to which those provisions apply all accounts with any particular specified deposit taker or with any deposit taker of a specified description[6].

1 For the purposes of the Supreme Court Act 1981 s 40, 'deposit taker' means a person who may, in the course of his business, lawfully accept deposits in the United Kingdom: Supreme Court Act 1981 s 40(6) (substituted by SI 2001/3649). As to the meaning of 'United Kingdom' see PARA 2 note 3. The Supreme Court Act 1981 s 40(6) must be read with the Financial Services and Markets Act 2000 s 22, any relevant order under that provision, and Sch 2 (see PARA 84): Supreme Court Act 1981 s 40(7) (added by SI 2001/3649). As from a day to be appointed, the Supreme Court Act 1981 is to be renamed as the Senior Courts Act 1981: see the Constitutional Reform Act 2005 Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed.

2 Ie due or accruing at a definite and certain approaching date: *Jones v Thompson* (1858) EB & E 63; *Webb v Stenton* (1883) 11 QBD 518; *Heppenstall v Jackson and Barclays Bank Ltd* [1939] 1 KB 585, [1939] 2 All ER 10, CA.

3 As to third party debt orders see CPR Pt 72; and PARA 869. As to the CPR see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 51 et seq.

4 Supreme Court Act 1981 s 40(1)–(3) (s 40(1) amended by SI 2001/3649); CPR 72.2(3). As to the other condition that has been prescribed see CPR 72.2(3); and head (1) in the text.

The position is identical in the County Court: see the County Courts Act 1984 s 108; and ENFORCEMENT vol 17(1) (Reissue) PARA 252.

5 Any such order must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Supreme Court Act 1981 s 40(5). At the date at which this volume states the law no such order had been made.

6 Supreme Court Act 1981 s 40(4) (amended by SI 2001/3649).

871. Foreign currency subject to third party debt orders. A sum standing to the credit of a judgment debtor in a foreign currency may be made the subject of a third party debt order[1] in accordance with the following procedure:

(1) so soon as reasonably practicable after the time of service of the interim third party debt order, the bank must ascertain, at its then normal buying rate of exchange against sterling, the amount of the foreign currency balance of the judgment debtor that would, if converted at that rate, produce an amount equal to the sterling judgment debt and costs, and that amount of foreign currency as ascertained must be made subject to the order;

(2) so soon as reasonably practicable after service of the final third party debt order, the bank must purchase, at its then normal buying rate of exchange against sterling, the amount of the foreign currency, or so much as will by the application of that rate produce the sterling judgment debt and costs, and pay it into court or to the judgment creditor;

(3) in order that the final third party debt order should express the obligation of the bank under the procedure described above, the bank should inform the court of the amount of foreign currency and the rate of exchange used by the bank; and, when the order is made final, it

should order the bank to pay the sterling equivalent of the foreign currency or the amount of the judgment debt and costs, whichever be the lesser[2].

1 See *Choice Investments Ltd v Jeromnimon* [1981] QB 149, [1981] 1 All ER 225, CA. As to third party debt orders see PARA 869; and ENFORCEMENT vol 17(1) (Reissue) PARA 251 et seq.
2 See *Choice Investments Ltd v Jeromnimon* [1981] QB 149 at 157, [1981] 1 All ER 225 at 228, CA, per Lord Denning MR.

872. Drawing against deposit account. It is doubtful whether valid cheques may be drawn against a deposit account at call[1]. Bankers may, however, honour such cheques, relying on a right of set-off against the money on deposit[2]. The position may be different where a course of business has been established.

1 The view expressed by Malins V-C in favour of their validity in *Hopkins v Abbott* (1875) LR 19 Eq 222 at 228 and *Stein v Ritherdon* (1868) 37 LJ Ch 369 seems inconsistent with the reasoning in *Re Head, Head v Head (No 2)* [1894] 2 Ch 236, CA, and finds no support in the summary of the banker's obligations given by Atkin LJ in *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 127, CA. Cf also *Re Tidd, Tidd v Overell* [1893] 3 Ch 154 at 156 per North J; and see *Re Glendinning, Steel v Glendinning* (1918) 88 LJ Ch 87.
2 See PARA 867.

(v) Statement of Account

873. Bank statements as evidence. Entries in statements of account to the credit of the customer are, when delivered to him, prima facie evidence against the banker; if such a statement is returned by the customer without objection, entries to his debit are prima facie evidence against him[1].

Where credits appear by mistake in the statement, and the customer alters his position in reliance on them, the bank cannot afterwards debit the account with the amount[2]; but, in the absence of any change of position, credits mistakenly entered may be rectified within a reasonable time[3]. However, a bank would not be permitted to retain money paid in, but omitted to be credited, even if the customer had not noticed its omission from his bank statement.

Where a bank stamps a paying-in slip counterfoil, it bears the onus of showing that a different sum was actually received from that acknowledged on the counterfoil[4].

1 For a consideration of the history of the pass-book, the predecessor to the bank statement, see *Devaynes v Noble, Baring v Noble* (1816) 1 Mer 529 at 535–536; *Commercial Bank of Scotland v Rhind* 1860 3 Macq 643. There would seem to be no reason why the law relating to pass-books should not apply equally to bank statements, but there is no authority to this effect. As to the admissibility of entries in a banker's books as evidence, including entries produced by computers, see PARA 908.
2 *Skyring v Greenwood* (1825) 4 B & C 281; *Holt v Markham* [1923] 1 KB 504, CA, followed in *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL; *Lloyds Bank Ltd v Brooks* (1950) 6 Legal Decisions Affecting Bankers 161; *United Overseas Bank v Jiwani* [1977] 1 All ER 733, [1976] 1 WLR 964. See also *Avon County Council v Howlett* [1983] 1 All ER 1073, [1983] 1 WLR 605, CA.
3 *Commercial Bank of Scotland v Rhind* (1860) 3 Macq 643 at 653, HL; *British and North European Bank Ltd v Zalzstein* [1927] 2 KB 92.
4 *Docherty v Royal Bank of Scotland* 1963 SLT (Notes) 43, Ct of Sess.

874. Effect of periodic statement. If a bank wishes to impose upon a customer an express obligation to examine periodic bank statements and to make those statements, in the absence of query, unchallengeable by the customer after expiry of a time limit, the burden of objection and of the sanction imposed

must be brought home to the customer[1]. The test is undoubtedly rigorous, and is not satisfied by a contractual provision that statements are to be confirmed, and that, if not confirmed within a specified time, they may be taken by the banker as approved by the customer[2]. A fortiori, in the absence of such an obligation, the returning of a bank statement without objection does not give rise to a settled account by which both are bound[3], even where the customer, upon receipt of periodic bank statements, returns a signed confirmation slip[4].

1 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 110, [1985] 2 All ER 947 at 959, PC.

2 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 109–110, [1985] 2 All ER 947 at 958–959, PC.

3 As to the case law preceding *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, [1985] 2 All ER 947, PC, see *Vagliano Bros v Bank of England* (1889) 23 QBD 243, CA (revsd sub nom *Bank of England v Vagliano Bros* [1891] AC 107, HL, but without affecting this point); *Lewes Sanitary Steam Laundry Co Ltd v Barclay & Co Ltd* (1906) 95 LT 444; *Kepitigalla Rubber Estates Ltd v National Bank of India Ltd* [1909] 2 KB 1010; *Walker v Manchester and Liverpool District Banking Co Ltd* (1913) 108 LT 728; cf *Blackburn Building Society v Cunliffe, Brooks & Co* (1882) 22 ChD 61, CA (affd sub nom *Cunliffe, Brooks & Co v Blackburn and District Benefit Building Society* (1884) 9 App Cas 857, HL); *Bank of England v Vagliano Bros* [1891] AC 107 at 115, HL.

4 See *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 109, [1985] 2 All ER 947 at 958, PC (customer not bound by return, on receipt of periodic bank statements for its account with Chekiang First Bank Ltd, of confirmation slips signed by two authorised signatories).

(vi) Banker as Bailee

875. Property deposited for safe custody. Unless the undertaking of the care of valuable property[1] when required is made a condition of opening an account or offered as an inducement to do so, the position of the banker as regards any property deposited with him for custody is probably that of a bailee for value[2]. In default of agreement to the contrary, the bailment will be determinable at the will of the bailor[3]. The bailee will be bound to take the same care of the property entrusted to him as a reasonably prudent and careful person may fairly be expected to take of his own property of the like description[4]. It is submitted that this involves the employment of all the facilities at the banker's command[5]; and, in view of the facilities usually existing, the question whether the banker is a gratuitous bailee or a bailee for value does not seem material[6]. The banker's knowledge or ignorance of the nature of the goods entrusted to him does not appear to affect the question of his liability[7]. If, however, the customer misleads the banker as to the nature or value of the goods, he would presumably not be entitled to hold the banker to a greater degree of care or to a larger compensation than was consistent with his own representations. An acknowledgment that the goods are received 'for safe custody' does not increase the liability of the banker[8].

The bank is liable for loss caused by the negligence or criminal act of members of its own staff[9] carried out in the scope of their employment[10].

If goods are brought to a bank for safe custody at the place to which they are brought, the bank may be liable for their loss if removed elsewhere[11].

1 In *Isaacs v Barclays Bank Ltd and Barclays Bank (France) Ltd* [1943] 2 All ER 682, the question arose, but was not decided, whether the demand for the return of securities held for safe custody must be made at the branch at which they were deposited.

2 See *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580 at 589, [1978] 3 All ER 337 at 340, PC. Cf *Giblin v McMullen* (1868) LR 2 PC 317; *Re United Service Co,*

Johnston's Claim (1871) 6 Ch App 212; *Leese v Martin* (1873) LR 17 Eq 224; *Brandao v Barnett* (1846) 12 Cl & Fin 787. For a discussion of the position of a gratuitous bailee see the remarks of Lord Goddard CJ in *Sachs v Miklos* [1948] 2 KB 23 at 37, [1948] 1 All ER 67 at 68, CA. See further BAILMENT vol 3(1) (2005 Reissue) PARA 6 et seq. See also PARA 876.

3 *United States of America and Republic of France v Dollfus Mieg et Cie SA and Bank of England* [1952] AC 582, [1952] 1 All ER 572, HL.

4 *Giblin v McMullen* (1868) LR 2 PC 317; *Lloyd v Grace, Smith & Co* [1911] 2 KB 489 at 513, CA per Farwell LJ (revsd without affecting this point [1912] AC 716, HL). In the case of documents, the bank may be compelled to deliver them up: see *R v Daye* [1908] 2 KB 333. As to the standard of care required of bailees see *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694 at 698, [1962] 2 All ER 159 at 161, CA, per Ormerod LJ. See further BAILMENT vol 3(1) (2005 Reissue) PARA 39.

5 It seems that the utilisation of available means of securing safety must be part of the care a reasonable person would take.

6 A bailee for value is bound to adopt at his own expense all reasonable safeguards. A gratuitous bailee is bound to do his best with what he has got, using the best facilities at his command, but not more. A banker invariably has safes, strong-rooms etc. Cf *Queensland National Bank Ltd v P & O Steam Navigation Co* [1898] 1 QB 567, CA; and see the dicta of Ormerod LJ in *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694 at 698, [1962] 2 All ER 159 at 161, CA. See further BAILMENT vol 3(1) (2005 Reissue) PARA 39.

7 The rule as stated was laid down in *Giblin v McMullen* (1868) LR 2 PC 317, without qualification as to knowledge. The facts in that case appear to point to ignorance on the part of the banker as to the nature of the goods. The presumption is that they are valuable.

8 *Ross v Hill* (1846) 2 CB 877. An undertaking in such terms must be interpreted in the light of the legal consequences resulting from the relation between the parties.

9 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA.

10 See the remarks of Salmon LJ in *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 737 et seq, [1965] 2 All ER 725 at 738 et seq, CA.

11 *A/S Rendal v Arcos Ltd* [1937] 3 All ER 577 at 587–588, HL, per Lord Wright; and see PARA 877.

876. Delivery to wrong person. Where the bank delivers the goods to the wrong person, and in consequence they are lost to the owner, the liability of the bank is absolute, though there is no element of negligence[1]. In law the banker could contract out of this liability, but he would be unlikely to do so in practice.

If the banker has suspicions as to the identity or authority of the person requiring delivery of the valuables or the genuineness of any written order produced by that person, the banker may retain the goods for a reasonable time in order to satisfy himself on these points, or, it is submitted, may decline to deliver them to the applicant, stating that he would himself send them to the owner, and doing so within a reasonable time[2].

1 The case is one of wrongful conversion of the goods, and the bank is liable for this wrongful conversion, apart from any question of negligence. This view is supported by the following authorities: *Youl v Harbottle* (1791) Peake 68; *Stephenson v Hart* (1828) 4 Bing 476 at 482 per Park J ('from the cases which have been cited it is clear that trover lies against a carrier for misfeasance in delivering a parcel to a wrong person'), and at 488 per Gaselee J ('for delivery to a wrong person a carrier is no doubt responsible in trover'); *M'Kean v M'Ivor* (1870) LR 6 Exch 36 at 41 per Bramwell B ('I assume that a misdelivery would have been a conversion'); *Hiort v London and North Western Rly Co* (1879) 4 ExD 188, CA, per Bramwell LJ; *Glyn, Mills, Currie & Co v East and West India Dock Co* (1880) 6 QBD 475 at 493, CA, per Bramwell LJ (affd (1882) 7 App Cas 591, HL); *Bristol and West of England Bank v Midland Rly Co* [1891] 2 QB 653 at 657, CA, per Lopes LJ ('delivery to a wrong person would be conversion').

The cases of *Stephenson v Hart* above, *Duff v Budd* (1822) 3 Brod & Bing 177, and *Heugh v London and North Western Rly Co* (1870) LR 5 Exch 51, which have been supposed to support the contrary contention, are distinguishable on the ground that in each of them there had been a refusal to accept the goods or a failure to discover the consignee; the bailee was therefore in the position of an involuntary bailee, who has the implied authority of the real owner to deal with the goods in any reasonable manner, and is therefore liable only for negligence. Those cases were explained and distinguished on this ground by Bramwell LJ in *Hiort v Bott* (1874) LR 9 Exch 86 at 90.

2 Such retention would not be conversion, as it involves no disregard of or interference with the owner's title: cf *Hollins v Fowler* (1875) LR 7 HL 757 at 766 per Blackburn J; and *Clayton v Le Roy* [1911] 2 KB 1031, CA.

877. **Removal.** A banker who receives goods for custody at his bank is not justified in removing them elsewhere for safe keeping, and may be liable for any loss occurring while they were deposited elsewhere[1].

If some of a number of similar items deposited with a bank are inadvertently sold by the bank and damages for conversion are awarded against it, the title to the goods sold vests in the bank[2].

1 Cf *Lilley v Doubleday* (1881) 7 QBD 510. See also *A/S Rendal v Arcos Ltd* [1937] 3 All ER 577, HL; and BAILMENT vol 3(1) (2005 Reissue) PARA 19.
2 See *United States of America and Republic of France v Dollfus Mieg et Cie SA and Bank of England* [1952] AC 582, [1952] 1 All ER 572, HL (where 13 of 64 gold bars sold).

878. **Securities held for a foreign bank.** If bonds are held in London to the order of a foreign bank for the account of a foreign national, there is no contractual relationship between him and the English bank[1]. If by the proper law of the bailment of the bonds to the foreign bank the bailor is not entitled to delivery of the bonds, the English bank, as bailee of the foreign bank, will not be compelled to deliver them up[2]. Similarly, if the delivery of the bonds would involve the foreign bank in doing an act abroad which was illegal[3] there, the English courts will not enforce delivery by a London branch of that bank[4].

1 *Kahler v Midland Bank Ltd* [1950] AC 24, [1949] 2 All ER 621, HL.
2 *Kahler v Midland Bank Ltd* [1950] AC 24 at 28–29, [1949] 2 All ER 621 at 624–625, HL, per Lord Simonds.
3 See *Kahler v Midland Bank Ltd* [1950] AC 24, [1949] 2 All ER 621, HL (Lord MacDermott and Lord Reid dissenting). The illegality, both in this case and in the case cited in note 4, was under national foreign exchange laws, which were not of such a penal or confiscatory nature as that they should be disregarded in England: see *Kahler v Midland Bank Ltd* above at 28 and 624 per Lord Simonds. It may, however, be argued that no effect should have been given to those laws because they did not form a point of the law applicable to the contract at issue.
4 *Zivnostenska Bank National Corpn v Frankman* [1950] AC 57, [1949] 2 All ER 671, HL. See also note 3.

(vii) Collection of Cheques etc; Protection and Duties of Collecting Banker

879. **Cheques.** A cheque is a bill of exchange drawn on a banker, payable on demand[1]. A bearer cheque is one expressed to be payable to a particular person or bearer[2], or to bearer; or a cheque on which the only or last indorsement is in blank[3]. An order cheque is one which is expressed to be so payable, or which is expressed to be payable to a particular person or body and does not contain words prohibiting transfer or indicating an intention that it should not be transferable[4]. A cheque payable to the order of a particular person, and not to him or his order, is nevertheless payable to him or his order at his option[5]. A cheque may be crossed either generally[6] or specially[7].

A warrant given by the Registrar of Government Stock for making any payment on the exchange of government securities[8] is deemed to be a cheque[9] and is exempt from stamp duty[10].

1 Bills of Exchange Act 1882 s 73. See PARAS 1405, 1410. In general, the provisions of the Bills of Exchange Act 1882 applicable to bills of exchange payable on demand apply to cheques: s 73. As to the nature of a cheque see also *Thairlwall v Great Northern Rly Co* [1910] 2 KB 509, DC; and PARA 898 note 14. Banker's drafts are not cheques: see PARA 896. As to the meaning of 'bill

of exchange' see the Bills of Exchange Act 1882 s 3(1); and PARA 1405. As to cheque guarantee cards see PARA 903; and as to credit cards and charge cards see PARAS 904–905.

2 As to cheques made payable to a particular object eg 'wages' see PARAS 855, 898.

3 See the Bills of Exchange Act 1882 ss 8(3), 73.

4 Bills of Exchange Act 1882 ss 8(4), 73.

5 Bills of Exchange Act 1882 ss 8(5), 73.

6 See the Bills of Exchange Act 1882 s 76(1); and PARA 880.

7 See the Bills of Exchange Act 1882 s 76(2); and PARA 880.

8 See the National Loans Act 1968 s 14; and PARA 1345.

9 Ie within the meaning of the Bills of Exchange Act 1882: see the text to note 1.

10 National Loans Act 1968 s 14(7) (amended by SI 2004/1662).

880. Crossing of cheques. The rules for the negotiation of bills and notes apply generally to cheques[1], with this addition, that the negotiation of a cheque may be affected by 'crossing' it. This is done by drawing two parallel transverse lines across the face of the cheque. If the lines are drawn simply, or if the words 'and company' or any abbreviation are written within them, with or without the addition in either case of the words 'not negotiable', the cheque is said to be crossed generally; and in that case a holder who desires to receive payment of the cheque must present it through a banker[2]. However it should be noted that cheques are usually pre-printed with an 'account payee' or 'a/c payee' crossing with the result that the cheque is not transferable (and hence not negotiable): such an instrument is valid only as between the parties to it[3].

If within the transverse lines there is written the name of a banker, with or without the words 'not negotiable', the cheque is said to be crossed specially, and to the banker named; and in that case a holder who desires to receive payment of the cheque must present it through that banker[4].

The drawer of a cheque may, if he wishes, cross it either generally or specially[5]. The holder may: (1) if the cheque is uncrossed, cross it either generally or specially; (2) if the cheque is crossed generally, add the name of a banker so as to convert the general crossing into a special one; and (3) in either case, add the words 'not negotiable'[6].

A banker: (a) to whom a cheque is crossed specially may cross it specially to another banker for collection; or (b) to whom a cheque that is uncrossed or crossed generally is sent for collection may cross it specially to himself[7].

1 See the Bills of Exchange Act 1882 s 73; and PARA 879. As to rules regarding negotiation of bills and notes see generally PARA 1401 et seq.

2 Bills of Exchange Act 1882 s 76(1). As to ss 76, 77 see also PARA 1411. The crossed cheques provisions of the Bills of Exchange Act 1882 (ss 76–81) extend to any document issued by a customer of a banker which, though not a bill of exchange, is intended to enable a person to obtain payment of the sum mentioned from that banker, any document issued by a public officer and intended to enable a person to obtain payment of the sum mentioned from the Paymaster General or the Queen's and Lord Treasurer's Remembrancer, and any banker's draft: Cheques Act 1957 ss 4(2), 5 (s 4(2) amended by the Cheques Act 1992 s 3). See also PARA 1411. As to the Paymaster General and the Queen's and Lord Treasurer's Remembrancer see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 714; COURTS vol 10 (Reissue) PARA 654.

It is unclear whether a cheque made payable to 'order' may be made non-transferable: *National Bank v Silke* [1891] 1 QB 435, CA. The judgments in this case have been read as implying that the 'not negotiable' crossing prohibited transfer. Such is clearly not the case: cf the Bills of Exchange Act 1882 s 81, which limits negotiability, not transferability (see PARA 838); *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414, HL.

For a description of the operation of the clearing system see *Barclays Bank plc v Bank of England* [1985] 1 All ER 385.

As to cheques marked 'account payee' see PARA 895. See also note 3.

3 See the Bills of Exchange Act 1882 s 81A; and PARAS 836, 895, 1500.

4 Bills of Exchange Act 1882 s 76(2). Transverse parallel lines, although usual, are not necessary in a specially crossed cheque. The words 'not negotiable' do not by themselves constitute a crossing: see PARA 838.

5 Bills of Exchange Act 1882 s 77(1).

6 Bills of Exchange Act 1882 s 77(2), (3), (4). The holder includes the payee: see s 2; and PARA 837 note 5. See also *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL (in which the contention of Fletcher Moulton LJ in *Lloyds Bank Ltd v Cooke* [1907] 1 KB 794, CA, that a named payee could be holder in due course was finally disapproved). The term 'holder' also includes a banker who is a mere agent for collection: *Sutters v Briggs* [1922] 1 AC 1, HL.

7 Bills of Exchange Act 1882 s 77(5), (6). As to the duties and rights of bankers in regard to crossed cheques see ss 79, 80; the Cheques Act 1957 s 4; *Capital and Counties Bank Ltd v Gordon* [1903] AC 240; and PARAS 838–839, 882. A bank which, acting as mere agent to collect, forwards a customer's cheque to the paying bank is a holder of the cheque, and accordingly, if the cheque is crossed generally, may cross it specially: *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465; and see the Bills of Exchange Act 1882 s 77(3). See also *Sutters v Briggs* [1922] 1 AC 1, HL.

881. Duties of a collecting banker. In collecting cheques and other instruments for a customer[1], a banker acts basically as a mere agent or conduit to receive payment of the cheques from the banker on whom they are drawn and to hold the proceeds at the disposal of his customer[2].

The character in which a banker receives a cheque is a matter of fact in each case: he may be a mere collecting agent, or he may take as a holder for value or in due course[3].

As agent for collection he is bound to exercise diligence in the presentation of the cheque for payment. He fulfils his duty if, when the cheque is drawn on a bank in the same place, he presents it the day after receipt[4], or, when it is drawn on a bank in another place, he either presents it or forwards it on the day following receipt[5]. The forwarding may be to another branch or to an agent of the bank[6], who has the same time after receipt in which to present. A non-clearing bank may so utilise a clearing bank; but in any case the bank which has received the cheque from its customer remains liable to him for default of its agent[7]. Where presentation is made through the inter-bank clearing system, the presenting bank's responsibility to its customer in respect of the collection of the cheque is discharged only when the cheque is physically delivered to that branch of the paying bank for decision whether it should be paid or not[8]. Presentation by post is sufficient[9]; and it would appear that, when a bank forwards a cheque by post to the bank on which it is drawn, the latter receives it as agent for presentment to itself[10], and in that capacity may hold it till the day after receipt.

Where a cheque drawn by one customer of a bank is received from another customer, it is a question of fact whether it was presented for payment or paid in for collection. If the latter, the bank has the usual time of an agent for giving notice of dishonour[11], but must pay in preference to a debt due to itself from the drawing customer[12].

If a banker fails to present a cheque within a reasonable time after it reaches him, he is liable to his customer for loss arising from the delay[13]. The indorsers, if any, are discharged if presentation is not made within reasonable time after indorsement[14]. Where a cheque is not presented within a reasonable time of its issue, the drawer is discharged to the extent of any actual damage he may have suffered by the failure to pay of the bank on which the cheque was drawn[15].

A banker receiving instruments delivered to him for collection and credit to a customer's account may collect solely for the customer or for himself or both. Where he collects for the customer, he may be liable in conversion if his customer has no title but, provided that he collects in good faith and without negligence,

he may plead statutory protection[16]; the cause of action is conversion or money had and received and entails ultimately choosing between a claim based on the tort and a claim based on an implied contract[17]. If the banker collects for himself, he needs no such protection unless the instrument is affected by forgery[18]. He can be both an agent for collection and a holder for value at the same time[19].

1 As to the customer see PARA 883.
2 *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL. A bank receiving a cheque from an individual to purchase shares or return it does not owe a duty of care to the bank against which the cheque is drawn not to lose it: *Yorkshire Bank plc v Lloyds Bank plc* [1999] 2 All ER (Comm) 153. It appears that a collecting bank does not owe a general duty of care to parties other than its customers: see *Box v Barclays Bank plc* [1998] 18 LS Gaz R 33, [1998] Lloyd's Rep Bank 185.
3 See *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465; *Bevan v National Bank Ltd* (1906) 23 TLR 65; *Jones & Co v Coventry* [1909] 2 KB 1029; *Re Farrow's Bank Ltd* [1923] 1 Ch 41, CA; *AL Underwood Ltd v Bank of Liverpool and Martin's* [1924] 1 KB 775, CA. See also *Westminster Bank Ltd v Zang* [1966] AC 182, [1966] 1 All ER 114, HL; *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719. See PARA 891. As to the banker as a holder for value see PARA 890. The banker may take in both capacities at the same time: see PARA 890.
4 *Alexander v Burchfield* (1842) 7 Man & G 1061; *Rickford v Ridge* (1810) 2 Camp 537; *Forman v Bank of England* (1902) 18 TLR 339; and cf *Boddington v Schlencker* (1833) 4 B & Ad 752.
5 *Hare v Henty* (1861) 10 CBNS 65; *Prideaux v Criddle* (1869) LR 4 QB 455; *Heywood v Pickering* (1874) LR 9 QB 428; and contrast *Moule v Brown* (1838) 4 Bing NC 266; *Bailey v Bodenham* (1864) 16 CBNS 288. As to the meaning of 'in the same place' see *Hamilton Finance Co Ltd v Coverley Westray Walbaum and Tosetti Ltd, and Portland Finance Co Ltd* [1969] 1 Lloyd's Rep 53.
6 *Prideaux v Criddle* (1869) LR 4 QB 455.
7 *Mackersy v Ramsays, Bonars & Co* (1843) 9 Cl & Fin 818, HL. Cf *Calico Printers' Association Ltd v Barclays Bank* (1931) 145 LT 51, CA (agent abroad).
8 *Barclays Bank plc v Bank of England* [1985] 1 All ER 385 (Bingham J sitting as arbitrator), distinguishing *Reynolds v Chettle* (1811) 2 Camp 596. See also *Turner v Royal Bank of Scotland plc* [1999] 2 All ER (Comm) 664, [1999] Lloyd's Rep Bank 231, CA.
9 *Prideaux v Criddle* (1869) LR 4 QB 455. As to presentation of bills of exchange see PARA 1509 et seq pos. It is the practice to treat presentation by post by one bank to another as sufficient, but not presentation by letter by an ostensible payee requesting remittance by post.
10 *Bailey v Bodenham* (1864) 16 CBNS 288 at 296 per Erle CJ.
11 *Boyd v Emmerson* (1834) 2 Ad & El 184.
12 *Kilsby v Williams* (1822) 5 B & Ald 815.
13 *Lubbock v Tribe* (1838) 3 M & W 607 at 612 per Lord Abinger CB; and see also *Hare v Henty* (1861) 10 CBNS 65.
14 Bills of Exchange Act 1882 ss 45(2), 73. See also PARAS 1405, 1410, 1516. For the rules as to presentation for payment see PARA 1509 et seq.
15 See the Bills of Exchange Act 1882 s 74 (differentiating the drawer of a cheque from the drawer of an ordinary bill under s 45); and PARA 1519.
16 Ie under the Cheques Act 1957 s 4: see PARA 882. It is arguable that negligence as a tort is different from the negligence which it is the statutory duty of a collecting banker to avoid under s 4. It has been argued (see *Arrow Transfer Co Ltd v Royal Bank of Canada, Bank of Montreal and Canadian Imperial Bank of Commerce* [1971] 3 WWR 241, BC CA) that collection of a cheque which is forged and which is a sham and outside the Cheques Act 1957 s 4 gives rise to liability for negligence although the contrary may well be the law. See also *Redmond v Allied Irish Banks plc* [1987] 2 FTLR 264.
17 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, [1940] 4 All ER 20, HL.
18 See PARA 890.
19 *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527 at 538, [1970] 1 All ER 719 at 727 per Milmo J.

882. Protection of collecting banker. Where a banker in good faith and without negligence[1] receives payment for a customer[2] of a cheque and the

customer has no title or a defective title to the cheque, the banker does not incur any liability to the true owner of the cheque by reason only of having received such payment[3]. The banker is not to be treated[4] as having been negligent by reason only of his failure to concern himself with absence of, or irregularity in, indorsement of the cheque or other instrument[5].

Where this statutory protection attaches, it covers the receipt of the cheque and every step taken in the ordinary course of business and intended to lead up to the receipt of payment[6], such as stamping the bank identification stamp on the cheque. It has been suggested[7] that the protection did not extend to cheques obtained by 'larceny or analogous felony'[8], but it is submitted that this suggestion is unfounded[9].

1 See PARA 884.

2 See PARA 883.

3 Cheques Act 1957 s 4(1)(a), (2)(a). See also PARA 1411. This includes cheques which under the Bills of Exchange Act 1882 s 81A(1) (see PARA 895) or otherwise are not transferable: Cheques Act 1957 s 4(2)(a) (amended by the Cheques Act 1992 s 3). A banker who, having credited his customer's account with the amount of a cheque, receives payment of it for himself, has the same protection as a banker who receives payment for a customer: Cheques Act 1957 s 4(1)(b), (2)(a). Section 4 applies not only to cheques, but also to: (1) any document issued by a banker's customer which, though not a bill of exchange, is intended to enable a person to obtain payment from that banker of the sum mentioned in the document (see s 4(2)(b); and PARAS 898, 900–901); (2) any document issued by a public officer which is intended to enable a person to obtain payment from the Paymaster General or the Queen's and Lord Treasurer's Remembrancer of the sum mentioned in the document but which is not a bill of exchange (see s 4(2)(c); and PARA 898 note 5); and (3) any draft payable on demand drawn by a banker upon himself, whether payable at the head office or at some other office of his bank (see s 4(2)(d); and PARA 896). As to the Paymaster General and the Queen's and Lord Treasurer's Remembrancer see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 714; COURTS vol 10 (Reissue) PARA 654. See *Honourable Society of the Middle Temple v Lloyds Bank plc* [1999] 1 All ER (Comm) 193.

A bank may be entitled to the protection of the Cheques Act 1957 s 4 even though the payee was a different entity from the account holder, so long as there appears to be a significant match: see *Architects of Wine Ltd v Barclays Bank plc* [2007] EWCA Civ 239, [2007] 2 All ER (Comm) 285.

4 Ie for the purposes of the Cheques Act 1957 s 4.

5 Cheques Act 1957 s 4(3). 'Instrument' refers to any instrument specified in s 4(2): see the text and note 3.

6 *Capital and Counties Bank Ltd v Gordon* [1903] AC 240 at 244, HL, per Lord Macnaghten. This view is not seriously affected by the dictum in *Taxation Comrs v English Scottish and Australian Bank Ltd* [1920] AC 683 at 688, PC.

7 Dicta of Lord Halsbury and Lord Brampton in *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414, HL, have been taken to imply this.

8 The offence of larceny is replaced by that of theft: see the Theft Act 1968 ss 1, 33(3), Sch 3; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 282. The distinction between felony and misdemeanour was removed by the Criminal Law Act 1967 s 1: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 49.

9 The customer cannot have less than no title, the contingency against which the banker is protected under the Cheques Act 1957 s 4 (replacing the Bills of Exchange Act 1882 s 82 (repealed)).

883. Receipt for customer. To entitle the banker to protection he must receive payment for a customer[1], but he may receive payment for himself and yet be entitled to the protection where, acting in a purely collecting capacity, he has nevertheless a lien or is otherwise a holder for value[2]. It seems that, in order to be a customer, a person need not have habitual dealings with the banker in the nature of ordinary banking business and that an isolated transaction may be enough to create the relationship of banker and customer[3], but the continued

cashing of crossed cheques over the counter from which the bank derives no direct benefit does not constitute such a relationship[4].

The existence of a current account creates the relationship of banker and customer between the bank and the owner of the account[5], as does the existence of a deposit account[6]. However, the banker may be entitled to the statutory protection before the account is opened provided that it is intended that the account should be opened after the normal preliminaries have been completed[7].

It will probably be enough to create the relationship of banker and customer if the customer habitually discounts bills at the bank. A first transaction, such as the payment in of a cheque to open an account, is protected[8]. If a person is not a customer, his drawing a counter cheque, or the entry of the transaction in the banker's books under such a heading as 'Sundry Customers', is of no avail[9]. A person is a customer although his account is overdrawn[10]. One bank may be a customer of another bank[11].

Where a crossed cheque drawn on one office of a bank is paid in by a customer at another branch, and is credited in his account, the bank is protected both as a collecting and as a paying bank[12]. This is so also where the cheque is paid in for the credit of an account at the branch where the drawer's account is kept, though in order to avoid liability the bank must bring itself within both the protection afforded to a collecting bank and that afforded to a paying bank[13].

1 Cheques Act 1957 s 4(1)(a). See also PARA 1002. The protection conferred by s 4 (see PARA 882) is conferred on a banker who receives payment for a customer, that is, who receives payment as an agent for collection; the bank should be 'a mere conduit pipe for conveying the cheque to the bank on which it is drawn and receiving the money from that bank for their customer': *Capital and Counties Bank Ltd v Gordon* [1903] AC 240 at 245–246, HL, per Lord Macnaghten. A receipt by a banker of cheques payable to himself but accompanied by a request to credit them to a customer is a receiving on behalf of the customer: *Lloyds Bank Ltd v Chartered Bank of India Australia and China* [1929] 1 KB 40, CA.

2 *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719. See also the Cheques Act 1957 s 4; and PARA 882. As to lien see PARAS 860–864.

3 *Ladbroke & Co v Todd* (1914) 111 LT 43; *Taxation Comrs v English, Scottish and Australian Bank Ltd* [1920] AC 683 at 688, PC. But, to the contrary, see *Matthews v Brown & Co* (1894) 63 LJQB 494; *Kleinwort Sons & Co v Comptoir National d'Escompte de Paris* [1894] 2 QB 157; *Lacave & Co v Crédit Lyonnais* [1897] 1 QB 148; *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414, HL. See also PARA 816.

4 *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414, HL. As to crossing of cheques see PARA 880.

5 *Lacave & Co v Crédit Lyonnais* [1897] 1 QB 148.

6 *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414 at 421, HL, per Lord Davey.

7 *Woods v Martins Bank Ltd* [1959] 1 QB 55, [1958] 3 All ER 166.

8 *Ladbroke & Co v Todd* (1914) 111 LT 43; *Taxation Comrs v English, Scottish and Australian Bank Ltd* [1920] AC 683 at 688, PC. But see *Tate v Wilts and Dorset Bank* (1899) 1 Legal Decisions Affecting Bankers 286 per Darling J.

9 *Matthews v Brown & Co* (1894) 10 TLR 386; *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414, HL.

10 *Clarke v London and County Banking Co* [1897] 1 QB 552 (distinguished by Lord Lindley in *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414 at 425, HL; but the doubt was whether the bank received only for the customer, not whether he was one). Cf *Hardy v Veasey* (1868) LR 3 Exch 107.

11 *Importers Co Ltd v Westminster Bank Ltd* [1927] 2 KB 297, CA. See also *Aschkenasy v Midland Bank Ltd* (1934) 51 TLR 34, CA (in which A instructed bank B to transfer money to bank C for D's credit; and B, not A, was the customer of C).

12 *Gordon v Capital and Counties Bank Ltd* [1902] 1 KB 242, CA (where the cheque was to order and bore a forged indorsement); affd on appeal on other grounds sub nom *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL. However, the protection would also apply in the case of a bearer cheque: see PARA 837.

13 *Carpenters' Co v British Mutual Banking Co Ltd* [1938] 1 KB 511, [1937] 3 All ER 811, CA.

884. Acting in good faith and without negligence. If the collecting banker wishes to plead the statutory protection, his dealings throughout must be in good faith and without negligence[1]. Negligence in this connection is breach of a duty to the possible true owner, not the customer, created by the statute itself, the duty being not to disregard the interests of the true owner[2]. The test of negligence is whether the transaction of paying in any given cheque coupled with the circumstances antecedent and present is so out of the ordinary course that it ought to arouse doubts in the banker's mind and cause him to make inquiries[3]. In discharging his contractual duties in crediting an account with a dividend, a banker is not obliged to consider the tax implications of the matter[4]. He is bound to make inquiries when there is anything to raise suspicion that the cheque is being wrongfully dealt with in being paid into the customer's account[5], but is not called upon to be abnormally suspicious[6].

Disregard of the bank's own regulations may be evidence of negligence[7]; and the production of a certificate under the Registration of Business Names Act 1916 (now the Business Names Act 1985)[8] has been held sufficient to satisfy a banker put on inquiry[9].

A bank is not liable for acts of negligence if these are induced or encouraged by the conduct of the true owner[10]. The banker cannot adduce pressure of exigencies of business or shortage of staff to modify what, in ordinary circumstances, would be negligence[11], but he may plead contributory negligence on the part of the customer in mitigation of damages[12].

A banker's failure to concern himself with the absence of, or an irregularity in, indorsement does not, by itself, constitute negligence[13].

It may be negligent not to make inquiries as to a customer upon opening an account and collecting a cheque for him[14]. Unless the reference obtained in respect of a customer renders it superfluous, inquiry ought to be made concerning the character and circumstances of the customer[15].

Fluctuations in the account may be a circumstance putting the bank upon inquiry[16].

1 See the Cheques Act 1957 s 4(1). As to the statutory protection see PARA 882. Section 4(1) specifically mentions only the receipt of the money, but negligence in taking the cheque has always been held to preclude protection as necessarily involving the subsequent receipt. As to negligence generally see NEGLIGENCE.

2 *Bissell & Co v Fox Bros & Co* (1885) 53 LT 193, CA. See also *Union Bank of Australia Ltd v McClintock & Co* [1922] 1 AC 240, PC; *Commercial Banking Co of Sydney Ltd v Mann* [1961] AC 1, [1960] 3 All ER 482, PC.

3 *Taxation Comrs v English, Scottish and Australian Bank Ltd* [1920] AC 683, PC. See also *Hampstead Guardians v Barclays Bank Ltd* (1923) 39 TLR 229; *London and Montrose Shipbuilding and Repairing Co Ltd v Barclays Bank Ltd* (1926) 31 Com Cas 67 (affd 31 Com Cas 182, CA); *Lloyds Bank v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA. See further *Slingsby v District Bank Ltd* [1932] 1 KB 544 at 556, CA (disagreeing with the findings as to negligence in *Slingsby v Westminster Bank Ltd* [1931] 1 KB 173, and overruling *Slingsby v Westminster Bank Ltd (No 2)* [1931] 2 KB 583); *Lloyds Bank Ltd v EB Savory & Co* [1933] AC 201 at 232, HL, per Lord Wright; *Marfani & Co Ltd v Midland Bank Ltd* [1968] 2 All ER 573 at 579, [1968] 1 WLR 968 at 972–973, CA, per Diplock LJ; *Thackwell v Barclays Bank plc* [1986] 1 All ER 676. An act or omission held to be a breach of duty at one time may not be a breach of duty at another: see *Marfani & Co Ltd v Midland Bank Ltd* above; *Lipkin Gorman v Karpnale Ltd* [1992] 4 All ER 409, [1989] 1 WLR 1340, CA. See also *Architects of Wine Ltd v Barclays Bank plc* [2007] EWCA Civ 239, [2007] 2 All ER (Comm) 285 (evidence of banking practice in regard to 'sufficient match' between the payee name and the account name should not be rejected out of hand due to hindsight or scepticism about the process leading to the cheques being accepted).

4 *Schioler v Westminster Bank Ltd* [1970] 2 QB 719, [1970] 3 All ER 177. See, however, *Morgan v Lloyds Bank plc* [1998] Lloyd's Rep Bank 73 at 80, CA, where accepting a request for advice

was said to be evidence of an assumption of responsibility. Where a bank assumes a duty to exercise reasonable care in giving advice and complies with that duty, it does not assume a further continuing obligation to keep the advice under review and, if necessary, correct it in the light of supervening events: *Fennoscandia Ltd v Clarke* [1999] 1 All ER (Comm) 365, CA; and see PARA 923.

5 See eg *AL Underwood Ltd v Bank of Liverpool and Martin's* [1924] 1 KB 775, CA (agent paying his principal's cheques into his own account); *Worshipful Co of Carpenters of City of London v British Mutual Banking Co Ltd* [1938] 1 KB 511, [1937] 3 All ER 811, CA (plaintiff's clerk paying into his own account cheques drawn by him on behalf of plaintiffs in favour of tradesmen). In *Motor Traders' Guarantee Corpn Ltd v Midland Bank Ltd* [1937] 4 All ER 90, it was held that the customer's banking history might be such as to put the banker on inquiry. See also *Marquess of Bute v Barclays Bank Ltd* [1955] 1 QB 202, [1954] 3 All ER 365 (order to pay A for B); *Baker v Barclays Bank Ltd* [1955] 2 All ER 571, [1955] 1 WLR 822; *Orbit Mining and Trading Co Ltd v Westminster Bank Ltd* [1963] 1 QB 794, [1962] 3 All ER 565, CA.

6 *Penmount Estates Ltd v National Provincial Bank Ltd* (1945) 173 LT 344. See also *Architects of Wine Ltd v Barclays Bank plc* [2007] EWCA Civ 239, [2007] 2 All ER (Comm) 285.

7 *Motor Traders' Guarantee Corpn v Midland Bank Ltd* [1937] 4 All ER 90; and see *Orbit Mining and Trading Co Ltd v Westminster Bank Ltd* [1963] 1 QB 794, [1962] 3 All ER 565, CA.

8 See COMPANIES vol 7(1) (2004 Reissue) PARA 368 et seq; PARTNERSHIP vol 35 (Reissue) PARA 5.

9 *Smith and Baldwin v Barclays Bank Ltd* (1944) 5 Legal Decisions Affecting Bankers 370.

10 *Morison v London, County and Westminster Bank Ltd* [1914] 3 KB 356, CA; but see *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA; *Bank of Montreal v Dominion Gresham Guarantee and Casualty Co Ltd* [1930] AC 659, PC.

11 *Crumplin v London Joint Stock Bank Ltd* (1913) 109 LT 856. Cf *Ross v London County Westminster and Parr's Bank Ltd* [1919] 1 KB 678.

12 See the Law Reform (Contributory Negligence) Act 1945 s 1; and NEGLIGENCE vol 33 (Reissue) PARA 675 et seq. See also *Lumsden & Co v London Trustee Savings Bank* [1971] 1 Lloyd's Rep 114. In any circumstances in which proof of absence of negligence by a banker would be a defence in proceedings by reason of the Cheques Act 1957 s 4 (see PARA 882), a defence of contributory negligence is also available to the banker notwithstanding the provisions of the Torts (Interference with Goods) Act 1977 s 11(1) (see TORT vol 45(2) (Reissue) PARA 639): Banking Act 1979 s 47.

13 Cheques Act 1957 s 4(3).

14 *Ladbroke & Co v Todd* (1914) 111 LT 43; and see *Taxation Comrs v English, Scottish and Australian Bank Ltd* [1920] AC 683 at 688, PC; *Hampstead Guardians v Barclays Bank Ltd* (1923) 39 TLR 229; *Linklaters v HSBC Bank plc* [2003] EWHC 1113 (Comm), [2003] 2 Lloyd's Rep 545. It is not clear whether the position at common law is affected by the inquiries which a bank is required to make under money laundering regulations (see PARA 831).

15 *Lloyds Bank Ltd v EB Savory & Co* [1933] AC 201, HL. See also the text and note 3.

16 *Crumplin v London Joint Stock Bank Ltd* (1913) 109 LT 856. On the other hand, see *Morison v London, County and Westminster Bank Ltd* [1914] 3 KB 356, CA; *Taxation Comrs v English, Scottish and Australian Bank Ltd* [1920] AC 683, PC.

885. When proceeds available. Where cheques are collected, the banker has a reasonable time, consistent with ordinary book-keeping, in which to pass the proceeds to current account before they are available for drawing against[1]. Where cheques are credited as cash prior to receipt of payment, the customer is entitled to draw on them at once only if there is an agreement, express or implied, to that effect[2]. If a cheque received for collection is dishonoured, or if the banker has to account to the true owner for the proceeds[3], the banker is entitled to debit the customer's account accordingly[4].

1 *Marzetti v Williams* (1830) 1 B & Ad 415.

2 See *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465; *Bevan v National Bank Ltd* (1906) 23 TLR 65; *Jones & Co v Coventry* [1909] 2 KB 1029; *Re Farrow's Bank Ltd* [1923] 1 Ch 41, CA; *AL Underwood Ltd v Bank of Liverpool and Martin's* [1924] 1 KB 775, CA. See also PARA 891 note 2.

3 *Bavins, Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA.

4 *Capital and Counties Bank Ltd v Gordon* [1903] AC 240 at 248, HL, per Lord Lindley; and see *Bavins, Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA.

886. Duties consequent upon dishonour. If a cheque is dishonoured on presentation, the collecting banker may debit the customer's account with the amount[1]. He must give due notice of dishonour[2] either to the parties liable on the cheque, or to his principal, the customer[3]. The usual course is to return the cheque to the customer, and this is deemed sufficient notice of dishonour[4]. Branches of the same bank are held to be separate persons for the transmission of notice of dishonour[5].

Where a cheque drawn by one customer of a bank is paid in for collection by another customer, and there are not sufficient funds to meet it, the banker still has until the next day in which to return it[6].

1 This is the universal custom of bankers, apparently recognised by Lord Lindley in *Capital and Counties Bank Ltd v Gordon* [1903] AC 240 at 248, HL. See also *Re Mills, Bawtree & Co, ex p Stannard* (1893) 10 Morr 193.
2 As to the general rules relating to notice of dishonour see PARA 1524 et seq. See also *Hamilton Finance Co Ltd v Coverley Westray Walbaum and Tosetti Ltd, and Portland Finance Co Ltd* [1969] 1 Lloyd's Rep 53.
3 Bills of Exchange Act 1882 ss 49(13), 73. See also PARAS 1405, 1410, 1526, 1532.
4 *Clode v Bayley* (1843) 12 M & W 51; *Prince v Oriental Bank Corpn* (1878) 3 App Cas 325, PC; *Fielding & Co v Corry* [1898] 1 QB 268, CA. A bank could apparently give notice of dishonour by telegram (see *Fielding & Co v Corry* [1898] 1 QB 268 at 271, CA, per AL Smith LJ); quaere whether this principle now extends to telex, fax etc.
5 See *Clode v Bayley* (1843) 12 M & W 51; *Prince v Oriental Bank Corpn* (1878) 3 App Cas 325, PC; *Fielding & Co v Corry* [1898] 1 QB 268, CA.
6 See *Boyd v Emmerson* (1834) 2 Ad & El 184.

887. Duties and liabilities of banker collecting bills. If a banker undertakes the collection of bills[1] for a customer, he is bound to present them for acceptance and payment in accordance with the provisions of the Bills of Exchange Act 1882[2], and must give notice of dishonour to his customer if they are dishonoured[3]. Where collection is undertaken at the customer's risk, under an agreement relieving the bank from all liability, the banker will be exempt from liability for the negligence of his agent[4]. If the banker employs a sub-agent for collection, he is responsible to the customer for negligence on the part of the sub-agent[5], but has a remedy against the sub-agent.

A banker who collects a bill to which his customer has no title is liable to the true owner in conversion or for money had and received to the face value of the bill, and has no statutory protection whatever[6].

Money received on a bill by a sub-agent is in law received by the banker, apart from any question of account between him and the sub-agent[7]. A banker receiving bills for collection from another banker is agent for the remitting banker, not for that banker's customer; unless, therefore, the banker has distinct notice that the bills are the property of the customer, they may be treated as the property of the remitting banker[8], and are subject to a lien for any balance due from the latter[9].

1 As to the collection of cheques see PARA 881.
2 See further PARA 1400 et seq.
3 Cf *Bank of Van Diemen's Land v Bank of Victoria* (1871) LR 3 PC 526; *Bank of Scotland v Dominion Bank (Toronto)* [1891] AC 592, HL.
4 *Calico Printers' Association Ltd v Barclays Bank Ltd* (1931) 145 LT 51, CA.
5 *Mackersy v Ramsays, Bonars & Co* (1843) 9 Cl & Fin 818; *Prince v Oriental Bank Corpn* (1878) 3 App Cas 325, PC. Cf *Calico Printers' Association Ltd v Barclays Bank Ltd* (1931) 145

LT 51, CA; *Royal Products Ltd v Midland Bank Ltd and Bank of Valletta Ltd* [1981] 2 Lloyd's Rep 194. See further AGENCY vol 1 (2008) PARA 54.

6 *Arnold v Cheque Bank* (1876) 1 CPD 578; *Fine Art Society Ltd v Union Bank of London Ltd* (1886) 17 QBD 705, CA; *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL. As to the need for the claimant to establish title see *Box v Barclays Bank plc* [1998] 18 LS Gaz R 33, [1998] Lloyd's Rep Bank 185. As to the relevance of negligence to an action for money had and received see *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50, [2002] 1 All ER (Comm) 193.

7 *Mackersy v Ramsays, Bonars & Co* (1843) 9 Cl & Fin 818.

8 *Johnson v Robarts* (1875) 10 Ch App 505. Cf *Re Dilworth, ex p Armitstead* (1828) 2 Gl & J 371.

9 *Re Parker, ex p Froggatt* (1843) 3 Mont D & De G 322. Cf *Prince v Oriental Bank Corpn* (1878) 3 App Cas 325 at 335, PC; *Re Burrough, ex p Sargeant* (1810) 1 Rose 153. In *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465 at 471, Bigham J used expressions with regard to cheques to the effect that collection was inconsistent with lien. This is clearly not the case: see PARA 860 note 3.

888. Negotiation of bills by banker. A banker is not justified in negotiating bills, whether indorsed by the customer or not, which have been paid in for collection[1], at any rate unless the state of the customer's account renders it a reasonable thing to do so[2]. Since 'account payee' cheques are no longer transferable in any event[3] issues of this kind will not now arise in practice.

1 *Thompson v Giles* (1824) 2 B & C 422; *Collins v Martin* (1797) 1 Bos & P 648 at 649; *Re Harrison, ex p Barkworth* (1858) 2 De G & J 194.

2 Negotiation in some such circumstances is clearly contemplated in *Thompson v Giles* (1824) 2 B & C 422: see at 429 per Bayley J ('the banker could only be justified in negotiating them when that was rendered a reasonable course by the state of the customer's account'); see also at 432 per Holroyd J. Cf *Re Harrison, ex p Barkworth* (1858) 2 De G & J 194. It is submitted, however, that the right arises only when there has been agreement, express or implied, that the bills may be so dealt with on contingencies which have arisen. The proper course is to hold and collect the bills when due and retain the proceeds by virtue of set-off. See also PARA 864.

3 See the Bills of Exchange Act 1882 s 81A; and PARAS 836, 1500.

889. Defective title of customer. If the customer for whom a banker collects has no title, or a defective title, prima facie the banker is liable to the true owner[1] for conversion or for money had and received to the face value of the cheque[2]; but if in collecting he acts in good faith and without negligence, he may claim statutory protection[3]. There is no difference in this respect between crossed and uncrossed cheques[4]. If the banker cannot establish the statutory protection, the damages may be reduced where the true owner also has been negligent[5]. Where, however, conversion will not lie, as where the collection has been for a customer having a revocable title unrevoked at the time the money was received and handed over, the banker will be protected as an innocent agent who has parted with the money to his principal before notice[6].

1 As to the meaning of 'true owner' see *Union Bank of Australia Ltd v McClintock* [1922] 1 AC 240, PC; *Commercial Banking Co of Sydney Ltd v Mann* [1961] AC 1, [1960] 3 All ER 482, PC. As to the circumstances in which a credit factor has sufficient title to sue see *International Factors Ltd v Rodriguez* [1979] QB 351, [1979] 1 All ER 17, CA.

2 *Fine Art Society Ltd v Union Bank of London Ltd* (1886) 17 QBD 705, CA; *Great Western Rly Co v London and County Banking Co Ltd* [1899] 2 QB 172 (on appeal [1900] 2 QB 464, CA; revsd [1901] AC 414, HL (reversing decisions of Bigham J and the Court of Appeal)); *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL; *Morison v London, County and Westminster Bank Ltd* [1914] 3 KB 356, CA; *AL Underwood Ltd v Bank of Liverpool* [1924] 1 KB 775, CA; *Midland Bank Ltd v Reckitt* [1933] AC 1, HL; *Motor Traders Guarantee Corpn Ltd v Midland Bank Ltd* [1937] 4 All ER 90; *Nu-Stilo Footwear Ltd v Lloyds Bank Ltd* (1956) 7 Legal Decisions Affecting Bankers 121; *Orbit Mining and Trading Co Ltd v Westminster Bank Ltd* [1963] 1 QB 794, [1962] 3 All ER 565, CA; *Marfani & Co Ltd v Midland Bank Ltd* [1968] 2 All ER 573, [1968] 1 WLR 956, CA; *Thackwell v Barclays*

Bank plc [1986] 1 All ER 676; *Linklaters v HSBC Bank plc* [2003] EWHC 1113 (Comm), [2003] 2 Lloyd's Rep 545. As to recovering the face value see *Bavins, Jnr and Sims v London and South Western Bank* [1900] 1 QB 270, CA; *Morison v London, County and Westminster Bank Ltd* above; *Midland Bank Ltd v Reckitt* above.

3 See the Cheques Act 1957 s 4; and PARA 882.

4 As to the crossing of cheques see PARA 880.

5 *Lumsden & Co v London Trustee Savings Bank* [1971] 1 Lloyd's Rep 114. See also the Banking Act 1979 s 47; and PARA 884.

6 *Holland v Russell* (1863) 4 B & S 14; *Tate v Wilts and Dorset Bank* (1899) 1 Legal Decisions Affecting Bankers 286; *Bavins, Jnr and Sims v London and South Western Bank* [1900] 1 QB 270, CA. In *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40 at 68, CA, Sankey LJ doubted whether *Tate v Wilts and Dorset Bank* above was good law since *Morison v London, County and Westminster Bank Ltd* [1914] 3 KB 356, CA.

890. Bank as holder for value. A banker who is asked by a customer to collect a cheque and who, pursuant to a contract express or implied to do so, credits the customer forthwith with the amount of the cheque before the proceeds are received, in fact receives the sum for himself and not for the customer[1]; but he has the same statutory protection in such circumstances as if he had received payment of the cheque for the customer[2]. Where there is no question of a forged indorsement or of the 'not negotiable' or 'account payee' crossings, the banker may, in the case of both crossed and uncrossed cheques, escape liability for conversion if he can establish an independent title as holder in due course[3]. Every holder is deemed to be a holder in due course; but if the instrument is shown to be affected by fraud, a banker dealing with it must show that he gave value in good faith subsequent to the fraud[4]. The status of holder for value may be claimed by the bank in the following circumstances: where cash has been given for the cheque over the counter; where the cheque is paid in in reduction of an overdraft[5]; where the cheque is paid in on the footing that it may be at once drawn against[6], whether in fact it is drawn against or not[7]; or where the cheque is subject to a lien[8]. The mere existence of an overdraft, though the banker's lien in respect of it makes him a holder for value to the extent of that lien[9], would not preclude the statutory protection[10].

Where, by any of the above methods, the banker becomes holder in due course of a cheque paid in, he has all the rights of such a holder, including that of suing the parties to it in his own name[11].

The banker may perhaps also escape liability if he can show that the proceeds of the cheque have in fact reached the hands of the true owner, or been applied for his benefit[12].

Prior to the passing of the Cheques Act 1957, the absence of an indorsement was fatal to any claim to be holding for value or in due course, for the possessor was no holder at all[13] unless the cheque was drawn payable to bearer. The Cheques Act 1957 did away with the necessity for indorsement. A banker who gives value for, or has a lien on, a cheque payable to order which the holder delivers to him for collection without indorsing it has such, if any, rights as he would have had if, upon delivery, the holder had indorsed the cheque in blank[14]. A banker taking such a cheque is the holder of it[15] and, if the requisite conditions are present, a holder for value or in due course. It is not essential that the cheque be credited to the account of the holder[16].

1 This is so because, by crediting the customer with the money before receiving it, the bank has become a holder for value: see *Capital and Counties Bank Ltd v Gordon* [1903] AC 240 at 245, HL, per Lord Macnaghten ('It is impossible, I think, to say that a banker is merely receiving payment for his customer and a mere agent for collection when he receives payment of a cheque of which he is the holder for value'). See also note 10. The conditions for becoming a

holder for value in these circumstances are explained by Atkin LJ in *AL Underwood Ltd v Barclays Bank* [1924] 1 KB 775 at 805–806, CA. Cf *Westminster Bank Ltd v Zang* [1966] AC 182, [1966] 1 All ER 114, HL.

2 See the Cheques Act 1957 s 4; and PARA 882 note 3.

3 See the Bills of Exchange Act 1882 s 29; and *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719. See also PARAS 1485, 1486. As to forged indorsements see PARA 850; as to cheques marked 'not negotiable' see PARA 894; as to cheques crossed 'account payee' see PARA 895; and as to the crossing of cheques generally see PARA 880.

4 Bills of Exchange Act 1882 s 30(2). See PARAS 1478, 1486. See also *Baker v Barclays Bank Ltd* [1955] 2 All ER 571, [1955] 1 WLR 822.

5 *London and County Banking Co v Groome* (1881) 8 QBD 288. Valuable consideration for a bill may be constituted by: (1) any consideration sufficient to support a simple contract; or (2) an antecedent debt or liability: Bills of Exchange Act 1882 s 27(1). See also PARA 1479. Such a debt or liability must be the liability of the promisor or drawer of the bill and not that of a stranger: *Hasan v Willson* [1977] 1 Lloyd's Rep 431.

6 *National Bank v Silke* [1891] 1 QB 435 at 439, CA, per Bowen LJ. It does not appear essential that the cheque should actually be drawn against before clearance: see the cases cited in PARA 891 note 2. In *Westminster Bank Ltd v Zang* [1966] AC 182, [1966] 1 All ER 114, HL, the bank had reserved, on its paying-in slips, the right to refuse payment against uncleared effects, and this was held to preclude there being any implied agreement that the customer could draw against uncleared effects.

7 *Royal Bank of Scotland v Tottenham* [1894] 2 QB 715, CA.

8 See *Re Keever (a bankrupt), ex p Trustee of the Property of the Bankrupt v Midland Bank Ltd* [1967] Ch 182, [1966] 3 All ER 631; and PARAS 860–864.

9 Bills of Exchange Act 1882 s 27(3). See also PARA 1487.

10 *Clarke v London and County Banking Co* [1897] 1 QB 552. The banker might be said to have waived his lien on the cheque, presented it on behalf of the customer, and retained the proceeds by virtue of his right of set-off. As to set-off see PARAS 868, 1012. Cf *Great Western Rly Co v London and County Banking Co Ltd* [1900] 2 QB 464 at 476, CA, per Romer LJ (revsd on appeal [1901] AC 414, HL, but without overruling *Clarke v London and County Banking Co* above). The courts gradually rescued the collecting banker from the apparent conflict indicated in *Capital and Counties Bank Ltd v Gordon* [1903] AC 240 at 245, HL, per Lord Macnaghten (see note 1). It is now accepted that a collecting banker may collect for a customer and plead the protection of the Cheques Act 1957 s 4 (see PARA 882), even though the bank is a holder in due course of the cheque or a holder for value to the extent of his lien: see *Re Keever, ex p Cork v Midland Bank Ltd* [1966] 2 Lloyd's Rep 475; *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719.

As to lien arising by reason of an antecedent debt see *Re Keever (a bankrupt), ex p Trustee of the Property of the Bankrupt v Midland Bank Ltd* [1967] Ch 182, [1966] 3 All ER 631; *Barclays Bank Ltd v Astley Industrial Trust Ltd* above; and PARAS 860–864.

11 *London and County Banking Co v Groome* (1881) 8 QBD 288 (paid in to reduce overdraft); *Re Palmer, ex p Richdale* (1882) 19 ChD 409, CA; *Royal Bank of Scotland v Tottenham* [1894] 2 QB 715, CA (placing at once to credit).

12 *Reid v Rigby & Co* [1894] 2 QB 40; *Bevan v National Bank Ltd* (1906) 23 TLR 65; *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48; *AL Underwood Ltd v Bank of Liverpool and Martin's* [1924] 1 KB 775, CA (where the company's cheques had been paid into the customer's own account). Contrast *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA.

13 See the definition of 'holder' in the Bills of Exchange Act 1882 s 2; and PARA 837 note 5.

14 See the Cheques Act 1957 s 2. An unindorsed cheque which appears to have been paid by the banker on whom it is drawn is evidence of the receipt by the payee of the sum payable by the cheque: s 3(1) (renumbered by SI 1996/2993). For these purposes, a copy of such a cheque is evidence of the cheque if: (1) the copy is made by the banker in whose possession the cheque is after presentment; and (2) it is certified by him to be a true copy of the original: Cheques Act 1957 s 3(2) (added by SI 1996/2993).

15 *Midland Bank Ltd v RV Harris Ltd* [1963] 2 All ER 685, [1963] 1 WLR 1021.

16 *Westminster Bank Ltd v Zang* [1966] AC 182, [1966] 1 All ER 114, HL.

891. Crediting as cash. The mere fact that the banker has credited the cheque in his customer's account before receiving the proceeds does not deprive him of protection against the true owner in the event of his customer having no title, or a defective title, to the cheque[1]. Crediting the customer's account does not of

itself alter the position of the banker from that of agent for collection to that of holder for value. It is a question of fact in each case. In order to constitute the banker a holder for value on this ground there must be a contract, express or implied, that the customer should be entitled to draw against the amount of the cheque before it is cleared[2].

If the banker becomes a holder for value, he may, in the absence of a forged indorsement and unless the cheque is crossed 'not negotiable' or 'account payee', sue upon a cheque in his own name as a holder in due course[3], and may debit the customer if the cheque is dishonoured[4]. He may apparently plead that he is a holder for value as against the person claiming as true owner, except where the indorsement is forged or the cheque is marked 'not negotiable' or 'account payee'.

1 See the Cheques Act 1957 s 4(1); and PARA 882. This provision replaces the combined effect of the Bills of Exchange Act 1882 s 82 and the Bills of Exchange (Crossed Cheques) Act 1906, the latter of which was passed in consequence of the decision in *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL (see note 2; and PARA 890 note 1). It would seem that a banker who was a mere agent for collection was always within the protection of the Bills of Exchange Act 1882 s 82 (repealed): see the judgments of Bigham J in *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465, and Channell J in *Bevan v National Bank Ltd* (1906) 23 TLR 65. It may be that the protection extends to a banker who has become a holder in due course: see *Sutters v Briggs* [1922] 1 AC 1 at 15, HL, per Lord Birkenhead LC; *Re Keever, ex p Cork v Midland Bank Ltd* [1966] 2 Lloyd's Rep 475; *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719. A contract between the banker and the customer that the banker will, before receipt of the proceeds of the cheques, honour cheques of the customer drawn against the cheques paid in is enough to constitute the banker a holder for value: see *AL Underwood Ltd v Bank of Liverpool and Martin's* [1924] 1 KB 775 at 805, CA per Atkin LJ; *Westminster Bank Ltd v Zang* [1966] AC 182, [1966] 1 All ER 114, HL.

2 *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465; *Bevan v National Bank Ltd* (1906) 23 TLR 65; *Jones & Co v Coventry* [1909] 2 KB 1029; *Re Farrow's Bank Ltd* [1923] 1 Ch 41, CA; *AL Underwood Ltd v Bank of Liverpool and Martin's* [1924] 1 KB 775, CA. These cases explain the meaning of the judgment in *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL. A banker who is an agent for collection has been held to be a 'holder' within the meaning of the Gaming Act 1835 s 2 (repealed): *Sutters v Briggs* [1922] 1 AC 1, HL. See also *Westminster Bank Ltd v Zang* [1966] AC 182, [1966] 1 All ER 114, HL; *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719. As to the bank as holder for value see PARA 890.

3 See *Royal Bank of Scotland v Tottenham* [1894] 2 QB 715, CA; *London and County Banking Co v Groome* (1881) 8 QBD 288; *Re Palmer, ex p Richdale* (1882) 19 ChD 409, CA. As to cheques crossed 'not negotiable' see PARA 894; and as to cheques crossed 'account payee' see PARA 895.

4 *Capital and Counties Bank Ltd v Gordon* [1903] AC 240 at 248, HL, per Lord Lindley.

892. Per pro indorsement. A per pro indorsement[1] puts the collecting banker on inquiry as to the authority of the person making it, and disregard of this intimation is a matter for consideration in determining the question of negligence, but not where the instrument so indorsed is paid in for the credit of the claimant's account[2]. Failure to inquire as to the authority of the signatory will not, of itself, constitute negligence[3]. The inquiry must include not only the authority to indorse, but the authority to deal with the indorsed cheque in the manner proposed[4]. The principle is not limited to signatures 'per pro'. Any cheque purporting to be indorsed in a representative capacity stands on the same footing[5]. Where the indorsement is authorised, the banker is not affected by the existence of unfulfilled conditions[6]; and where the indorsement and application are authorised, he is not liable for misapplication of the proceeds in the absence of any ground of suspicion[7].

1 A per pro signature is a signature by procuration (*per procurationem*); it operates as notice that the agent has only a limited authority to sign: Bills of Exchange Act 1882 s 25. See also PARA 1474.

2 *Bissell & Co v Fox Bros & Co* (1885) 53 LT 193, CA; *Alexander v Mackenzie* (1848) 6 CB 766; *Morison v London, County and Westminster Bank Ltd* [1914] 3 KB 356, CA; *Crumplin v London Joint Stock Bank Ltd* (1913) 109 LT 856; *Baker v Barclays Bank Ltd* [1955] 2 All ER 571, [1955] 1 WLR 822; *Universal Guarantee Pty Ltd v National Bank of Australasia Ltd* [1965] 2 All ER 98, [1965] 1 WLR 691, PC.

3 *Morison v London, County and Westminster Bank Ltd* [1914] 3 KB 356, CA; but see the doubts about this decision expressed by Lord Wright in *Lloyds Bank Ltd v EB Savory & Co* [1933] AC 201 at 236, HL.

4 *Gompertz v Cook* (1903) 20 TLR 106.

5 The distinction between 'per pro' and other forms of representative signature as affecting a transferee of the instrument (see *O'Reilly v Richardson* (1865) 17 ICLR 74; *Gerald McDonald & Co v Nash & Co* [1922] WN 272, CA (revsd on other grounds [1924] AC 625, HL); *Alexander Stewart & Son of Dundee Ltd v Westminster Bank Ltd* [1926] WN 271, CA (the judgments in the latter two cases unreported on this point)) does not appear applicable to the case of either collecting or paying banker.

6 *Re Land Credit Co of Ireland, ex p Overend Gurney & Co* (1869) 4 Ch App 460; *Dey v Pullinger Engineering Co* [1921] 1 KB 77.

7 *Bank of Bengal v Macleod* (1849) 7 Moo PCC 35; *Bryant, Powis and Bryant v Quebec Bank* [1893] AC 170, PC; *Hambro v Burnand* [1904] 2 KB 10, CA; *Corporation Agencies Ltd v Home Bank of Canada* [1927] AC 318, PC. Cf, however, *Reckitt v Barnett, Pembroke and Slater* [1929] AC 176, HL, following *John v Dodwell & Co* [1918] AC 563, PC, and distinguishing *Hambro v Burnand* above.

893. Cheques payable to officials. Any indication that the customer is using for his own benefit a document prima facie created for the benefit of, and being the property of, another person with whom he stands in fiduciary relationship should put the banker on inquiry[1]. Under this head would come cheques payable to secretaries of companies or charitable institutions, and the like, in their official capacities, and cheques payable to a partnership and indorsed by one partner paying in to his private account[2]. It would ordinarily be negligent for a banker to take such cheques without inquiry for private account. It would perhaps be negligence to take for the private account of one executor a cheque payable to executors as such[3]. It has been held that the fact that cheques paid in by a stockbroker may possibly represent money of his clients in his hands does not necessarily put a banker on inquiry[4].

It is equally negligence where the information which should put the bank on inquiry is divided between two offices of the same bank, as where a cheque is paid into one branch to the credit of an account at another[5].

1 *Hannan's Lake View Central Ltd v Armstrong & Co* (1900) 16 TLR 236 (where the secretary of a company indorsed a cheque payable to the company and paid it into a private account); *Ross v London County, Westminster and Parr's Bank Ltd* [1919] 1 KB 678; *Souchette Ltd v London County, Westminster and Parr's Bank Ltd* (1920) 36 TLR 195; *AL Underwood Ltd v Bank of Liverpool and Martin's* [1924] 1 KB 775, CA; *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA; *Slingsby v District Bank Ltd* [1932] 1 KB 544, CA; *Motor Traders Guarantee Corpn Ltd v Midland Bank Ltd* [1937] 4 All ER 90; *Marquess of Bute v Barclays Bank Ltd* [1955] 1 QB 202, [1954] 3 All ER 365. Statutory protection is given to banks in relation to solicitors' client accounts: see PARA 826.

2 *Bevan v National Bank Ltd* (1906) 23 TLR 65. The position may be different from that of a partner drawing on a partnership account and paying into a private account: see *Backhouse v Charlton* (1878) 8 ChD 444. The suggestion was repudiated by Mackinnon J in *London and Montrose Shipbuilding and Repairing Co Ltd v Barclays Bank Ltd* (1926) 31 Com Cas 67 (affd 31 Com Cas 182, CA) that a bank was put on inquiry where it collected for the indorsee a cheque payable to a limited company and indorsed over to that indorsee.

3 Cf, however, *Shields v Bank of Ireland* [1901] 1 IR 222 (where the court appears to have seen nothing irregular in an executor paying executorship money into his private account).

4 *Thomson v Clydesdale Bank Ltd* [1893] AC 282, HL.

5 *Lloyds Bank Ltd v EB Savory & Co* [1933] AC 201, HL. However, in *Lipkin Gorman v Karpnale Ltd* [1992] 4 All ER 409, [1989] 1 WLR 1340, CA, the customer's expert witness agreed that if a number of different cashiers handle a particular account, it would be impossible for any one cashier to build up a reliable indication of what the ordinary pattern of transactions on that account was.

894. 'Not negotiable'. It has been suggested that the fact that a cheque is crossed 'not negotiable' of itself puts the banker on inquiry[1]; but it is submitted that such is not the case[2].

Where a cheque is crossed 'not negotiable', the banker cannot avail himself of the defence that he dealt with the cheque pending revocation of a voidable title in the customer[3].

1 *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414 at 422, HL, per Lord Brampton; and see *Morison v London, County and Westminster Bank Ltd* [1914] 3 KB 356 at 373, CA, per Lord Reading CJ. Cf *Bevan v National Bank Ltd* (1906) 23 TLR 65 at 67 per Channell J.

2 These words being merely part of the crossing, negligence in respect of a crossed cheque must be something outside the crossing. This particular crossing being for the protection of the public, the banker is entitled to correlative protection. In *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL, Lord Brampton's view (see note 1) was either not pressed or not adopted. Cf that case in the Court of Appeal sub nom *Gordon v Capital and Counties Bank Ltd* [1902] 1 KB 242 at 275 and *Crumplin v London Joint Stock Bank Ltd* (1913) 109 LT 856 (where a banker taking a 'not negotiable' cheque without making inquiries was held not guilty of negligence). In *Smith and Baldwin v Barclays Bank Ltd* (1944) 5 Legal Decisions Affecting Bankers 370, Stable J held that an instrument in the form of a cheque, crossed 'not negotiable' and over the crossing 'please pay cash', was none the less a crossed cheque, and that the Bills of Exchange Act 1882 s 82 could be pleaded. Section 82 has been repealed and replaced by the Cheques Act 1957 s 4 which applies to uncrossed as well as crossed cheques: see s 4, s 6(3), Schedule (repealed); and PARA 882.

3 As to this defence in the case of other cheques see *Tate v Wilts and Dorset Bank* (1899) 1 Legal Decisions Affecting Bankers 286. However, see the doubt cast upon this case by Sankey LJ in *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40 at 68, CA. As to the exclusion of the defence by non-negotiable crossing cf *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414, HL.

895. 'Account payee'. Where a cheque is crossed and bears across its face the words 'account payee' or 'a/c payee', either with or without the word 'only', the cheque is not transferable, but is only valid as between the parties to it[1]. A banker is not to be treated[2] as having been negligent by reason only of his failure to concern himself with any purported indorsement of a cheque which is not transferable[3].

Where a bank acts as agent for collection for a foreign bank of a cheque crossed 'account payee', the test[4] is whether there was anything in the circumstances which was noticed or which ought to have been noticed; if so, the bank is on inquiry and may not be able to discharge its onus of proving the absence of negligence[5].

1 Bills of Exchange Act 1882 s 81A(1) (s 81A added by the Cheques Act 1992 s 1). As to the Bills of Exchange Act 1882 s 81A see also PARA 1500. As to the position before the enactment of this provision see *National Bank v Silke* [1891] 1 QB 435, CA; *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465; *Bevan v National Bank Ltd* (1906) 23 TLR 65; *Morison v London, County and Westminster Bank Ltd* [1914] 3 KB 356, CA; *House Property Co of London Ltd and Baylis and Durlacher v London, County and Westminster Bank Ltd* (1915) 84 LJKB 1846; *AL Underwood Ltd v Bank of Liverpool and Martin's* [1924] 1 KB 775, CA; *Importers Co v Westminster Bank Ltd* [1927] 2 KB 297, CA; *Universal Guarantee Pty Ltd v National Bank of Australasia Ltd* [1965] 2 All ER 98, [1965] 1 WLR 691, PC; *Honourable Society of the Middle Temple v Lloyds Bank plc* [1999] 1 All ER (Comm) 193.

2 Ie for the purposes of the Bills of Exchange Act 1882 s 80: see PARA 838.
3 Bills of Exchange AQt 1882 s 81A(2) (as added: see note 1). This applies to cheques which are not transferable under s 81A(1) or otherwise: s 81A(2).
4 Ie the test in applying the Cheques Act 1957 s 4: see PARA 882.
5 *Honourable Society of the Middle Temple v Lloyds Bank plc* [1999] 1 All ER (Comm) 193. See also *Linklaters v HSBC Bank plc* [2003] EWHC 1113 (Comm), [2003] 2 Lloyd's Rep 545.

896. Drafts drawn by bank on itself. Drafts payable on demand drawn by a branch office on the head office of the same bank, or vice versa, are not cheques[1], not being drawn by one person on another[2], but the crossed cheques provisions of the Bills of Exchange Act 1882[3] apply to the drafts as if they were cheques[4]. Such a draft is one payable on demand and drawn by or on behalf of a bank upon itself, whether payable at the head office or some other office of the bank[5]. It is presumably negotiable[6]. It is also 'a draft or order drawn upon a banker' within the Stamp Act 1853[7], and, if payable to order on demand, the issuing banker is protected if he pays in good faith, notwithstanding that the indorsement is forged or unauthorised[8]. Payment operates as a discharge[9]. A banker receiving payment in circumstances amounting to conversion is liable to the true owner[10] for the face value unless he can bring himself within the protection of the Cheques Act 1957[11]. A paying bank is protected if it has paid such drafts on a forged indorsement where they are payable to order on demand[12], whether the draft be inland or foreign[13], or if it is paying in good faith and in the ordinary course of business in the absence of an indorsement or on an irregular indorsement[14].

Drafts between two branches or between a branch and head office of the same bank may not be issued payable to bearer on demand[15].

Drafts of the above nature payable to order on demand may be crossed[16]. The protection against forged indorsements, in respect of uncrossed drafts, would generally be sufficient for the paying bank[17].

If such a draft bearing a crossing is presented for payment across the counter, the banker may refuse to pay it[18], but the holder may sue the bank either as drawer of a bill or maker of a promissory note[19].

1 *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL. The decision of Bailhache J in *Ross v London County, Westminster and Parr's Bank Ltd* [1919] 1 KB 678, to the opposite effect, appears to be wrong: see *Slingsby v Westminster Bank Ltd* [1931] 1 KB 173 at 187.
2 See the Bills of Exchange Act 1882 ss 3, 73. Cf PARA 897.
3 Ie the Bills of Exchange Act 1882 ss 76–81; and the Cheques Act 1957 s 4(1) (replacing the Bills of Exchange Act 1882 s 82): see PARAS 880, 882.
4 Cheques Act 1957 s 5 (replacing the Bills of Exchange Act (1882) Amendment Act 1932). The Cheques Act 1957 ss 1, 4 apply to banker's drafts: see ss 1(2)(b), 4(2)(d); note 14; and PARA 882. See also PARA 1411.
5 See the Cheques Act 1957 ss 1(2)(b), 4(2)(d). The meaning of 'banker's draft' was formerly explicitly set out in the Bills of Exchange Act (1882) Amendment Act 1932 (repealed by the Cheques Act 1957 Schedule).
6 See the Bills of Exchange Act 1882 s 5(2). Thus, in the absence of a forged indorsement, an independent title may be set up where circumstances admit.
7 See the Stamp Act 1853 s 19. In *Worshipful Co of Carpenters of the City of London v British Mutual Banking Co Ltd* [1938] 1 KB 511, [1937] 3 All ER 811, CA, it was held that this provision had been implicitly repealed, in the case of cheques, by the Bills of Exchange Act 1882 s 60: see PARA 848 note 1.
8 Stamp Act 1853 s 19; Cheques Act 1957 s 1(2); *Charles v Blackwell* (1877) 2 CPD 151, CA; *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL. It is submitted that payment in good faith is a condition of protection: see *Smith v Union Bank of London* (1875) LR 10 QB 291 at 296 per Blackburn J; affd (1875) 1 QBD 31 at 35, CA. The protection afforded by the Cheques Act 1957 s 1 is additional to that given by the Stamp Act 1853 s 19.
9 Cheques Act 1957 s 1(2); *Halifax Union v Wheelwright* (1875) LR 10 Exch 183.

10 As to the meaning of 'true owner' see PARA 889 note 1.

11 See the Cheques Act 1957 ss 4(1), (2)(d), 5 (replacing the combined effect of the Bills of Exchange Act 1882 s 82 and the Bills of Exchange Act (1882) Amendment Act 1932). See also PARA 1411.

12 Stamp Act 1853 s 19; *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL.

13 It has been contended that the Stamp Act 1853 s 19 can apply only to inland drafts, but the enactment, though in the form of a proviso, is general in its terms. The fact that it is a proviso does not prevent its being a substantive enactment: *Matthiessen v London and County Bank* (1879) 5 CPD 7. The Supreme Court of Judicature (Consolidation) Act 1925 s 139 (repealed), referred to the Bills of Exchange Act 1882 s 60 (which gives a similar protection to bankers in the case of drafts or orders which are bills of exchange or cheques), as relating to 'the indorsement of drafts or orders drawn upon bankers for the payment of money', without specifying inland drafts. In *Brown Brough & Co v National Bank of India Ltd* (1902) 18 TLR 669, Bigham J clearly thought the Stamp Act 1853 s 19 applied to foreign drafts, and his ruling was not dissented from by the House of Lords in *Capital and Counties Bank Ltd v Gordon* [1903] AC 240.

14 See the Cheques Act 1957 s 1(2), by which, where a banker, in good faith and in the ordinary course of business, pays a draft payable on demand drawn by him upon himself, whether payable at the head office or some other office of his bank, he does not, in doing so, incur any liability by reason only of the absence of or irregularity in indorsement, and the payment discharges the instrument. See also note 8.

15 Bank Charter Act 1844 s 11 (amended by the Statute Law Revision Act 1891; and the Currency and Bank Notes Act 1928 Schedule).

16 See the text and notes 3–4.

17 See the text and note 8.

18 See PARA 839.

19 Bills of Exchange Act 1882 s 5(2); *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL.

897. Drafts drawn by one bank on another. Drafts drawn by one bank on another are normally merely cheques, and may in all respects be dealt with as such[1].

1 See PARA 879 et seq. As to drafts drawn by a bank on itself see PARA 896.

898. Orders for payment. An order for payment drawn by a customer on his banker payable conditionally[1] on the payee's signing a special attached receipt is not a cheque[2]; nor is an instrument in the form of a cheque which is drawn in favour of 'cash' or 'wages' or other impersonal payee[3].

Such documents are not negotiable[4]; but they are documents issued by a customer which, though not bills of exchange, are intended to enable a person to obtain payment from the banker of the sum mentioned in them[5].

The crossing on such documents has generally been regarded as affording both collecting and paying bankers the same protection as the crossing on cheques, and as imposing the same duties on the latter[6]. If the collecting banker has received the amount payable under any of such documents in circumstances constituting conversion of the document, he is liable to the true owner for the face value[7], unless he can bring himself within the protection of the Cheques Act 1957[8].

It would seem not to be regarded as negligence in a banker to take these documents for collection for a party other than the named payee[9]. Beyond this, their transferability would seem doubtful. Nor is a banker negligent in collecting by reason only of his failure to concern himself with absence of, or irregularity in, indorsement of an instrument[10]. As these documents are capable of being effectively crossed[11], the banker paying in good faith and without negligence, and in accordance with the crossing, would be protected[12].

Where a banker in good faith and in the ordinary course of business pays a document issued by his customer which, though not a bill of exchange, is intended to enable a person to obtain payment from him of the sum mentioned in the document, he does not, in doing so, incur any liability by reason only of the absence of, or irregularity in, indorsement, and the payment discharges the instrument[13]. Forgery of indorsement is probably irrelevant except in cases in which the banker has demanded an indorsement as a pre-requisite to payment[14]. The signature to a receipt is probably not an indorsement and, where the receipt is not signed by the payee, the banker has paid away his customer's money without authority, and cannot debit him.

Where documents are made payable by the banker[15] conditionally on presentation within a limited time[16], it is a matter of doubt whether the banker is protected if he pays them on a forged indorsement.

It is usual for bankers to take indemnities from customers with regard to paying these documents, which, not being cheques, they are under no primary obligation to honour.

1 To disqualify the instrument from being a cheque, the condition must be a condition between drawer and banker, and not merely between drawer and payee: *Roberts & Co v Marsh* [1915] 1 KB 42, CA. Cf PARA 899.

2 *Bavins, Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA; *Capital and Counties Bank Ltd v Gordon* [1903] AC 240 at 252, HL, per Lord Lindley.

3 See *North and South Insurance Corpn Ltd v National Provincial Bank Ltd* [1936] 1 KB 328 (in which the order was construed as payable to bearer); *Cole v Milsome* [1951] 1 All ER 311; *Orbit Mining and Trading Co Ltd v Westminster Bank Ltd* [1963] 1 QB 794, [1962] 3 All ER 565, CA.

4 See the Cheques Act 1957 s 6(2); *Gordon v London City and Midland Bank Ltd* [1902] 1 KB 242 at 275, CA, per Collins MR (affd sub nom *London City and Midland Bank Ltd v Gordon* [1903] AC 240, HL). See also the Revenue Act 1883 s 17 proviso (repealed by the Cheques Act 1957 Schedule), which treated these instruments as being, and, when crossed, remaining, non-negotiable.

5 See the Cheques Act 1957 ss 1(2)(a), 4(2)(b). By the Revenue Act 1883 s 17 (repealed), Her Majesty's Paymaster General and the Queen's and Lord Treasurer's Remembrancer were deemed to be bankers, and the public officers drawing on them were deemed to be customers: see now the Cheques Act 1957 s 4(2)(c); and PARA 882. See also PARA 1411.

6 The crossed cheques provisions of the Bills of Exchange Act 1882 apply to such documents by virtue of the Cheques Act 1957 s 5 (replacing the Revenue Act 1883 s 17). The provisions so applied are the Bills of Exchange Act 1882 ss 76–81 and the Cheques Act 1957 s 4(1) (replacing the Bills of Exchange Act 1882 s 82): see PARA 880. See also *Bavins, Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA; *Gordon v London, City and Midland Bank Ltd* [1902] 1 KB 242, CA (on appeal sub nom *London City and Midland Bank Ltd v Gordon* [1903] AC 240 at 252, HL, where certain expressions used by Lord Lindley, and concurred in by the other law lords, seemed to imply that the Revenue Act 1883 s 17 did not apply to these documents; but as the form of such documents was clearly within that provision, it can only be supposed that Lord Lindley meant that, though the documents were effectively crossed by virtue of s 17 and the crossed cheque provisions incorporated by it, the protection of the Bills of Exchange Act 1882 s 82 was lost by reason of the document having been credited as cash). The Cheques Act 1957 ss 1, 4 protect paying as well as collecting bankers: see ss 1(2)(a), 4(2)(b), (c); and PARA 882.

7 *Bavins, Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA; *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL.

8 See the Cheques Act 1957 s 4(1), (2)(b), (c) (replacing the combined effect of the Bills of Exchange Act 1882 s 82 and the Revenue Act 1883 s 17); and PARA 882.

9 Both in *Bavins, Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA, and in *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL, the documents were taken from a third party, and no objection on this ground appears in the arguments or judgments. So far as a collecting banker is concerned there is no difference, in effect, between a cheque and the other instruments referred to in the Cheques Act 1957 s 4(2): see PARA 882.

10 Cheques Act 1957 s 4(3).

11 See note 6.
12 Bills of Exchange Act 1882 s 80 (amended by the Cheques Act 1992 s 2). See PARA 838.
13 Cheques Act 1957 s 1(2).
14 In *Thairlwall v Great Northern Rly Co* [1910] 2 KB 509, a statement that the instrument would not be honoured after three months from date of issue unless specially indorsed by the secretary of the defendant company was held not to make the order conditional so as to preclude it from being a cheque.
15 See note 1.
16 See note 14.

899. Cheques with receipt attached. To conform with the definition in the Bills of Exchange Act 1882[1], a cheque which a banker is bound to honour, must be an unconditional order in writing[2]. By a narrow but appreciable distinction, however, a condition, such as the signing of a receipt, imposed by the instrument on the holder and not addressed to the banker, that is, the drawee, does not destroy its character as a cheque[3]. Nevertheless a banker would probably refuse to pay such a document unless the receipt was duly signed[4]. Signature to the receipt is probably not an indorsement[5], and it would seem that such signature would not give the banker protection under the Bills of Exchange Act 1882[6] if it proved to be a forgery. In other respects such instruments may be dealt with in the same manner as cheques.

1 See the Bills of Exchange Act 1882 ss 3, 73. See also PARAS 1405, 1410.
2 *Bavins, Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA; cf PARA 898 text and notes 2, 14.
3 See *Nathan v Ogdens Ltd* (1905) 93 LT 553 (affd 94 LT 126, CA); *Roberts & Co v Marsh* [1915] 1 KB 42, CA. As to the position where the signing of the receipt is made a condition of payment addressed to a banker cf PARA 898 text and note 2.
4 Cf PARA 898.
5 Cf PARA 898.
6 Ie under the Bills of Exchange Act 1882 s 60: see PARA 836.

900. Dividend warrants. A banker's duties, liabilities and protection with regard to dividend warrants, which are strictly in cheque form, are the same as they are with regard to other cheques. For example, dividend warrants, payment of which is made conditional on signature and production of an annexed receipt or on presentation within a specified period[1], are not cheques[2], but they are treated in the same category as cheques vis-à-vis the banker paying or collecting if they are documents issued by a customer which, though not bills of exchange, are intended to enable a person to obtain payment from that banker of the sum mentioned in them[3].

The rules as to presentation and notice of dishonour applicable to cheques are not binding in the case of those dividend warrants which are not cheques. It is, however, the duty of the banker to present them in reasonable time and return them to the customer if not paid on presentation.

The crossed cheques provisions of the Bills of Exchange Act 1882[4] apply to dividend warrants[5], if they are within the category laid down in the Cheques Act 1957[6].

A forged indorsement or a 'not negotiable' or 'account payee' crossing precludes the banker from setting up an independent title[7]. Whether he may do so in other cases, or is justified in taking dividend warrants for collection from anyone other than the payee, depends on the negotiability of a dividend warrant, which has never been judicially recognised[8]. Where the amount of a dividend warrant has been received in circumstances constituting conversion of the

document, the damages recoverable by the true owner would be the face value, independent of any question of negotiability[9].

1 Cf *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL; *Thairlwall v Great Northern Rly Co* [1910] 2 KB 509; *Roberts & Co v Marsh* [1915] 1 KB 42, CA; and see PARA 898. An instrument is not a bill or cheque unless it is unconditional: see the Bills of Exchange Act 1882 ss 3, 73.
2 See PARA 898 text and note 2.
3 See the Cheques Act 1957 ss 1(2)(a), 4(2)(b), (c); and PARAS 882, 898.
4 Ie the Bills of Exchange Act 1882 ss 76–81; and the Cheques Act 1957 s 4(1) (replacing the Bills of Exchange Act 1882 s 82): see PARA 880.
5 Bills of Exchange Act 1882 s 95. See PARA 1619.
6 See the Cheques Act 1957 s 5. See also PARA 1411. This applies to instruments in the categories laid down in s 4(2)(b), (c); but quaere where warrants are credited as cash. See PARA 882 note 3.
7 As to forged indorsements see PARA 851. As to 'not negotiable' crossing see PARA 894; and as to 'account payee' crossing see PARA 895.
8 Cf *Partridge v Bank of England* (1846) 9 QB 396 at 424 per Tindal CJ, doubted in *Goodwin v Robarts* (1875) LR 10 Exch 337 at 354 (on appeal (1876) 1 App Cas 476, HL). Possibly a custom of merchants could be proved at the present day making dividend warrants negotiable if payable to bearer or order. The Bills of Exchange Act 1882 s 97(3)(d) (which saves the validity of any usage relating to dividend warrants or their indorsement) is not sufficient to confer negotiability. See also PARA 1619.
9 Cf *Bavins, Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA.

901. Interest warrants. The crossed cheques provisions of the Bills of Exchange Act 1882[1] were held to apply to warrants for the payment of interest on 3½ per cent War Loan[2]. The decision goes no further, and ordinary interest warrants (for example, for the payment of interest on debenture stock) drawn by a customer on a banker are either cheques or orders on a banker issued by the customer[3].

1 Ie the Bills of Exchange Act 1882 ss 76–81 and the Cheques Act 1957 s 4(1) (replacing the Bills of Exchange Act 1882 s 82): see PARA 880. The crossed cheques provisions apply to interest warrants by virtue of the Cheques Act 1957 s 5. See also notes 2–3.
2 See Bills of Exchange Act 1882 s 95 (which extends the crossed cheques provisions to warrants for the payment of 'dividend'). See also *Slingsby v Westminster Bank Ltd* [1931] 1 KB 173, in which it was held that a warrant for interest on 5 per cent War Stock 1929–47 was a dividend warrant within the meaning of the Bills of Exchange Act 1882 s 95 and also a cheque. See also PARA 1619. The stock was regulated by special legislation whereby payments on this security were designated 'dividends'. Warrants paying savings bank annuities sent by post are deemed to be cheques within the meaning of any enactment relating to cheques: see the Government Annuities Act 1929 s 59(1), (2). Certain regulations expressly provide that the crossed cheques provisions apply to warrants issued under the regulations as if the warrants were cheques: see eg the Savings Certificates Regulations 1991, SI 1991/1031, reg 7(2); and the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 8(2).
3 As to orders on bankers issued by the customer see the Cheques Act 1957 ss 1(2)(a), 4(2)(b); and PARAS 882, 898. Whether the provisions of the Bills of Exchange Act 1882 ss 95, 97(3)(d) (see PARA 900) extend to warrants for the payment of fixed interest or are confined to dividend warrants strictly so termed is uncertain. In practice, interest warrants, whether cheques or not, are often treated in the same manner as dividend warrants; and in any event, both paying and collecting bankers are protected by the Cheques Act 1957 ss 1(2)(a), 4(2)(b): see PARA 882.

902. Travellers' cheques. Travellers' cheques, used to enable travellers to obtain money abroad, take many forms; in appearance they resemble cheques, but they may not have the essential attributes of a cheque. Some are drawn by the issuing banker, others by the person to whom they are issued, the place for the name of the payee in most cases being left blank. The grantee is required to sign them as soon as they are issued to him, and it is a condition of payment by the payer who fills in his own name as payee, that the grantee signs again in the

presence of the payer so that the latter may compare the grantee's signature. The legal nature of any type of travellers' cheques has not been considered in any reported case in England[1].

Where a contract contains an express term obliging a bank to refund the value of lost or stolen travellers' cheques, neither the fact of recklessness or of want of care by the purchaser, nor the bank's belief in their existence, constitutes grounds for refusing to make the refunds[2].

1 In *Emerson v American Express Co* 90 A 2d 236 (1950), the Municipal Court of Appeals for the District of Columbia held that, when countersigned, travellers' cheques of the defendant company were fully negotiable; that the lack of a named payee did not render them incomplete in the hands of a subsequent holder for value; and that the beneficiary in countersigning other than in the presence of the paying agents was in breach of his contract with the issuers.

2 *El Awadi v Bank of Credit and Commerce International SA* [1990] 1 QB 606, [1989] 1 All ER 242. Cf *Braithwaite v Thomas Cook Travellers Cheques Ltd* [1989] QB 553, [1989] 1 All ER 235.

903. Cheque guarantee cards. A cheque guarantee card is a card issued by a bank to its customer for use in conjunction with cheques drawn by him. The issuing bank undertakes[1] to the payee that payment of the drawer's cheques will be honoured subject to the fulfilment of specified conditions.

The conditions are normally that:

(1) the cheque is in settlement of one transaction only not exceeding the specified limit;

(2) the cheque is drawn on one of the bank's forms bearing the code number appearing on the cheque guarantee card;

(3) the cheque is dated before the date on which the cheque guarantee card expires;

(4) the cheque is signed in the presence of the payee, the drawer's signature corresponding with that on the cheque guarantee card;

(5) the number of the card is written on the back of the drawer's cheque by the payee.

On issuing the card, the issuing bank stipulates that the customer may not countermand payment of a cheque drawn in conjunction with the card[2].

1 'By exhibiting to the payee a cheque card containing the undertaking by the bank to honour cheques drawn in compliance with the conditions indorsed on the back, and drawing the cheque accordingly, the drawer represents to the payee that he has actual authority from the bank to make a contract with the payee on the bank's behalf that it will honour the cheque on presentment for payment': *Metropolitan Police Comr v Charles* [1977] AC 177 at 182, [1977] 3 All ER 112 at 114, HL, per Lord Diplock. The description 'cheque guarantee card' is a misnomer as the obligation assumed by the bank is not a secondary obligation dependent on default by the customer tendering the card but a separate and independent obligation: *First Sport Ltd v Barclays Bank plc* [1993] 3 All ER 789 at 795, [1993] 1 WLR 1229 at 1236, CA, per Evans LJ.

2 'The obligation undertaken by the bank to the supplier, which it enters into through the agency of its customer when he uses the bank card, is not to dishonour the cheque on presentation for want of funds in the account, so that it is obliged if necessary to advance moneys to the customer to meet it': *Re Charge Card Services Ltd* [1987] Ch 150 at 166, [1986] 3 All ER 289 at 301 per Millett J; on appeal: [1989] Ch 497, [1988] 3 All ER 702, CA. See also *R v Kassim* [1992] 1 AC 9, [1991] 3 All ER 713, HL.

904. Credit cards and charge cards. The normal features of credit card and charge card transactions[1] are:

(1) there is an underlying contractual scheme which pre-dates the individual contracts of sale whereby the supplier agrees to accept the credit card in

payment of the price of the goods bought, and the purchaser is entitled to use the credit card to commit the card company to pay the supplier;

(2) the underlying scheme is established by two separate contracts, namely: (a) a contract between the card company and the seller, whereby the seller agrees to accept payment by use of the card from anyone holding the card and the card company agrees to pay to the supplier the price of the goods supplied less a discount; and (b) a contract between the card company and the card holder, whereby the card holder is provided with a card enabling him to pay the price by its use in return for agreeing to pay the card company the full amount of the price charged by the supplier;

(3) the underlying scheme is designed primarily for use in over-the-counter sales, that is to say sales where the only connection between a particular seller and a particular buyer is one sale;

(4) the actual sale and purchase of the commodity is the subject of a third bilateral contract made between the buyer and seller; in the majority of cases this sale contract will be an oral, over-the-counter sale, and tendering and acceptance of the credit card in payment is made on the tacit assumption that the legal consequences will be regulated by the separate underlying contractual obligations between the seller and the card company and the buyer and the card company;

(5) the card does not carry the address of the card holder and the supplier will have no record of his address; therefore the seller has no obvious means of tracing the purchaser save through the card company[2].

Credit cards have come to be regarded as substitutes for cash; they are frequently referred to as 'plastic money'[3].

A card scheme provides advantages to both seller and buyer: the seller is able to attract custom by agreeing to accept credit card payment; and the buyer, by using the card, minimises the need to carry cash and obtains at least a period of free credit during the period until payment to the card company is due[4].

1 The practical difference between a credit card and a charge card is that a credit card agreement normally entitles the card holder to extended credit, subject to repayment of a minimum amount specified in the statement of account, whereas a charge card agreement normally requires the card holder to pay the total amount within a specified period. As to the prohibition of restrictive agreements in the supply of credit card services see the Credit Cards (Merchant Acquisition) Order 1990, SI 1990/2158 (amended by SI 2000/2031); and the Credit Cards (Price Discrimination) Order 1990, SI 1990/2159 (amended by SI 2000/2031). See also the Price Indications (Method of Payment) Regulations 1991, SI 1991/199, which set out requirements for the indication of prices of certain goods where different prices are charged for payment by different methods.

2 *Re Charge Card Services Ltd* [1989] Ch 497, [1988] 3 All ER 702, CA.

3 *Re Charge Card Services Ltd* [1989] Ch 497 at 509, [1988] 3 All ER 702 at 705, CA, per Sir Nicolas Browne-Wilkinson V-C.

4 *Re Charge Card Services Ltd* [1989] Ch 497 at 509, [1988] 3 All ER 702 at 705, CA, per Sir Nicolas Browne-Wilkinson V-C.

905. Payment by credit card or charge card. There is no general principle of law that, whenever a method of payment is adopted which involves a risk of non-payment by a third party, there is a presumption that the acceptance of payment through a third party is conditional upon the third party making the payment, and that, if he does not pay, the original obligation of the purchaser remains[1].

Whether the seller's acceptance of payment by a credit card or charge card is conditional or absolute payment depends on the terms of the agreement between

the parties, and, in the absence of express agreement, the correct approach in such a case is that the court should seek to infer from the parties' conduct and the surrounding circumstances what is the fair term to imply[2].

The following factors, if present, point clearly to a conclusion that, subject to any special features of a particular card scheme, payment by card is unconditional payment of the price:

(1) the card holder's knowledge that, if he signs a voucher, the seller will be entitled to receive payment which would discharge his liability for the price;

(2) the card holder's knowledge that the card-issuing company will deduct commission in paying the seller;

(3) the seller's knowledge that, on signing the voucher, the card holder renders himself liable to the card company to pay to it the price;

(4) the underlying assumption of the buyer and seller in entering into their respective contracts with the card company before entering into the contract of sale that, on completion of a sale, the parties' future rights and obligations will be regulated by those underlying contracts;

(5) the fact that the seller has no record of the address of the customer and no ready means of tracing him[3].

The following additional factors, if present, point the same way:

(a) the existence of a guarantee of the card company's obligations to the seller;

(b) the fact, if neither the seller nor the buyer envisages that the buyer/card holder will have to pay twice (once to the seller and once to the card company), that, under the terms of the agreement between the card holder and the card company, the card holder may be required to pay the card company even though the card company has not paid the seller[4].

A conclusion that payment by card is absolute accords with the popular perception of the role of credit cards in modern retail trade as 'plastic money'[5].

Whether payment by the use of a cheque guarantee card[6] is to be analysed in the same way as payment by credit card or charge card is undecided[7].

1 *Re Charge Card Services Ltd* [1989] Ch 497 at 511–512, [1988] 3 All ER 702 at 707, CA, per Sir Nicolas Browne-Wilkinson V-C.

2 For these purposes, there is no relevant distinction between credit cards and charge cards: *Re Charge Card Services Ltd* [1989] Ch 497 at 512, [1988] 3 All ER 702 at 707–708, CA, per Sir Nicolas Browne-Wilkinson V-C. See further *Customs and Excise Comrs v Diners Club Ltd* [1989] 2 All ER 385, [1989] 1 WLR 1196, CA.

3 *Re Charge Card Services Ltd* [1989] Ch 497 at 513 [1988] 3 All ER 702 at 708, CA, per Sir Nicolas Browne-Wilkinson V-C.

4 *Re Charge Card Services Ltd* [1989] Ch 497 at 514, [1988] 3 All ER 702 at 708–709, CA, per Sir Nicolas Browne-Wilkinson V-C.

5 *Re Charge Card Services Ltd* [1989] Ch 497 at 517, [1988] 3 All ER 702 at 711, CA, per Sir Nicolas Browne-Wilkinson V-C.

6 Where a buyer uses a cheque guarantee card, the obligation undertaken by the bank to the supplier, which it enters into through the agency of its customer when he uses the card, is not to dishonour the cheque, if drawn for a sum less than a specified amount, for want of funds in the account: see *Re Charge Card Services Ltd* [1987] Ch 150 at 166, [1986] 3 All ER 289 at 301; on appeal [1989] Ch 497, [1988] 3 All ER 702, CA. See also note 7.

7 In *Re Charge Card Services Ltd* [1987] Ch 150 at 166, [1986] 3 All ER 289 at 301–302, Millett J stated obiter that the presumption that the giving of a cheque operates as a conditional payment only would not be displaced merely by the fact that the cheque is accompanied by a bank card; on appeal [1989] Ch 497 at 517, [1988] 3 All ER 702 at 711, CA, per Sir Nicolas Browne-Wilkinson V-C, this point was expressly left open.

(viii) Electronic Funds Transfer

906. Electronic funds transfer. Payment by electronic funds transfer (EFT) is now very common, although there is no universally accepted legal definition[1]. There are two categories of EFT systems: (1) non-consumer activated systems[2]; and (2) consumer activated systems[3]. The main consumer activated systems are automated teller machines (ATMs) and electronic funds transfer at point of sale (EFTPOS). A customer may use an ATM to obtain cash, check an account balance, request a statement or make a deposit[4]. EFTPOS allows payment to be made for goods and services by the electronic transfer of funds from the customer's account to the supplier's account[5].

There is no statutory regime in the United Kingdom governing the electronic transfer of funds and instead the general law of contract and agency must be invoked[6]. Banks and building societies have a code of conduct set out in the *Banking Code* (1 March 2005) and the *Business Banking Code* (1 March 2005), covering matters such as the issue of cards and personal identification numbers, security of cards, lost or stolen cards and customer complaints; but compliance with this is voluntary[7].

Cross-border credit transfers within the European Economic Area are, subject to various conditions, governed by regulations[8]. The provision of cross-border payment services will be subjected to further regulation when the EU Payment Services Directive is implemented towards the end of 2009[9].

1 In the United States, the Electronic Fund Transfer Act 1978 defines EFT as 'any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorise a financial institution to debit or credit an account'. Cf the United Nations Commission on International Trade Law (UNCITRAL) which defines EFT as 'a funds transfer in which one or more of the steps in the process that were previously done by paper-based techniques are now done by electronic techniques': see UNCITRAL, *Legal Guide on Electronic Funds Transfers* (1987, United Nations, New York). For a full discussion of electronic funds transfer see Paget's Law of Banking (12th Edn, 2003) ch 17. In particular see *R v Preddy* [1996] AC 815, [1996] 3 All ER 481, HL; *R v Williams* [2001] 1 Cr App Rep 362, [2001] Crim LR 253, [2000] All ER (D) 1393, CA.

2 Non-consumer activated systems are those in which the bank selects and activates the system, eg the Clearing House Automated Payments System (CHAPS).

3 Consumer activated systems are those in which the consumer selects and activates the system, eg cash-dispensers, automated teller machines, tele-shopping and home banking.

4 To obtain access to an ATM, the bank's customer is issued with a plastic card with a magnetic strip, together with a four-digit personal identification number (PIN). The card must be inserted into the ATM, and the PIN must be entered. Once the PIN has been verified, the customer may select the function he requires and the card is returned to him on completion.

5 In the case of a retail sale, the customer presents the seller with a plastic EFTPOS debit card which has information relating to the customer's bank account encoded in a magnetic stripe on the back. The usual practice has been for the seller to swipe the card through a card reader and enter the amount. A voucher is issued for the customer to sign and the seller checks that this corresponds with the signature on the back of the card. The signature acts as the customer's mandate to his bank to debit his account and credit the seller's account and a message to this effect is transmitted via an EFTPOS network to the customer's bank and the seller's bank. A new system, known as 'chip and PIN', has been introduced, which enables the customer to enter his PIN number onto a pad instead of signing a voucher. As to the use of credit cards see PARA 904.

6 See AGENCY; CONTRACT. Principles of tort, restitution, property law, equity and criminal law may also be relevant.

7 The banks and building societies must also conform to the requirements of the Consumer Credit Act 1974, the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083: see CONSUMER CREDIT; CONTRACT vol 9(1) (Reissue) PARA 820 et seq. As to the extent to which the courts may take cognisance of the Banking codes see *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL. At the date at which

this volume states the law, there is website setting out the Banking Code and supplying other relevant information: see www.bankingcode.org.uk.

8 See the Cross-Border Credit Transfers Regulations 1999, SI 1999/1876 (amended by SI 2000/2952, SI 2002/765, SI 2003/2066, SI 2003/3075; SI 2007/108). The regulations lay down certain standard conditions for cross-border credit transfers not exceeding 50,000 euros or its equivalent in another currency of a state within the EEA. A cross-border credit transfer is defined as a transaction or series of transactions carried out as a result of instructions given directly to an institution in one EEA state, the purpose of which is to make available to the ultimate recipient of the funds transferred at an institution in another EEA state an amount in euros or another currency of an EEA state. The regulations (1) set out the minimum information which must be made available to the actual and prospective customers of an institution which participates in the carrying out of cross-border credit transfers, and which must be given by an institution to customers on whose behalf it has carried out such a transfer; (2) enable a customer to seek undertakings regarding the time it will take to carry out a transfer and the charges to be made in connection therewith; (3) lay down maximum periods for the carrying out of a transfer, where there is no time limit agreed between a customer and the institution, and for payment of compensation where a transfer is completed late, (4) make provision regarding charging for transfers; and (5) make provision for the recovery of sums deducted from the amount transferred in contravention of the customer's instructions.

9 The proposed directive introduces the concept of a 'payment institution', which will be authorised to participate in the payments business but will not be permitted to accept deposits: see further PARA 1399.

(ix) Bankers' Books; Production in Evidence, Inspection, etc

907. Bankers' Books Evidence Act 1879. The statutory privileges offered by the Bankers' Books Evidence Act 1879[1] extend to banks and bankers within the meaning of the Act, that is: (1) deposit takers[2]; and (2) the National Savings Bank[3]. The Bankers' Books Evidence Act 1879 does not apply to the Bank of England[4], except in so far as it is applied to the Bank for particular purposes.

The provisions of the Bankers' Books Evidence Act 1879 apply for the purpose of proving any entry in the stock registers as if the Registrar were a bank and a banker[5], and as if such entry or, where the information recorded in the register is not in readable form and is later transcribed into readable form, the transcribed version of such an entry, were an entry in a banker's book[6].

1 See PARA 908.

2 'Deposit taker' means: (1) a person who has permission under the Financial Services and Markets Act 2000 Pt IV (ss 40–55) (see PARA 348 et seq) to accept deposits; or (2) an EEA firm of the kind mentioned in Sch 3 para 5(b) which has permission under Sch 3 para 15 (as a result of qualifying for authorisation under Sch 3 para 12(1)) to accept deposits or other repayable funds from the public (see PARA 315): Bankers' Books Evidence Act 1879 s 9(1A) (s 9(1A)–(1C) added by SI 2001/3649). A person is not a deposit-taker if he has permission to accept deposits only for the purpose of carrying on another regulated activity in accordance with that permission: Bankers' Books Evidence Act 1879 s 9(1B) (as so added). The provisions of s 9(1A), (1B) must be read with the Financial Services and Markets Act 2000 s 22, any relevant order under that provision, and Sch 2 (see PARA 84 et seq): Bankers' Books Evidence Act 1879 s 9(1C) (as so added).

3 Bankers' Books Evidence Act 1879 s 9(1) (substituted by the Banking Act 1979 Sch 6 Pt I para 1; and amended by the Trustee Savings Banks Act 1985 Sch 4; SI 2001/1149; and SI 2001/3649). As to the National Savings Bank see PARA 810 et seq.

4 *R v Lewis* [1955] Crim LR 374, Bow St Magistrates' Ct.

5 See heads (1) and (2) in the text.

6 Government Stock Regulations 2004, SI 2004/1611, reg 7(7). See PARA 807. Expressions in the Bankers' Books Evidence Act 1879 relating to 'bankers' books' include ledgers, day books, cash books, account books and other records used in the ordinary business of the bank, whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism: s 9(2) (substituted by the Banking Act 1979 Sch 6 Pt I para 1). The words 'other records' in the Bankers' Books Evidence Act 1879 must be construed ejusdem generis with 'ledgers, day books, cash books and account books'; assorted

bundles of cheques and paying-in slips are not 'other records' within the meaning of the Act: *Williams v Williams* [1988] QB 161 at 168, [1987] 3 All ER 257 at 261, CA, per Sir John Donaldson MR. The expression 'used in the ordinary business' does not mean that the books must be in use every day; it is sufficient if the banker keeps a book to refer to if necessary: *Idiots' Asylum v Handysides* (1906) 22 TLR 573, CA. As to the inspection of documents not forming part of a banker's books see *Re Howglen Ltd* [2001] 1 All ER 376.

908. Copies of entries as evidence. In all legal proceedings[1], a copy of any entry in a banker's books[2] is to be received as prima facie evidence of such entry[3], and of the matters, transactions and accounts recorded in it[4]. A copy of an entry in a banker's books may not, however, be so received in evidence unless it is first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank[5], or of the successors to the bank in whose custody or control it was when the entry was made[6]; and such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits[7]. It must also be proved that the copy has been examined with the original entry and is correct; and such proof must be given by some person who has examined the copy with the original entry, and may likewise be given either orally or by an affidavit[8].

Although cheques and paying-in slips constitute part of a bank's records used in the ordinary course of its business, the adding of an individual cheque or paying-in slip to a bundle of cheques or paying-in slips does not constitute the making of an entry in those records[9]. A microfilm recording the payment of cheques by photographing the name of the payee appears to be an entry in a banker's books within the meaning of the Bankers' Books Evidence Act 1879[10].

A letter from a banker to his customer is not a banker's book[11].

1 'Legal proceeding' for this purpose means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes: (1) an arbitration (see generally ARBITRATION); (2) an application to, or an inquiry or other proceeding before, the Solicitors Disciplinary Tribunal (see SOLICITORS vol 44(1) (Reissue) PARA 421); and (3) an investigation, consideration or determination of a complaint by a member of the panel of ombudsmen for the purposes of the ombudsman scheme within the meaning of the Financial Services and Markets Act 2000 (see PARA 575 et seq): Bankers' Books Evidence Act 1879 s 10 (definition amended by SI 2001/3649). As to the application of the Bankers' Books Evidence Act 1879 in service disciplinary proceedings and standing civilian courts see ARMED FORCES vol 2(2) (Reissue) PARA 487.

2 As to the meaning of 'bankers' books' see PARA 907 note 6.

3 Entries in bankers' books under the Bankers' Books Evidence Act 1879 are prima facie evidence against the world: *London and Westminster Bank v Button* (1907) 51 Sol Jo 466. The Bankers' Books Evidence Act 1879 makes copies of such entries evidence against anyone; thus the entries in a defendant's bankers' books are made evidence against the claimant: see *Harding v Williams* (1880) 14 ChD 197.

4 Bankers' Books Evidence Act 1879 s 3. Whether the non-existence of any entry in the material books is prima facie evidence of the non-existence of an account is undecided: see *Douglas v Lloyds Bank Ltd* (1929) 34 Com Cas 263.

5 Bankers' Books Evidence Act 1879 s 4.

6 *Idiots' Asylum v Handysides* (1906) 22 TLR 573, CA.

7 Bankers' Books Evidence Act 1879 s 4. Where the proceedings concerned are proceedings before a magistrates' court inquiring into an offence as examining justices, proof must be given by affidavit and not orally: s 4 (amended, in relation to alleged offences into which no criminal procedure has begun before 1 April 1997, by the Criminal Procedure and Investigations Act 1996 Sch 1 para 15). As from a day to be appointed the above words are repealed (except in relation to Northern Ireland): Bankers' Books Evidence Act 1879 s 4 (prospectively amended by the Criminal Justice Act 2003 Sch 3 Pt 2 para 30(1), (2), Sch 37 Pt 4). At the date at which this volume states the law no such day had been appointed.

8 Bankers' Books Evidence Act 1879 s 5; *R v Albutt* (1910) 75 JP 112. Where the proceedings concerned are proceedings before a magistrates' court inquiring into an offence as examining justices, proof must be given by affidavit and not orally: the Bankers' Books Evidence Act 1879 s 5 (amended, in relation to alleged offences into which no criminal procedure has begun before 1 April 1997, by the Criminal Procedure and Investigations Act 1996 Sch 1 para 16). As from a day to be appointed the above words are repealed (except in relation to Northern Ireland): Bankers' Books Evidence Act 1879 s 5 (prospectively amended by the Criminal Justice Act 2003 Sch 3 Pt 2 para 30(1), (3), Sch 37 Pt 4). At the date at which this volume states the law no such day had been appointed.

9 *Williams v Williams* [1988] QB 161 at 168, [1987] 3 All ER 257 at 261, CA, per Sir John Donaldson MR.

10 *Barker v Wilson* [1980] 2 All ER 81, [1980] 1 WLR 884, DC; *Williams v Williams* [1988] QB 161 at 168, [1987] 3 All ER 257 at 260, CA, per Sir John Donaldson MR.

11 *R v Dadson* (1983) 77 Cr App Rep 91, CA.

909. Production of originals. No banker or officer of a bank[1], in any legal proceeding[2] to which the bank is not a party, may be compelled to produce any banker's book[3] the contents of which can be proved[4], or to appear as a witness to prove the matters, transactions and accounts recorded in it, unless by order of a judge made for special cause[5].

However, to obtain the benefit of this relief from attendance and production, the banker or officer must have furnished, or have been willing to furnish, verified copies of the required entries; and, if he has not done so, the books may still be obtained by order of the court[6].

A bank which is a party to litigation is under the ordinary duty to give disclosure of relevant documents and to allow inspection[7].

1 As to the meaning of 'bank' for the purposes of the Bankers' Books Evidence Act 1879 see PARA 907.

2 As to the meaning of 'legal proceeding' see PARA 908 note 1.

3 As to the meaning of 'banker's books' see PARA 907 note 6.

4 Ie under the Bankers' Books Evidence Act 1879: see PARA 908.

5 Bankers' Books Evidence Act 1879 s 6. As to the meaning of 'judge' see PARA 911 note 3. See also *Douglas v Pindling* [1996] AC 890, [1996] 3 WLR 242, PC.

6 *Emmott v Star Newspaper Co* (1892) 62 LJQB 77. See also *R v Daye* [1908] 2 KB 333.

7 See eg *Woods v Martins Bank Ltd* [1959] 1 QB 55, [1958] 3 All ER 166.

(x) Secrecy, References and Advice

910. Obligation of secrecy. It is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons, without the express or implied consent of the customer, either the state of the customer's account, or any of his transactions with the bank or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by order of a court, or the circumstances give rise to a public duty of disclosure or the protection of the banker's own interests requires it[1].

If a bank chooses to organise its business through a corporate structure involving separate companies, disclosure by one such company to another may constitute a breach of the duty of secrecy[2].

1 *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, CA. This has been recognised by the legislature in conferring upon bankers privilege from disclosure under certain statutes: see further PARA 916 et seq.

As to disclosure pursuant to a public duty see *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728, [1988] 1 Lloyd's Rep 259. As to the public interest in uncovering fraud

overriding the banker's duty of confidentiality see *Pharaon v Bank of Credit and Commerce International SA (in liquidation) (Price Waterhouse (a firm) intervening)* [1998] 4 All ER 455, 142 Sol Jo LB 251.

The exceptions to the duty of secrecy which were recognised in *Tournier v National Provincial and Union Bank of England* above have been accepted in numerous subsequent cases, including: *Re State of Norway's Application* [1987] QB 433, [1989] 1 All ER 661, CA (affd [1990] AC 723, [1989] 1 All ER 745, HL); *Lipkin Gorman v Karpnale Ltd* [1992] 4 All ER 409, [1989] 1 WLR 1340, CA; *Bank of Tokyo Ltd v Karoon* [1987] AC 45n, [1986] 3 All ER 468, CA; *Bhogal v Punjab National Bank* [1988] 2 All ER 296, CA. See also *Barclays Bank plc v Taylor, Trustee Savings Bank of Wales and Border Counties v Taylor* [1989] 3 All ER 563, [1989] 1 WLR 1066, CA (disclosure pursuant to court order); *Adham v Bank of Credit and Commerce International SA (No 2), El Jawhary v Bank of Credit and Commerce International SA (No 2)* [1995] 2 BCLC 581 (the duty of confidentiality is not breached if confidential information about a customer is disclosed in pursuance of an obligation to give discovery in the course of proceedings); *Christofi v Barclays Bank plc* [1999] 4 All ER 437, [1999] 2 All ER (Comm) 417, CA (no implied duty on a bank not to disclose to a trustee in bankruptcy that property, over which the bank had a security, is not protected by the entry of a caution in the Land Registry). The distinction can be made between a duty of loyalty, which ends upon the termination of the contractual relationship, and a duty of confidentiality, which continues beyond that relationship: *MacLean v Arklow Investments* [2000] 1 WLR 594, PC.

As to disclosure pursuant to criminal law statutes see PARA 920.

2 *Bank of Tokyo Ltd v Karoon* [1987] AC 45n at 53–54, [1986] 3 All ER 468 at 475–476, CA, per Ackner LJ; and see *Bhogal v Punjab National Bank* [1988] 2 All ER 296 at 305, CA, per Dillon LJ.

911. Order for inspection under the Bankers' Books Evidence Act 1879. The Bankers' Books Evidence Act 1879 provides that any party to a legal proceeding[1] may apply to the court or a judge for an order that the applicant be at liberty to inspect and take copies of any entries in a banker's book[2] for the purposes of such proceeding[3].

The main object of these provisions is to enable evidence to be procured and given[4], and to relieve bankers from the necessity of attending and producing their books[5]. They enable a party, who formerly had the right to issue a subpoena duces tecum to compel bankers to produce their books and to attend and be examined on them, to obtain an order for leave to inspect and take copies of the books[6]. They do not give any new power of disclosure[7], or alter the principles of law or the practice with regard to disclosure[8], or take away any previously existing ground of privilege[9]. Nor do they enable a party to obtain disclosure, before the trial, of entries which would be privileged or protected from production, or which are, or are sworn to be, irrelevant[10], or which are sworn to tend to incriminate[11], or which are not the subject of disclosure apart from the Bankers' Books Evidence Act 1879[12]. Where, therefore, a party swears that the entries sought to be inspected are irrelevant, his affidavit is conclusive, and no order for inspection should be made before the trial[13].

The power to order inspection is a discretionary power[14], and will be exercised with great caution[15], and on sufficient grounds only[16]; and the order, if made, should be limited to relevant entries[17]. The order will be made only where the entries of which inspection is sought will be admissible in evidence at the trial[18].

The fact that the banker's book containing the relevant entry is in the list of documents served by the other party does not preclude the obtaining of an order for inspection, and in a fit case an order will be made[19]. An order for inspection may be made against a bank which is a defendant to a tracing claim[20].

Where a banker's book is in the possession, custody or power of a party to litigation and that party is in default of a court order requiring him to give disclosure of the documents, a bank which holds the documents as his agent may be required to disclose them[21].

1 As to the meaning of 'legal proceeding' see PARA 908 note 1.
2 As to the meaning of 'bankers' books' see PARA 907 note 6.
3 Bankers' Books Evidence Act 1879 s 7; *Re Marshfield, Marshfield v Hutchings* (1886) 32 ChD 499. The order may be made on a bank in Scotland or Northern Ireland (*Kissam v Link* [1896] 1 QB 574, CA), and may be made by a magistrate (*R v Kinghorn* [1908] 2 KB 949). 'Court' means the court, judge, arbitrator, persons or person before whom a legal proceeding is held or taken; and 'judge' means, in England, a judge of the High Court, although a judge assigned to a county court district or acting as a judge so assigned may with respect to any proceedings in a county court exercise the powers of a judge under the Bankers' Books Evidence Act 1879: s 10 (definition amended by the Statute Law Revision Act 1898). As to the procedure on an application see PARA 913.
4 *Arnott v Hayes* (1887) 36 ChD 731, CA; *Emmott v Star Newspaper Co* (1892) 62 LJQB 77.
5 *Parnell v Wood* [1892] P 137, CA; *Emmott v Star Newspaper Co* (1892) 62 LJQB 77; *Pollock v Garle* [1898] 1 Ch 1, CA; *Re Bankers' Books Evidence Act 1879, R v Bono* (1913) 29 TLR 635, DC.
6 *Re Marshfield, Marshfield v Hutchings* (1886) 32 ChD 499.
7 *Arnott v Hayes* (1887) 36 ChD 731 at 737, CA, per Cotton LJ; but consider *Perry v Phosphor Bronze Co Ltd* (1894) 71 LT 854, CA.
8 *Pollock v Garle* [1898] 1 Ch 1 at 4, CA, per Lindley MR.
9 *South Staffordshire Tramways Co v Ebbsmith* [1895] 2 QB 669 at 676, CA, per Kay LJ; *Parnell v Wood* [1892] P 137 at 139, CA, per Lindley LJ.
10 *Parnell v Wood* [1892] P 137, CA.
11 *Waterhouse v Barker* [1924] 2 KB 759, CA (majority decision). See also *Williams v Summerfield* [1972] 2 QB 512, [1972] 2 All ER 1334, where it was held that the Bankers' Books Evidence Act 1879 s 7 was available where the circumstances demanded, but that it should be applied only after the most careful thought on the clearest grounds; in a difficult case it was proper for justices to decline to make an order but to indicate that the application was more appropriate to the High Court.
12 *Pollock v Garle* [1898] 1 Ch 1, CA.
13 *South Staffordshire Tramways Co v Ebbsmith* [1895] 2 QB 669, CA. In applications under the Bankers' Books Evidence Act 1879 s 7, the court is guided by the general rules regulating inspection of documents before trial: *Waterhouse v Barker* [1924] 2 KB 759, CA (by a majority of the Court of Appeal). See also *Bhimji v Chatwani (No 3)* [1992] 4 All ER 912, sub nom *Bhimji v Chatwani (No 2)* [1992] 1 WLR 1158.
14 *Emmott v Star Newspaper Co* (1892) 62 LJQB 77.
15 *Arnott v Hayes* (1887) 36 ChD 731 at 738, CA, per Bowen LJ; *South Staffordshire Tramways Co v Ebbsmith* [1895] 2 QB 669 at 674, CA, per Lord Esher MR.
16 *Perry v Phosphor Bronze Co Ltd* (1894) 71 LT 854, CA. See also *Douglas v Pindling* [1996] AC 890, [1996] 3 WLR 242, PC (where it was held to be reasonable for a commission of inquiry to issue a summons for production of bankers' books where there was bona fide belief that the books might be of assistance in relation to matters within the commission's terms of reference).
17 *Arnott v Hayes* (1887) 36 ChD 731, CA. Where a defendant applied for inspection to assist him to justify a libel imputing pecuniary embarrassment, inspection was refused: *Emmott v Star Newspaper Co* (1892) 62 LJQB 77.
18 *Howard v Beall* (1889) 23 QBD 1 at 2 per Mathew J.
19 *Perry v Phosphor Bronze Co Ltd* (1894) 71 LT 854, CA; but see *Re Bankers' Books Evidence Act 1879, R v Bono* (1913) 29 TLR 635.
20 *A v C* [1981] QB 956n, [1980] 2 All ER 347, CA. As to tracing claims see PARA 915.
21 *Williams v Williams* [1988] QB 161 at 169, [1987] 3 All ER 257 at 261, CA, per Sir John Donaldson MR. It seems that disclosure may be required on the ground that the agent's failure to deliver up would aid and abet a contempt of court.

912. Order for inspection of accounts of non-parties. There is jurisdiction to order inspection under the Bankers' Books Evidence Act 1879[1] of accounts of non-parties to the litigation[2]. Except where the account sought to be inspected is in form or substance really the account of a party to the litigation or is kept on

his behalf, so that the entries in it would be evidence against him at trial[3], the power to order such inspection will be exercised only in exceptional circumstances[4], such as where the evidence and fruits of crime and fraud might otherwise disappear[5]. Notice of the application should be given to the account holder[6] and preferably also the bank[7].

Where such an order is made without notice, the non-party in respect of whose account it is made, or that party's bank, may apply to have the order set aside without being joined as a party to the action[8].

1 Ie under the Bankers' Books Evidence Act 1879 s 7: see PARA 911.

2 *Howard v Beall* (1889) 23 QBD 1; *R v Grossman* (1981) 73 Cr App Rep 302 at 308, CA, per Lord Denning MR, and at 309 per Oliver LJ; *DB Deniz Nakliyati TAS v Yugopetrol* [1992] 1 All ER 205, [1992] 1 WLR 437, CA (standard of proof for order after judgment not lower than that before trial).

3 *South Staffordshire Tramways Co v Ebbsmith* [1895] 2 QB 669, CA; *Pollock v Garle* [1898] 1 Ch 1, CA; *Ironmonger & Co v Dyne* (1928) 44 TLR 579, CA.

4 *Pollock v Garle* [1898] 1 Ch 1 at 5, CA, per Lindley MR; *R v Grossman* (1981) 73 Cr App Rep 302, CA; *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corpn* [1986] Ch 482, [1986] 1 All ER 653.

5 *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corpn* [1986] Ch 482 at 499, [1986] 1 All ER 653 at 662 per Hoffmann LJ. For a further example of a case where an application under the Bankers' Books Evidence Act 1879 s 7 in respect of a non-party account was rejected see *Pollock v Garle* [1898] 1 Ch 1, CA. In practice, where such circumstances exist, the applicant is likely to be able to obtain relief under the court's jurisdiction to grant disclosure orders in aid of a tracing claim: see PARA 915. It may also be possible to join the bank as a party to the proceedings by claiming declaratory relief and/or an order for repayment of moneys paid under a mistake: see eg *A v C* [1981] QB 956n, [1980] 2 All ER 347, CA.

6 *South Staffordshire Tramways Co v Ebbsmith* [1895] 2 QB 669 at 677, CA, per Kay LJ; *R v Marlborough Street Magistrates' Court Metropolitan Stipendiary Magistrate, ex p Simpson* [1980] Crim LR 305.

7 *L'Amie v Wilson* [1907] 2 IR 130.

8 *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corpn* [1986] Ch 482 at 492, [1986] 1 All ER 653 at 657 per Hoffmann LJ.

913. Procedure on the application. In the High Court an order for permission to inspect and take copies[1] may be made either with or without summoning the bank or any other party, and must be served on the bank three clear days before the order is to be obeyed, unless the court or judge otherwise directs[2]. In ordinary cases, the application should be supported by an affidavit showing what entries it is desired to inspect and the materiality of the inspection[3], and that the application is made bona fide. An affidavit is not, however, essential[4]. The party whose account is sought to be inspected may oppose the application on any ground on which inspection of ordinary documents could be resisted[5].

The costs of the application, and of anything done or to be done under the order, are in the court's discretion[6]. Where the whole or any part of the costs have been occasioned by any default or delay on the bank's part, they may be ordered to be paid by the bank to any party, any such order against a bank being enforceable as if the bank were a party to the proceeding[7].

1 As to the right to apply see PARA 911.

2 Bankers' Books Evidence Act 1879 s 7. As to the meanings of 'court' and 'judge' see PARA 911 note 3. A Sunday, Christmas Day, Good Friday and any bank holiday must be excluded from the computation of time: s 11. See also *Arnott v Hayes* (1887) 36 ChD 731, CA; *Davies v White* (1884) 53 LJQB 275.

3 See *Howard v Beall* (1889) 23 QBD 1.

4 *Arnott v Hayes* (1887) 36 ChD 731, CA.

5 See PARA 911.

6 Bankers' Books Evidence Act 1879 s 8.
7 Bankers' Books Evidence Act 1879 s 8.

914. Disclosure order having extra-territorial effect. Save in exceptional circumstances[1], the court will not make an order under the Bankers' Books Evidence Act 1879[2] or require the production by a non-party of documents outside the jurisdiction concerning business which it has transacted outside the jurisdiction, especially where the non-party is a foreign bank[3]. The principle is that a state should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction[4]. In accordance with this principle, the court will generally not give effect to an order made in foreign proceedings against a non-party bank requiring production of documents relating to accounts maintained within the jurisdiction[5].

The fact that the evidence sought to be obtained may be obtained by the issue of letters of request to a foreign court[6], or by an application to a foreign court, generally weighs heavily against the court's making an extra-territorial order[7].

1 As to what constitutes exceptional circumstances see PARA 912.
2 Ie an order under the Bankers' Books Evidence Act 1879 s 7: see PARA 911.
3 *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corpn* [1986] Ch 482 at 493, [1986] 1 All ER 653 at 658 per Hoffmann J.
4 See *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corpn* [1986] Ch 482 at 493, [1986] 1 All ER 653 at 658 per Hoffmann J.
5 *X AG v A Bank* [1983] 2 All ER 464.
6 Such a procedure is generally available as between parties to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (The Hague, 18 March 1970; Cmnd 6727) and in other cases covered by bilateral conventions.
7 See *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corpn* [1986] Ch 482 at 499, [1986] 1 All ER 653 at 662 per Hoffmann J.

915. Disclosure order in aid of tracing claims etc. If a person through no fault of his own becomes involved in the tortious acts of others so as to facilitate their wrong-doing, he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrong-doers[1]. Where there are grounds for thinking that money in a bank has been obtained by a customer's wrong-doing and belongs in equity to the claimant, the court has jurisdiction to order the bank to disclose documents relating to the money[2]. The documents which may be ordered to be disclosed are not limited to those within the provisions[3] of the Bankers' Books Evidence Act 1879[4]. The claimant must give an undertaking in damages to the bank and must pay all and any expenses to which the bank is put in making the disclosure[5]. The international jurisdictional limits of this principle are the same as those for an order under the Bankers' Books Evidence Act 1879[6].

1 *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133, [1973] 2 All ER 943, HL.
2 *Bankers Trust Co v Shapira* [1980] 3 All ER 353, [1980] 1 WLR 1274, CA, applying *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133, [1973] 2 All ER 943, HL. In *A v C* [1981] QB 956n, [1980] 2 All ER 347, decided shortly before *Bankers Trust Co v Shapira* above, an order was made against a bank in similar circumstances under the more limited jurisdiction conferred by the Bankers' Books Evidence Act 1879 s 7 (see PARA 911). See also *Omar v Omar* [1995] 3 All ER 571, [1995] 1 WLR 1428 (disclosed documents legitimately used to amend plaintiff's statement of claim and to add a personal claim).
3 Ie within the provisions of the Bankers' Books Evidence Act 1879 s 7: see PARA 911.
4 *Bankers Trust Co v Shapira* [1980] 3 All ER 353 at 358–359, [1980] 1 WLR 1274 at 1283, CA, per Waller LJ.
5 *Bankers Trust Co v Shapira* [1980] 3 All ER 353 at 358, [1980] 1 WLR 1274 at 1282, CA, per Lord Denning MR.

6 *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corpn* [1986] Ch 482 at 498–499, [1986] 1 All ER 653 at 661 per Hoffmann J. See PARA 914.

916. Disclosure order under the Evidence (Proceedings in Other Jurisdictions) Act 1975. Where an application is made to the High Court, and the court is satisfied: (1) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal (the 'requesting court') exercising jurisdiction in any other part of the United Kingdom or in a country or territory outside the United Kingdom; and (2) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated, the court has power by order to make such provision for obtaining evidence in the part of the United Kingdom in which it exercises jurisdiction as may appear to it to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made[1]. Where the evidence sought to be obtained is evidence from a banker as to the affairs of a customer, the court, in exercising its discretion, must carry out a balancing exercise: in the scales on one side must be placed the desirable policy of assisting a foreign court, and, on the other, the opposing principle that the court will give great weight to the desirability of upholding the recognised duty of confidence[2].

1 See the Evidence (Proceedings in Other Jurisdictions) Act 1975 ss 1, 2(1); and EVIDENCE vol 17(1) (Reissue) PARAS 1051, 1054. The court's jurisdiction is limited by s 2(3), (4): see EVIDENCE vol 17(1) (Reissue) PARA 1054. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 *Re State of Norway's Application* [1987] QB 433 at 486, 490, [1989] 1 All ER 661 at 688, 691, CA, per Kerr and Glidewell LJJ (affd [1990] AC 723, [1989] 1 All ER 745, HL), applying *British Steel Corpn v Granada Television Ltd* [1981] AC 1096, [1981] 1 All ER 417, HL. See also *First American Corp v Sheikh Zayed Al-Nahyan* [1998] 4 All ER 439, [1999] 1 WLR 1154, CA.

917. Disclosure in insolvency proceedings. Where: (1) an administration order is made in relation to a company; (2) an administrative receiver is appointed; (3) the company goes into liquidation; or (4) a provisional liquidator is appointed, the court may, on the application of the relevant office-holder, summon to appear before it (inter alios): (a) any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company; or (b) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company[1]. The court may require any such person to submit an affidavit to the court containing an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in head (b) above[2].

At any time after a bankruptcy order has been made the court may, on the application of the official receiver or the trustee of the bankrupt's estate, summon to appear before it (inter alios): (i) any person known or believed to have any property comprised in the bankrupt's estate in his possession or to be indebted to the bankrupt; (ii) any person appearing to the court to be able to give information concerning the bankrupt or the bankrupt's dealings, affairs or property[3]. The court may require any such person to submit an affidavit to the court containing an account of his dealings with the bankrupt or to produce any documents in his possession or under his control relating to the bankrupt or the bankrupt's dealings, affairs or property[4].

1 See the Insolvency Act 1986 s 236(1), (2); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 679.
2 See the Insolvency Act 1986 s 236(1), (3); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 679. See also *Re Financial Insurance Co Ltd* (1867) 36 LJ Ch 687; *Re Contract Corpn, Druitt's Case* (1872) LR 14 Eq 6 (order made requiring disclosure of information by the managing clerk of the bank with which the contributory maintained an account, and for production of books and documents relating to such account).
3 See the Insolvency Act 1986 s 366(1); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 307.
4 See the Insolvency Act 1986 s 366(1).

918. Disclosure to investigators etc. When inspectors are appointed to investigate the affairs of a company, it is the duty of all officers and agents[1] of the company, and of all officers and agents of any other body corporate which is or at any relevant time has been the company's subsidiary or holding company, or a subsidiary of its holding company or a holding company of its subsidiary, and which is being investigated: (1) to produce to the inspectors all documents of or relating to the company or, as the case may be, the other body corporate which are in their custody or power; (2) to attend before the inspectors when required to do so; and (3) otherwise to give the inspectors all assistance in connection with the investigation which they are reasonably able to give[2].

In connection with its supervisory and enforcement functions, the Financial Services Authority may require a person authorised to carry on financial services, or a person connected with such a person, to provide specified information or documents in such form as the Authority requires[3]. The Authority may also require authorised persons to provide a report by a skilled person on any matter about which the Authority could require the provision of information or documents[4]. The Authority has power to appoint investigators into the business of authorised persons[5]. The Authority and its investigators may apply for a warrant to search for and seize documents or information[6].

1 In the Companies Act 1985 s 434, 'agents', in relation to a company or other body corporate, includes its bankers, whether they are or are not officers of the company or other body corporate: see s 434(4).
2 See the Companies Act 1985 s 434(1); and COMPANIES vol 7(2) (2004 Reissue) PARA 1672. These provisions apply also to an investigation into the ownership of a company under s 442: see s 443(1); and COMPANIES vol 7(2) (2004 Reissue) PARA 1674. As to the Secretary of State's power to require documents and information see s 447; and COMPANIES vol 7(2) (2004 Reissue) PARA 1679. Where the Secretary of State carries out an investigation under the Insolvency Act 1986 s 218(4) (prosecution of delinquent officers and members of the company: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 1015), he may for the purposes of his investigation exercise any of the powers which are exercisable by inspectors appointed under the Companies Act 1985 s 431 or s 432: see the Insolvency Act 1986 s 218(5); and see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 1016. As to the Secretary of State see PARA 3.
3 See the Financial Services and Markets Act 2000 s 165; and PARA 447. As to the Financial Services Authority see PARA 792 and also PARAS 4, 6 et seq.
4 See the Financial Services and Markets Act 2000 s 166; and PARA 448.
5 See the Financial Services and Markets Act 2000 s 167; and PARA 449.
6 See the Financial Services and Markets Act 2000 s 176; and PARA 454.

919. Disclosure to HM Revenue and Customs. A bank may be required to give information to the Commissioners for Her Majesty's Revenue and Customs as to the receipt of income from United Kingdom securities by persons other than the holders or from United Kingdom bearer securities[1]; and to tax inspectors as to interest paid or credited by the bank without deduction of tax[2]. Further, the commissioners may by notice require any person to furnish them within such

time as they may direct, not being less than 28 days, with such particulars as they think necessary for the purposes of the tax provisions[3] relating to the transfer of assets abroad[4]. However, a bank is under no obligation to furnish particulars of any ordinary banking transactions between it and a customer carried out in the ordinary course of banking business[5] unless the bank has acted or is acting on behalf of the customer in connection with: (1) the formation or management of any body corporate resident or incorporated outside the United Kingdom which is, or if resident in the United Kingdom would be, a close company but not a trading company; or (2) the creation, or the execution of the trusts, of any settlement by virtue or in consequence of which income becomes payable to a person resident or domiciled outside the United Kingdom[6].

1 See the Taxes Management Act 1970 s 24(1), (2); and INCOME TAXATION vol 23(2) (Reissue) PARA 1709. This provision extends to United Kingdom government and commercial securities: see s 24(4). It does not, however, impose on a bank the obligation to disclose particulars where the person beneficially entitled to the income is not resident in the United Kingdom: s 24(3). As to the meaning of 'United Kingdom' see PARA 2 note 3. Note that the Inland Revenue merged with Her Majesty's Customs and Excise to form Her Majesty's Revenue and Customs: see the Commissioners for Revenue and Customs Act 2005 s 50: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 900 et seq. See also INCOME TAXATION.

2 See Taxes Management Act 1970 s 17(1); and INCOME TAXATION vol 23(2) (Reissue) PARA 1696. This provision applies only to the money received or retained in the United Kingdom: see s 17(4). It extends to the National Savings Bank: s 17(3). As to the National Savings Bank see PARA 810 et seq.

3 Ie the Income and Corporation Taxes Act 1988 Pt XVII Ch III (ss 739–746) (repealed from 2007–08 tax years): see INCOME TAXATION vol 23(2) (Reissue) PARA 1607 et seq.

4 See the Income and Corporation Taxes Act 1988 s 745(1) (repealed from 2007–08 tax years); and INCOME TAXATION vol 23(2) (Reissue) PARA 1615.

There have been a number of well-publicised cases against well-known banks requiring disclosure of accounts with foreign branches: see in particular *Re an Application by Revenue and Customs Comrs to Serve section 20 Notice* [2006] STC (SCD) 71.

5 See *Royal Bank of Canada v IRC* [1972] Ch 665, [1972] 1 All ER 225, where the corresponding provisions of the Income Tax Act 1952 s 414(5) (repealed) were discussed.

6 See the Income and Corporation Taxes Act 1988 s 745(4), (5) (repealed from 2007–08 tax years); and INCOME TAXATION vol 23(2) (Reissue) PARA 1615.

920. Disclosure pursuant to criminal law statutes. The Director of the Serious Fraud Office may by notice in writing require persons who are under investigation or any other person who may have relevant information to answer questions or otherwise furnish information, including documents[1]. A person may not be required to disclose information or produce a document in respect of which he owes an obligation of confidence by virtue of carrying on a banking business unless: (1) the person to whom the obligation is owed consents to the disclosure or production; or (2) the Director of the Serious Fraud Office has authorised the making of the requirement personally, or a member of the Serious Fraud Office designated by the Director for this purpose has done so[2].

A constable may obtain access to specified material for the purposes of a criminal investigation by making an application for an order under the Police and Criminal Evidence Act 1984[3]. A bank has no implied contractual obligation to support the confidentiality of its customers by resisting such an order or by informing a customer that such an order is being sought[4].

1 See the Criminal Justice Act 1987 s 2(2), (3) (amended by the Criminal Justice Act 1988 Sch 15 para 113). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARAS 1090–1091. As to powers in relation to money laundering see PARA 831. As to the Director of the Serious Fraud Office see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARAS 1067, 1089 et seq.

2 See the Criminal Justice Act 1987 s 2(10); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1090.

3 See the Police and Criminal Evidence Act 1984 s 9, Sch 1; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 874 et seq.

4 See *Barclays Bank plc v Taylor* [1989] 3 All ER 563, [1989] 1 WLR 1066, CA; *R v Manchester Crown Court, ex p Taylor* [1988] 2 All ER 769, [1988] 1 WLR 705, DC.

921. Bankers' references. With his customer's express or implied consent, a banker is justified in answering inquiries regarding his customer's general position and character put to him by a person contemplating business relations with that customer[1].

However, no claim lies against the banker in respect of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any person[2] made to the intent or purpose that such person may obtain credit, money or goods, unless such representation or assurance is made in writing and signed by the banker[3]. This protection applies to fraudulent misrepresentations[4], and to misrepresentations alleged to give rise to liability under the Misrepresentation Act 1967[5], but it does not apply to negligent misrepresentations[6]. The representation must relate in some way to the creditworthiness of a person[7]. The signature on behalf of a company of its duly authorised agent acting within the scope of his authority is, for this purpose, the signature of the company[8]. A representation made by an individual must be in writing and signed by him, and accordingly no claim lies against a non-signing partner even if he has ratified the act of the signing partner[9].

The making of a credit reference or other representation as to a person may give rise to liability for breach of fiduciary duty[10], or for breach of a common law duty of care[11].

Where the banker may be held responsible, it is immaterial whether he gave the information direct to the person acting on it or to another banker in order that it might be communicated to him[12].

A disclaimer of liability which amounts to a notice which purports to exclude liability for negligence is therefore ineffective unless it satisfies the requirement of reasonableness[13].

1 *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, CA. See also *Robshaw v Smith* (1878) 38 LT 423 (exhibition of a libellous anonymous letter held to be privileged). A general practice among banks of replying to status inquiries from other banks does not justify imputing the customer's consent to the release of confidential information: *Turner v Royal Bank of Scotland plc* [1999] 2 All ER (Comm) 664, [1999] Lloyd's Rep Bank 231, CA.

2 'Person' includes a corporation: *Banbury v Bank of Montreal* [1918] AC 626, HL, approving *Hirst v West Riding Union Banking Co Ltd* [1901] 2 KB 560; *UBAF Ltd v European American Banking Corpn* [1984] QB 713 at 719, [1984] 2 All ER 226 at 230, CA, per Ackner LJ.

3 Statute of Frauds Amendment Act 1828 s 6.

4 *Banbury v Bank of Montreal* [1918] AC 626, HL; distinguished in *Woods v Martins Bank Ltd* [1959] 1 QB 55, [1958] 3 All ER 166; applied in *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850. See also *UBAF Ltd v European American Banking Corpn* [1984] QB 713 at 718, [1984] 2 All ER 226 at 229, CA, per Ackner LJ.

5 Ie under the Misrepresentation Act 1967 s 2(1) (see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 801): see *UBAF Ltd v European American Banking Corpn* [1984] QB 713 at 718, [1984] 2 All ER 226 at 229, CA, per Ackner LJ.

6 *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850; *UBAF Ltd v European American Banking Corpn* [1984] QB 713 at 718, [1984] 2 All ER 226 at 229, CA, per Ackner LJ. As to negligent misrepresentation see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 762.

7 *Diamond v Bank of London and Montreal Ltd* [1979] QB 333, [1979] 1 All ER 561, CA; *UBAF Ltd v European American Banking Corpn* [1984] QB 713 at 719, [1984] 2 All ER 226 at 230, CA, per Ackner LJ.
8 *UBAF Ltd v European American Banking Corpn* [1984] QB 713, [1984] 2 All ER 226, CA, per Ackner LJ.
9 *Williams v Mason* (1873) 28 LT 232, explained in *UBAF Ltd v European American Banking Corpn* [1984] QB 713 at 723, [1984] 2 All ER 226 at 229–230, CA.
10 *UBAF Ltd v European American Banking Corpn* [1984] QB 713, [1984] 2 All ER 226, CA. See also *Woods v Martins Bank Ltd* [1959] 1 QB 55, [1958] 3 All ER 166.
11 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL; *UBAF v European American Banking Corpn* [1984] QB 713, [1984] 2 All ER 226, CA. See also *Parsons v Barclay & Co Ltd* (1910) 103 LT 196, CA; *Robinson v National Bank of Scotland* 1916 SC (HL) 154 at 157, 1916 1 SLT 336 at 337 per Lord Haldane; *Wilson v United Counties Bank Ltd* [1920] AC 102, HL; *Batts Combe Quarry Co v Barclays Bank Ltd* (1931) 48 TLR 4; *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850; *Mutual Life and Citizens' Assurance Co Ltd v Evatt* [1971] AC 793, [1971] 1 All ER 150, PC.
12 See eg *Swift v Winterbotham* (1873) LR 8 QB 244 at 253, varied on other points sub nom *Swift v Jewsbury and Goddard* (1874) LR 9 QB 301. See also *Commercial Banking Co of Sydney Ltd v RH Brown & Co* [1972] 2 Lloyd's Rep 360, Aust HC.
13 *Smith v Eric S Bush, Harris v Wyre Forest District Council* [1990] 1 AC 831, [1989] 2 All ER 514, HL. See, as to the requirement of reasonableness, the Unfair Contract Terms Act 1977 ss 1(1)(b), 2; and CONTRACT vol 9(1) (Reissue) PARA 820 et seq. A disclaimer will not be effective if the answer is deliberately false or is given recklessly: see *Commercial Banking Co of Sydney Ltd v RH Brown & Co* [1972] 2 Lloyd's Rep 360, Aust HC.

922. Advice on investments. Where it is within the scope of a bank's business to advise on financial affairs, it owes a customer to whom it offers such advice or assistance a contractual duty to exercise reasonable skill and care[1]; and it will not avail the bank that it has issued secret instructions not to give such advice[2]. If the customer is advised in a matter in which the bank has conflicting interests, the conflict should be fully disclosed[3].

Where advice is given to one who is not a customer, liability may arise where there exists a fiduciary relationship[4] or a relationship such as to found a common law duty of care[5].

1 *Woods v Martins Bank Ltd* [1959] 1 QB 55, [1958] 3 All ER 166, distinguishing *Banbury v Bank of Montreal* [1918] AC 626, HL. Having complied with its duty to exercise reasonable care in giving advice, there is no further continuing obligation on a bank to keep its advice under review and correct it in the light of supervening events: *Fennoscandia Ltd v Clarke* [1999] 1 All ER (Comm) 365, CA. See *Frost v James Finlay Bank Ltd* [2002] EWCA Civ 667, [2002] Lloyd's Rep IR 503 (where the bank was not holding itself out to be an insurance broker; and it was held that no duty was owed in relation to insurance advice).

Where a bank gives financial advice, it will be judged by the same standards as other professionals who give such advice: *Verity and Spindler v Lloyds Bank plc* [1996] Fam Law 213, [1995] CLC 1557. However see contra *Investors Compensation Scheme Ltd v West Bromwich Building Socirty (No 2)* [1999] Lloyd's Rep PN 496, [1999] PNLR 496.
2 *Woods v Martins Bank Ltd* [1959] 1 QB 55 at 72, [1958] 3 All ER 166 at 173.
3 *Woods v Martins Bank Ltd* [1959] 1 QB 55 at 73, [1958] 3 All ER 166 at 174.
4 *Woods v Martins Bank Ltd* [1959] 1 QB 55 at 72, [1958] 3 All ER 166 at 173.
5 *Box v Midland Bank Ltd* [1979] 2 Lloyd's Rep 391; *Royal Bank Trust Co (Trinidad) Ltd v Pampellonne* [1987] 1 Lloyd's Rep 218, PC.

(xi) Letters of Credit; Performance Bonds

A. IN GENERAL

923. Nature of letters of credit. A letter of credit is an undertaking by a bank to pay to the beneficiary of the credit, or to accept and pay drafts drawn by the beneficiary, in accordance with the terms and conditions of the credit. A letter of

credit may be addressed: (1) to banks generally, or to all banks within a specified country or territory; or (2) to one or more specified banks. All banks to whom a credit is addressed are known as nominated banks.

A credit may contain an instruction to a bank either merely to advise the beneficiary of the credit, without any commitment, or to add its confirmatory undertaking to it, in which case the beneficiary has the promise of both banks. Where a credit is intended to facilitate trade, it is called a commercial letter of credit[1].

It is often made a condition of a mercantile contract that the buyer is to pay for the goods by means of an irrevocable credit[2], and it is then the buyer's duty to procure that his bank, known as the issuing bank, issues an irrevocable credit in favour of the seller by which the bank undertakes to the seller, either directly or through another bank in the seller's country, to pay or accept drafts drawn upon him for the price of the goods, against the tender by the seller of the shipping documents.

1 As to commercial letters of credit see PARA 924.
2 As to irrevocable credits see further PARA 928.

924. Commercial letters of credit. Where buyer and seller are in different countries, the bank issuing the credit at the instance of a buyer does so usually through a bank in the other country; the authorisation of the issuing bank is addressed to the other bank and instructs it to advise the credit to the beneficiary with or without committing itself by adding its confirmation. The bank issuing the credit is called the issuing bank; the second bank, which advises the beneficiary, is an advising, negotiating, confirming or paying bank according to the role it plays[1].

Commercial letters of credit may be of two types, namely revocable and irrevocable credits[2]. Irrevocable credits may be confirmed or unconfirmed[3]. They may take several forms, but the more common are those by which a banker undertakes to pay against documents of title to goods; or he may engage himself to negotiate drafts accompanied by such documents of title, or to accept drafts drawn under the credit[4]. Credits create a binding contract to accept or pay bills on the specified conditions, enforceable against the bank by a beneficiary who has acted on the faith of it[5]. Similarly, if the credit requests payments to be made or money advanced apart from acceptance of bills[6], and such payments or advances are made to the grantee on production of the letter, the bank becomes liable to the party making them[7]. Where a credit issued pursuant to a cif contract[8] calls for a guarantee by the buyers through their bankers that documents will be taken up on first presentation, such a guarantee may be held to be exactly the same as a letter of credit and so have to be available within a reasonable time before the first date for shipment[9]. Possession of the letter is not sufficient evidence that the person presenting it is the grantee[10].

A credit may be a revolving credit, of which one type is that in which sums drawn may be added to the balance so as to keep the total amount available always up to the permitted figure[11].

1 See PARA 949.
2 See PARA 928.
3 See PARA 933.
4 See *Re Barned's Banking Co, Banner and Young v Johnston* (1871) LR 5 HL 157. The usual form of import credit consists of an undertaking by the buyer's bank addressed to his foreign correspondent (the paying, negotiating or advising bank) that payment will be made against tender of documents (including usually full set of bills of lading, invoice (in duplicate or

triplicate), and marine insurance policy) within a given period of time. Where 'usual documents' were called for, it was held that this meant those which under a cif contract would be expected in the particular trade: *Borthwick v Bank of New Zealand* (1900) 17 TLR 2. As to cif contracts see note 8.

5 *Maitland v Chartered Mercantile Bank of India, London and China* (1869) 38 LJ Ch 363; *Union Bank of Canada v Cole* (1877) 47 LJCP 100, CA; *Re Agra and Masterman's Bank, ex p Asiatic Banking Corpn* (1867) 2 Ch App 391; *Urquhart, Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 KB 318. See also *MA Sassoon & Sons Ltd v International Banking Corpn* [1927] AC 711, PC (distinguishing *Re Agra and Masterman's Bank, ex p Asiatic Banking Corpn* above). As to the transferability of credits subject to the ICC Uniform Customs and Practice for Documentary Credits see PARA 935.

6 Eg anticipatory or red-clause credits. The 'red-clause' authorises advances to the seller before shipment. A refinement is the 'green-clause', which also covers storage in the name of the bank.

7 See *Morgan v Larivière* (1875) LR 7 HL 423.

8 Ie a contract which provides that the price includes the cost of the goods, the freight and the insurance premium for the transit: see further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 324 et seq.

9 *Sinason-Teicher Inter-American Grain Corpn v Oilcakes and Oilseeds Trading Co Ltd* [1954] 3 All ER 468, [1954] 1 WLR 1394, CA; cf *Heisler v Anglo-Dal Ltd* [1954] 2 All ER 770, [1954] 1 WLR 1273, CA (seller's personal guarantee satisfying condition in fob contract calling for guarantee of delivery of goods). As to fob contracts see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 351 et seq.

10 *Orr and Barber v Union Bank of Scotland* (1854) 1 Macq 513; *British Linen Co v Caledonian Insurance Co* (1861) 4 Macq 107.

11 See *Nordskog & Co v National Bank* (1922) 10 Ll L Rep 652; *JW Mitchell Ltd v Ivan Pedersen Ltd* (1929) 34 Ll L Rep 310.

925. Uniform Customs and Practice for Documentary Credits. Commercial letters of credit almost invariably incorporate the Uniform Customs and Practice for Documentary Credits (the 'Uniform Customs and Practice')[1], which apply to all documentary credits[2], including, to the extent to which they may be applicable, standby letters of credit[3], where they are incorporated into the text of the credit; and they are binding on all parties unless otherwise expressly agreed[4].

Where a credit incorporates the Uniform Customs and Practice for Documentary Credits 'except so far as otherwise stated', it is wrong to approach the construction of the credit by looking at the document first without reference to the Uniform Customs and Practice for Documentary Credits[5]; and, if there is ambiguity as to the meaning of the provisions of the Uniform Customs and Practice for Documentary Credits, the ambiguity should, if possible, be resolved in a way which will result in their reflecting the position under general maritime and commercial law[6].

1 Ie the ICC Uniform Customs and Practice for Documentary Credits (2007 Revision) (UCP600), copyright 2006, International Chamber of Commerce (ICC), Paris. This replaces the ICC Uniform Customs and Practice for Documentary Credits (1993 Revision) (UCP500), copyright 1993, International Chamber of Commerce (ICC), Paris. Copies of these and other ICC publications are available from ICC Publishing SA, 38 Cours Albert 1er, 75008 Paris, France, or from ICC United Kingdom, 12 Grosvenor Place, London SW1X 7HH. For a comparison of the 1983 and the 1993 Revisions see Documentary Credits: UCP 500 and 400 compared (1993 revision) (UCP 511); and for a comparison of the 1993 and 2007 Revisions see Prof James Byrne *The Comparison of UCP600 and UCP500* (Institute of International Banking Law and Practice Inc).

The 2007 Revision has an 'effective' date of 1 July 2007 but this is a general guideline only as to when the rules should be put into effect and, as the rules are not law, this date has no binding effect. The 1993 Revision is likely to be relevant for some time to come as some letters of credit may specifically refer to that version. However according to the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 1, the rules apply to any documentary credit ('credit') (including, to the extent to which they may be applicable, any standby letter of credit) when the text of the credit expressly indicates that it is subject to these rules; furthermore they are binding on all parties thereto unless expressly modified or excluded by the credit. While

there may be a period while adjustments are made, the majority of commercial letters of credit are likely to be issued subject to it after July 2007. It is considered that the 2007 Revision may be the most extensive revision of the six (revised) versions of the UCP (previous versions being issued in 1933 (UCP82), 1951 (UCP151), 1962 (UCP222), 1974 (UCP290), 1983 (UCP400) and 1993 (UCP500)). It has been reorganised, some new concepts and terms have been added and there are new expressions of older concepts with definitions and interpretations now located in their own provisions: see Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 2, 3. The 2007 Revision is intended to be clearer, simpler, easier to follow and more precise rather than to introduce radical change.

Also of relevance is the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation (eUCP) which supplements the Uniform Customs and Practice for Documentary Credits (2007 Revision) in order to accommodate presentation of electronic records alone or in combination with paper documents. In a similar way it applies where the credit indicates that it is subject to it (see arts e1, e2). Like other ICC publications, it is available from the ICC Publishing SA or ICC United Kingdom.

What follows (see PARA 926 et seq) is a brief overview with reference to both the 2007 and 1993 Revisions of the Uniform Customs and Practice but for more detail and full texts specialist works should be consulted: see eg the *Encyclopaedia of Banking Law*.

It should be noted that, as the provisions of the Uniform Customs and Practice do not have the force of law, in the exceptional case where they are not incorporated, the position is governed by the common law. As to the application of the Uniform Customs and Practice generally see *Credit Agricole Indosuez v Generale Bank (Seco Steel Trading Inc) (No 2)* [1999] 2 All ER (Comm) 1016.

2 The Uniform Customs and Practice for Documentary Credits (2007 Revision) art 2 defines 'credit' as being any arrangement, however named or described, that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation'. The definition in the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 2 is substantially broader defining the expressions 'documentary credit(s)' and 'standby letter(s) of credit' ('credit(s)') as meaning any arrangement, however named or described, whereby a bank (the 'issuing bank'), acting at the request and on the instructions of a customer (the 'applicant') or on its own behalf: (1) is to make a payment to or to the order of a third party (the 'beneficiary') or is to pay or accept bills of exchange ('drafts') drawn by the beneficiary; (2) authorises another bank to effect such payment, or to accept and pay such bills of exchange ('drafts'); or (3) authorises another bank to negotiate, against stipulated documents, provided that the terms and conditions of the credit are complied with: furthermore branches of a bank in different countries are considered another bank. Reference should also be made to art 9(a) referring to an irrevocable credit constituting a definite undertaking of the issuing bank. The much simpler and narrower definition in the 2007 Revision may well exclude some transactions thought to be letters of credit.

3 As to the meaning of 'standby letter(s) of credit' see note 2. The basic difference between a standby letter of credit and other documentary credits is that the standby letter of credit is issued to protect the beneficiary against non-performance or default, usually that of the applicant, whereas the traditional documentary letter of credit is intended to be drawn on where the beneficiary/seller performs his part of the underlying contract. The extent to which the Uniform Customs and Practice for Documentary Credits (1993 Revision) applies to standby letters of credit is left undefined. However as to the clearer and narrower definition in the Uniform Customs and Practice for Documentary Credits (2007 Revision) see note 2.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 1; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 1. See also note 1.

5 *Forestal Mimosa Ltd v Oriental Credit Ltd* [1986] 2 All ER 400, [1986] 1 WLR 631, CA.

6 *Golodetz (M) & Co Inc v Czarnikow-Rionda Co Inc, The Galatia* [1979] 2 All ER 726 at 738, [1980] 1 WLR 495 at 509; affd [1980] 1 All ER 501, [1980] 1 WLR 495, CA.

926. Credits as autonomous transactions. Credits[1], by their nature, are separate transactions from the sales or other contract or contracts on which they may be based and banks are in no way concerned with, or bound by, such contract or contracts, even if any reference whatsoever to such contract or contracts is included in the credit[2]. Banks deal with documents, and not with goods, services or other performances to which the documents may relate[3].

An international sale of goods transaction to be financed by means of a confirmed irrevocable documentary credit[4] in fact involves four autonomous though interconnected contractual relations:

(1) the underlying contract for the sale of goods, to which the only parties are the buyer and the seller;

(2) the contract between the buyer and the issuing bank under which the latter agrees to issue the credit and either itself or through a confirming bank to notify the credit to the seller and to make payments to, or to the order of, the seller (or to pay, accept or negotiate bills of exchange drawn by the seller) against presentation of stipulated documents, and the buyer agrees to reimburse the issuing bank for payments made under the credit; for such reimbursement the stipulated documents, if they include a document of title such as a bill of lading, constitute a security available to the issuing bank;

(3) if payment is to be made through a confirming bank, the contract between the issuing bank and the confirming bank authorising the latter to make such payments and to remit the stipulated documents to the issuing bank when they are received, the issuing bank in turn agreeing to reimburse the confirming bank for payments made under the credit;

(4) the contract between the confirming bank and the seller under which the confirming bank undertakes to pay to the seller (or to accept or negotiate without recourse to drawer bills of exchange drawn by him) up to the amount of the credit against presentation of the stipulated documents[5].

The interconnections are such that the contractual duty owed by confirming and issuing banks to the buyer to honour the credit notified by him on presentation of apparently conforming documents by the seller, despite the fact that they contain inaccuracies or even are forged, is matched by a corresponding liability of the confirming bank to the seller/beneficiary, in the absence of any fraud on his part, to pay the sum stipulated in the credit upon presentation of apparently conforming documents[6]. It is, however, undecided whether, in the case of payment under reserve where the documents are ultimately rejected[7], the obligations owed by the issuing bank to the confirming bank[8] are matched by identical obligations owed by the confirming bank to the beneficiary[9].

The autonomy of the credit is such that: (a) the beneficiary can in no case make use of the contractual relationships existing between the banks or between the applicant for the credit and the issuing bank[10]; (b) banks are not entitled to refuse payment in reliance upon the terms of the contract between the buyer and the seller[11]; and (c) the buyer is not entitled on the ground of alleged defects in the goods to an injunction restraining the seller from drawing on the credit[12].

1 As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 4; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 3. See generally PARA 925 note 1. Consequently, the undertaking of a bank to honour or negotiate or fulfil any other obligations under the credit, is not subject to claims or defences by the applicant resulting from his relationships with the issuing bank or the beneficiary: art 4. The provisions are broadly similar but without that warning but the 2007 Revision version also has a warning against adding as part of the credit copies of the underlying contract or similar documents. As to the applicant and the beneficiary see PARA 925 note 2. See *Belgian Grain and Produce Co Ltd v Cox & Co (France) Ltd* (1919) 1 Ll L Rep 256, CA. In *Urquhart, Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 KB 318, Rowlatt J held that the paying banker was in the position of one who had contracted to buy documents. This view was adopted in *Dexters Ltd v Schenker & Co* (1923) 14 Ll L Rep 586. See also *Stein v Hambro's Bank of Northern Commerce* (1921) 9 Ll L

Rep 433 (revsd without affecting this point (1922) 10 Ll L Rep 529, CA); *National Bank of South Africa v Banca Italiana di Sconto and Arnhold Bros & Co (Oleifici Nazionale of Genoa, third parties)* (1922) 10 Ll L Rep 531, CA; *Donald H Scott & Co Ltd v Barclays Bank Ltd* [1923] 2 KB 1 at 14, CA, obiter per Scrutton LJ; *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127, [1958] 1 All ER 262, CA (in which the court refused to restrain the sellers from dealing with the credit). See further *Comdel Commodities Ltd v Siporex Trade SA* [1997] 1 Lloyd's Rep 424, CA; *Cargill International SA v Bangladesh Sugar and Food Industries Corpn* [1998] 2 All ER 406, [1998] 1 WLR 461, CA; *Sirius International Insurance Corpn (Publ) v FAI General Insurance Co Ltd* [2004] UKHL 54, [2005] 1 All ER 191, [2004] 1 WLR 3251. See also *Oliver v Dubai Bank Kenya Ltd* [2007] EWHC 2165 (Comm), [2007] All ER (D) 135 (Sep); *Spiersbridge Property Developments Ltd v Muir Construction Ltd* [2008] CSOH 44, 2008 Scot (D) 17/3.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 5; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 4. The provisions are virtually identical. The principle is stated in numerous authorities: see eg *Westpac Banking Corpn v South Carolina National Bank* [1986] 1 Lloyd's Rep 311 at 315, PC. See also *Mahonia Ltd v JP Morgan Chase Bank* [2003] EWHC 1927 (Comm), [2003] 2 Lloyd's Rep 911; *Mahonia Ltd v West LB AG* [2004] EWHC 1938 (Comm), [2004] All ER (D) 10 (Aug) (where allegations of illegality and conspiracy as the true purposes of the relevant letters of credit were rejected).

4 As to irrevocable credits see PARA 928.

5 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 182–183, [1982] 2 All ER 720 at 725, HL, per Lord Diplock.

6 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168, [1982] 2 All ER 720, HL.

7 As to payment under reserve see PARA 956.

8 Ie under the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 14(a), 15(c), 16; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14: see PARA 953.

9 In *Co-operative Centrale Raiffeisen-Boereleenbank BA v Sumitomo Bank Ltd* [1987] 1 Lloyd's Rep 345 at 352, it was held by Gatehouse J that the obligations are matching. On appeal it was found unnecessary to determine the point, and it was expressly left open: see *Sumitomo Bank Ltd v Co-operative Centrale Raiffeissen-Boereleenbank BA* [1988] 2 Lloyd's Rep 250, CA.

10 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 4; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 3.

11 *Urquhart, Lindsay & Co v Eastern Bank Ltd* [1922] 1 KB 318 at 323; *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127, [1958] 1 All ER 262, CA.

12 *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127, [1958] 1 All ER 262, CA. See further PARA 959.

927. Performance bonds. By issuing a performance bond or performance guarantee[1], a bank assumes obligations to a buyer or other beneficiary analogous to those assumed by a confirming bank to the seller under a documentary credit[2]. A bank which gives a performance guarantee must honour that guarantee according to its terms; it is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not; nor with the question whether the supplier is in default or not; and, subject to the fraud exception[3], the bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions[4]. A performance bond is virtually a promissory note payable on demand[5], and certainly has much more of the characteristics of a promissory note than of a guarantee[6]. The bank is simply concerned to see whether the event has happened upon which its obligation to pay arises[7].

Where a performance bond is payable on demand upon the occurrence of a specified event, the beneficiary's demand must state that the event has occurred[8].

1 The difference between the terms 'performance bond' and 'performance guarantee' appears to be purely semantic. As to more extensive discussion of performance bonds or performance guarantees see PARA 1271 et seq.

2 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 184, [1982] 2 All ER 720 at 725, HL, per Lord Diplock. As to the application of the Uniform Customs and Practice for Documentary Credits to standby letters of credit, which appear to be performance bonds under a different name, see PARA 925.

3 As to the fraud exception see PARA 958. See also *Turkiye IS Bankasi AS v Bank of China* [1996] 2 Lloyd's Rep 611 (in challenging a demand made on a performance bond, the challenging party must show that the only inference the bank concerned could draw was that the demand was fraudulent; in doing so, it must put before the bank irrefutable evidence because it is not for the bank to verify mere allegations).

4 *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 at 171, [1978] 1 All ER 976 at 983, CA, per Lord Denning MR, approving *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, [1977] 2 All ER 862.

5 *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 at 170, [1978] 1 Ali ER 976 at 983, CA, per Lord Denning MR.

6 *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 at 175, [1978] 1 All ER 976 at 986, CA, per Geoffrey Lane LJ.

7 *Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd* [1978] 1 Lloyd's Rep 161 at 165, CA, per Roskill LJ.

8 *Esal (Commodities) Ltd and Reltor Ltd v Oriental Credit Ltd and Wells Fargo Bank NA* [1985] 2 Lloyd's Rep 546 at 550, CA, per Ackner LJ (bond payable 'on your written demand in the event that the supplier fails to execute the contract in perfect performance'); it should be noted, however, that at 554 Neill LJ expressly reserved the point for future decision. See also *IE Contractors Ltd v Lloyd's Bank plc* [1990] 2 Lloyd's Rep 496, CA (a demand required to state that it is a claim for damages for breach of contract is valid if it does so in substance but not in express words).

B. FORM AND NOTIFICATION OF CREDITS

928. Revocable and irrevocable credits. Credits[1] may be either revocable or irrevocable; and all credits, therefore generally or at least previously were required to indicate clearly whether they are revocable or irrevocable[2]. A credit is irrevocable despite the absence of any indication to that effect[3].

A bank authorised to effect payment is not bound to advise the beneficiary of the revocation of a revocable credit[4]; and, where a revocable credit takes the form of an authority to purchase drafts[5], any bank acting on the strength of the authority must be deemed to know its terms[6].

A credit[7] constitutes a definite undertaking of the issuing bank, provided that the stipulated documents are presented to the nominated bank or to the issuing bank and that the terms and conditions of the credit are complied with and there should be provision for the issuing bank to honour if the credit is available by sight payment, deferred payment, acceptance with the issuing bank or in certain circumstances with a nominated bank or by negotiation with a nominated bank and that nominated bank does not negotiate[8].

Where a credit, not stated to be irrevocable or otherwise, states that it will remain in force for a given period, it cannot be revoked as against negotiators of bills drawn under the credit and negotiated within the period of validity on the strength of the credit[9].

1 As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 6(a), (b). There is no corresponding article in the 2007 Revision: see note 3. See generally PARA 925 note 1.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 3 PARA 2; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 6(c). The provision of the 2007 Revision is almost identical although it makes no reference to revocability on the basis that revocable letters of credit are rarely encountered in practice; the 1993 Revision version provided that in the absence of any indication the credit was deemed to be irrevocable. A provision of the 1993 Revision (see the Uniform Customs and Practice for Documentary

Credits (1993 Revision) art 8) relates to revocation of a credit and therefore has no equivalent in the 2007 Revision. Under that provision a revocable credit could be amended or cancelled by the issuing bank at any moment and without prior notice to the beneficiary (see the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 8(a)). The issuing bank however still had several duties in regard to reimbursement: see art 8(b); and also *Gelpcke v Quentell* 74 NY 599 (1878), CA. Where a revocable credit is intended then this should be expressly stated in the body of the credit.

4 See *Cape Asbestos Co Ltd v Lloyds Bank Ltd* [1921] WN 274; and see also *Giddens v Anglo-African Produce Co Ltd* (1923) 14 Ll L Rep 230. Note however that in the Uniform Customs and Practice for Documentary Credits (2007 Revision) there is no provision about revocable credits: see note 3.

5 As to the meaning of 'draft' see PARA 925 note 2.

6 *Chartered Bank of India, Australia and China v P Macfayden & Co* (1895) 64 LJQB 367.

7 See note 3.

8 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 7(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 9(a). In the 2007 Revision there is also a provision (see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 7(b)) that an issuing bank is irrevocably bound to honour as of the time it issues the credit but there is no such provision in the 1993 Revision, although otherwise the articles are similar though worded differently.

9 *Re Agra and Masterman's Bank, ex p Asiatic Banking Corpn* (1867) 2 Ch App 391. See also *MA Sassoon & Sons Ltd v International Banking Corpn* [1927] AC 711, PC.

929. Buyer and issuing bank. A letter of credit comes into being as the result of a formal written application by the applicant, usually the buyer[1], and the contractual relationship is defined by the terms of the agreement between them under which the credit is issued. The buyer who pursuant to his sales contract instructs his bank to open a credit undertakes to put the bank in funds or to reimburse it, provided the documents against which the bank pays are what the bank calls for. The bank is bound to apply the funds to the purpose to which they are appropriated[2]; but, if it becomes insolvent before this is done, the buyer has only a right to prove[3].

Where, in accordance with a credit opened at the request of the seller's agents (the defendants), an issuing bank accepted drafts against documents of title which it released in trust to the seller's agents, who delivered the documents to the buyer against payment which, after notice that the bank had gone into liquidation, they remitted to the seller, the issuing bank was held not entitled to the money because it had evinced an intention not to honour the seller's draft at maturity; accordingly the seller's agents were released from their obligation to put the bank in funds and the seller was entitled to be released from his obligation under his pledge of the documents to the issuing bank[4].

The bank must comply rigidly with its instructions[5], and the same applies to the intermediary bank[6], the latter being indemnified by the former if it complies strictly with its instructions[7]. There is ordinarily no privity between the buyer and the paying (intermediary) bank[8].

1 Cf *Sale Continuation Ltd v Austin Taylor & Co Ltd* [1968] 2 QB 849, [1967] 2 All ER 1092 (where the application was made by the seller's agents).

2 *Farley v Turner* (1857) 26 LJ Ch 710.

3 *Re Barned's Banking Co Ltd, Massey's Case* (1870) 39 LJ Ch 635.

4 *Sale Continuation Ltd v Austin Taylor & Co Ltd* [1968] 2 QB 849, [1967] 2 All ER 1092.

5 *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Ll L Rep 49, HL; *South African Reserve Bank v Samuel & Co* (1931) 40 Ll L Rep 291, CA; *Gian Singh & Co Ltd v Banque de l'Indochine* [1974] 2 All ER 754, [1974] 1 WLR 1234, PC.

6 *Rayner & Co Ltd v Hambros Bank Ltd* [1943] KB 37, [1942] 2 All ER 694, CA; *Bank Melli Iran v Barclays Bank (Dominion Colonial and Overseas)* [1951] 2 TLR 1057.

7 *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Ll L Rep 49, HL.

8 *Johnson v Robarts* (1875) 10 Ch App 505; *Calico Printers' Association v Barclays Bank* (1931) 145 LT 51, CA; *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Ll L Rep 49, HL.

930. Form of credits. Previously there was a rule that instructions for the issue of credits[1], the credits themselves, instructions for any amendments to them and the amendments themselves had to be complete and precise; and in order to guard against confusion and misunderstanding, banks should discourage any attempt to include excessive detail in the credit or in any amendment to the credit; and to give instructions in regard to a credit by reference to a credit previously issued where such previous credit has been subject to amendments[2]. If incomplete or unclear instructions were received in regard to a credit, the bank requested to act on such instructions could give preliminary notification to the beneficiary for information only and without responsibility; and the credit was to be issued, confirmed, advised or amended only when the necessary information had been received and if the bank is at that stage prepared to act on the instructions[3].

All credits must clearly indicate whether they are available by sight payment, by deferred payment, by acceptance or by negotiation; and they must nominate the bank (the 'nominated bank') which is authorised to pay, to incur a deferred payment undertaking, to accept drafts[4] or to negotiate[5]. There are various provisions governing nomination matters[6].

1 As to the meaning of 'credit' see PARA 925 note 2.
2 See the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 5(a), (b). There is no equivalent to art 5 in the 2007 Revision. See generally PARA 925 note 1. Notwithstanding the provision in the 1993 Revision modern credits tend to stipulate for presentation of numerous documents, and not infrequently refer to a state of fact without specifying the documentary evidence to be tendered in respect of such fact. See further PARA 950.
3 See the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 12 which also provides that banks should provide the necessary information without delay. As to the beneficiary see PARA 925 note 2. There is no equivalent to art 12 in the 2007 Revision. See generally PARA 925 note 1.
4 As to the meaning of 'draft' see PARA 925 note 2.
5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 6(a), (b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 10(a), (b).
6 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 12; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 10. These are substantially similar in substance if not in wording although the 2007 Revision version expressly permits a nominated bank to prepay or purchase its own accepted draft or a deferred payment undertaking. As to the obligation to reimburse see PARA 949.

931. Applicant (buyer) and beneficiary (seller). If the underlying contract between the applicant (buyer) and the beneficiary (seller) provides for payment by confirmed credit, the credit, in the absence of express stipulation, must be available to the seller at the beginning of the shipment period[1] and the contract is not satisfied by the buyer procuring a revocable credit[2].

Where the parties do not, in their sale contract, define the terms of the proposed letter of credit, the letter of credit as subsequently agreed between the parties may fill the contractual gap[3].

Where a letter of credit is regarded as absolute payment, the buyer's obligation to pay the price is discharged upon the opening of a conforming credit even if the issuing bank becomes insolvent[4]. A letter of credit is, however, not to be regarded as absolute payment unless the seller expressly or impliedly stipulates that it should be so[5]. He may do so impliedly if he stipulates for the

credit to be issued by a particular bank in such circumstances that it is to be inferred that the seller looks to that particular bank to the exclusion of the buyer[6].

Where a letter of credit is conditional payment, the buyer is discharged if the seller fails to obtain payment because of failure on his part to comply with its terms[7].

1 *Pavia & Co SpA v Thurmann-Nielsen* [1952] 2 QB 84 at 88, [1952] 1 All ER 492 at 495, CA, per Denning LJ; and see *AE Lindsay & Co Ltd v Cook* [1953] 1 Lloyd's Rep 328; *Sinason-Teicher Inter-American Grain Corpn v Oilcakes and Oilseeds Trading Co Ltd* [1954] 3 All ER 468, [1954] 1 WLR 1394, CA. The rule applies to c i f and f o b contracts in general: see *Ian Stach Ltd v Baker Bosley Ltd* [1958] 2 QB 130 at 140–144, [1958] 1 All ER 542 at 547–549. As to c i f and f o b contracts see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 324 et seq, 351 et seq. The measure of damages for failure to procure a letter of credit within the proper time may be the seller's loss of profit on the transaction: *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, [1952] 1 All ER 970, CA; *Ian Stach Ltd v Baker Bosley Ltd* above at 145 and 549.

2 *Panoutsos v Raymond Hadley Corpn of New York* [1917] 2 KB 473, CA. A seller may be held to have waived a condition requiring a confirmed credit: see *Shamsher Jute Mills Ltd v Sethia (London) Ltd* [1987] 1 Lloyd's Rep 388 at 392; *Plasticmoda SpA v Davidsons (Manchester) Ltd* [1952] 1 Lloyd's Rep 527, CA (waiver as to credit amount). A seller who waives as regards earlier shipments a condition requiring a confirmed credit may avail himself of the condition as regards later shipments, but only upon giving reasonable notice to the buyer: *Panoutsos v Raymond Hadley Corpn of New York* above; and see also *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n. As to revocable credits (which are relatively rare in practice) see PARA 928.

3 *Ficom SA v Sociedad Cadex Ltda* [1980] 2 Lloyd's Rep 118 at 131; *Shamsher Jute Mills Ltd v Sethia (London) Ltd* [1987] 1 Lloyd's Rep 388 at 392.

4 *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 at 209–210, [1972] 2 All ER 127 at 136–137, CA, per Lord Denning MR.

5 *Hindley & Co v Tothill, Watson & Co* (1894) 13 NZLR 13, NZCA; *Greenough v Munroe* 53 F 2d 362 (1931) (see, however, *Vivacqua Irmaos SA v Hickerson* 190 SO 657 (1939) (Louisiana) and *Ornstein v Hickerson* 40 F Supp 305 (1941)); *Newman Industries Ltd v Indo-British Industries Ltd* [1956] 2 Lloyd's Rep 219; *Soprama SpA v Marine and Animal By-Products Corpn* [1966] 1 Lloyd's Rep 367; *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, [1972] 2 All ER 127, CA (in which the above authorities were reviewed); *Man (ED & F) Ltd v Nigerian Sweets & Confectionery Co Ltd* [1977] 2 Lloyd's Rep 50.

6 *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 at 210, [1972] 2 All ER 127 at 137, CA, per Lord Denning MR.

7 *Ficom SA v Sociedad Cadex Ltda* [1980] 2 Lloyd's Rep 118; *Shamsher Jute Mills Ltd v Sethia (London) Ltd* [1987] 1 Lloyd's Rep 388.

932. Teletransmitted and pre-advised credits. When an issuing bank instructs a bank (the 'advising bank') by an authenticated teletransmission to advise a credit[1] or an amendment to a credit, the teletransmission will be deemed to be the operative credit instrument or amendment, and any subsequent mail confirmation should be disregarded[2]. However, if the teletransmission states 'full details to follow' (or something of similar effect) or that the mail confirmation is to be the operative credit instrument or amendment, then the teletransmission will not be deemed to be the operative credit instrument or amendment; and the issuing bank must forward the operative credit instrument or amendment to the advising bank without delay[3].

If a bank uses the services of an advising bank to have the credit advised to the beneficiary, it must also use the services of the same bank in regard to advising any amendments[4].

A preliminary advice of the issue or amendment of a credit ('pre-advice'), must only be given by an issuing bank if such bank is prepared to issue the

operative credit instrument or amendment and in such circumstances the issuing bank having given such pre-advice is irrevocably committed to issue or amend the credit, in terms not inconsistent with the pre-advice, without delay[5].

1 As to the meaning of 'credit' see PARA 925 note 2.
2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 11(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 11(a)(i). The provisions are similar in substance although the 1993 Revision version is much wordier. See generally PARA 925 note 1.
3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 11(a) (second paragraph); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 11(a)(ii) which are in similar terms.
4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 9(d); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 11(b). The provisions are broadly similar. As to the beneficiary see PARA 925 note 2.
5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 11(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 11(c). The provisions are similar although the 1993 Revision version refers to an 'irrevocable credit' (but see PARA 928).

933. Advising and confirming of credits. A credit[1] and any amendment may be advised to a beneficiary through another bank (the 'advising bank') and that bank, by advising the credit or amendment signifies that it has satisfied itself as to authenticity and related matters[2].

Provided that the stipulated documents are presented to the bank confirming the credit[3] (the 'confirming bank') or to any other nominated bank and such documents amount to a complying presentation, the confirming bank must (1) honour if the credit is available by sight payment, deferred payment, acceptance with the issuing bank or in certain circumstances with a nominated bank or by negotiation with a nominated bank and that nominated bank does not negotiate; (2) negotiate if the credit is available by negotiation with the confirming bank[4].

1 As to the meaning of 'credit' see PARA 925 note 2.
2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 9(a), (b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 7(a). If the bank elects not to advise the credit, it must inform the issuing bank without delay: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 9(e); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 7(a). The same bank must be used for advising a credit and advising any amendment to it: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 9(d); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 11(b). The provisions appear similar in effect although have different wording. In addition the 2007 Revision has a specific similar provision on where the advising bank uses the services of a second advising bank: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 9(c). The 1993 Revision also has a provision dealing with the situation where authenticity cannot be established and the actions that should be taken: see the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 7(b). As to the beneficiary, and as to the issuing bank, see PARA 925 note 2. See generally PARA 925 note 1.
3 As to irrevocable credits see PARA 928.
4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 8(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 9(b) which are in broadly similar terms although worded differently. In the 2007 Revision there is also a provision (see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 8(b)) that a confirming bank is irrevocably bound to honour as of the time it issues the credit but there is no such provision in the 1993 Revision. It has been held in the United States that a bank may confirm a non-bank's credit: *Barclays Bank DCO v Mercantile National Bank* [1973] 2 Lloyd's Rep 541, US Ct of Appeals.

The relation between the confirming (and issuing) bank and beneficiary is contractual: see *Urquhart, Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 KB 318 at 321 per Rowlatt J; *Donald H Scott & Co Ltd v Barclays Bank Ltd* [1923] 2 KB 1 at 14, CA, per Scrutton LJ;

United City Merchants (Investments) Ltd v Royal Bank of Canada [1983] 1 AC 168 at 183, [1982] 2 All ER 720 at 725, HL, per Lord Diplock. See also *Dexters Ltd v Schenker & Co* (1923) 14 Ll L Rep 586. As to the position of a confirming house see *Rusholme and Bolton and Roberts Hadfield Ltd v Read & Co (London) Ltd* [1955] 1 All ER 180, [1955] 1 WLR 146.

C. AMENDMENT AND TRANSFER OF CREDITS

934. Amendment of credits. A revocable credit[1] could be amended or cancelled by the issuing bank at any moment and without prior notice to the beneficiary[2]. An irrevocable credit[3] can neither be amended nor cancelled without the agreement of the issuing bank, the confirming bank, if any, and the beneficiary; and partial acceptance of amendments contained in one and the same advice of amendment is not allowed and consequently will be deemed rejection of the amendment[4].

1 As to the meaning of 'credit' see PARA 925 note 2. As to revocable and irrevocable credits see PARA 928.

2 See the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 8(a). There is no direct equivalent in the 2007 Revision as it makes no reference to revocable credits: see further PARA 928. As to the issuing bank, and as to the beneficiary, see PARA 925 note 2.

3 Note that in the 2007 Revision all credits are irrevocable: see PARA 928.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 10(a), (e); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 9(d)(i), (iv). Both are expressed to be subject to provisions on transferable credit: see PARA 935. In the 2007 Revision there is a provision requiring the bank advising an amendment to inform the bank from whom it received the amendment of any notification of acceptance or rejection: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 10(d). Generally the issuing bank will put itself at risk if it consents to an amendment without the prior consent of the applicant. As to the drafting of amendments see PARA 930.

The issuing bank is irrevocably bound by an amendment issued by it from the time of its issue; and a confirming bank may extend its confirmation to an amendment and is irrevocably bound as of the time of its advice of the amendment; however, a confirming bank may choose to advise an amendment to the beneficiary without extending its confirmation and if so must inform the issuing bank and the beneficiary in its advice without delay: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 10(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 9(d)(ii). The terms of the original credit (or one incorporating previously accepted amendments) remain in force for the beneficiary until he communicates his acceptance of the amendment to the bank that advised the amendment; the beneficiary must give notification of acceptance or rejection of amendments; and if the beneficiary fails to give the notification, the tender of documents to the nominated bank or the issuing bank that conform to the credit and to not yet accepted amendments, is deemed to be notification of acceptance by the beneficiary of the amendments and as of that moment the credit will be amended: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 10(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 9(d)(iii). The provisions are similar in effect with some minor differences in wording. See generally PARA 925 note 1. In the 2007 Revision there is also a provision that any amendment which provides that it shall enter into force unless rejected by the beneficiary by a certain time is to be disregarded: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 10(f).

935. Transfer of credits. A transferable credit is a credit[1] which says it is 'transferable' and a transferable credit may be made available in whole or in part to another beneficiary (the 'second beneficiary') at the request of the beneficiary (the 'first beneficiary') to the bank authorised to pay, incur a deferred payment undertaking, accept or negotiate (the 'transferring bank'), or in the case of a freely negotiable credit, the bank specifically authorised in the credit as a transferring bank[2]. The bank requested to effect the transfer (the 'transferring bank') is under no obligation to effect such transfer except to the extent and in the manner expressly consented to by such bank[3]. The mere designation of a

credit as transferable is insufficient to constitute consent to a subsequent transfer request, since the request and consent contemplated are to effect a transfer to a particular extent and in a particular manner[4].

Bank charges in respect of transfers are payable by the first beneficiary unless otherwise specified[5].

Provision is made for partial transfer[6]. The transferred credit must reflect the terms and conditions of the credit, including confirmation, with the exception of the amount of the credit, any unit prices stated in it, the expiry date, the last shipment date or period, any or all of which may be reduced or curtailed; and there is provision for increase in insurance cover and for substitution of the name of the first beneficiary[7].

The first beneficiary has the right to substitute his own invoices, and drafts[8] for those of the second beneficiary, for amounts not in excess of the original amount stipulated in the credit and for the original unit prices if stipulated in the credit, and upon such substitution of invoices (and drafts) the first beneficiary can draw under the credit for the difference, if any, between his invoices and the second beneficiary's invoices[9].

Provision is made for the first beneficiary of a transferable credit to request that the payment or negotiation be effected to a second beneficiary at the place to which the credit has been transferred up to and including the expiry date of the credit[10].

1 As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 38(a), (b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 48(a), (b), (c). The two articles are similar in effect but the 2007 Revision has a number of clarifications and changes in definitions of transfer terms and has specific provisions about the duty of a transferring bank, the right to present the second beneficiary's documents and the place where the second beneficiary must present documents. See generally PARA 925 note 1.

For a case in which damages were awarded when the transferring bank sent a copy of the second beneficiary's invoice to a third party, instead of to the first beneficiary, leading to the third party ceasing to do business with the first beneficiary, see *Jackson v Royal Bank of Scotland* [2000] EWCA Civ 203, [2000] All ER (D) 881. See also *Struthers v Commercial Bank of Scotland* (1842) 4 D 460.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 38(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 48(c). There is also provision for the conditions under which amendments may be advised to the second beneficiary: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 38(e); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 48(d). Where a credit is transferred to more than one second beneficiary, there is provision for when there is refusal of an amendment by one or more second beneficiaries: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 38(f); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 48(e). See note 2.

4 *Bank Negara Indonesia 1946 v Lariza (Singapore) Pte Ltd* [1988] AC 583 at 599, PC.

5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 38(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 48(f). See note 2.

6 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 38(d); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 48(g). A transferred credit cannot be transferred at the request of the second beneficiary to any subsequent third beneficiary. See note 2.

7 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 38(g); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 48(h). See note 2.

8 As to the meaning of 'draft' see PARA 925 note 2.

9 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 38(i); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 48(i). See note 2.

10 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 38(h); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 48(j). See note 2.

936. Assignment of proceeds. The fact that a credit[1] is not stated to be transferable does not affect the beneficiary's right to assign any proceeds to which he may be or may become entitled under such credit, in accordance with the provisions of the applicable law[2]. This relates only to the assignment of proceeds and not to the assignment of the right to perform under the credit itself[3].

1 As to the meaning of 'credit' see PARA 925 note 2.
2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 39; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 49. The two provisions are almost identical. See generally PARA 925 note 1. As to assignments of choses or things in action see CHOSES IN ACTION vol 6 (2003 Reissue) PARA 9 et seq.
3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 39; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 49. See note 2. Whether there can be a valid assignment of the right to present documents under a credit which is not stated to be transferable is undecided. The apparent intention (see also PARA 935) is that such an assignment should not be effective. This result could perhaps be reached either by reference to authorities in which the benefit of a personal contract has been held unassignable (see eg *Kemp v Baerselman* [1906] 2 KB 604, CA) or on the principle that parties may by agreement deprive an otherwise assignable chose or thing in action of the quality of assignability (see *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All ER 262).

D. DOCUMENTS

937. Documents to be stipulated precisely. It is to the obvious advantage of all parties to a documentary letter of credit that the documents to be presented should be stipulated with precision. All instructions for the issue of credits[1] and the credits themselves and, where applicable, all instructions for amendments to credits and the amendments themselves, must, therefore, state precisely the document or documents against which payment, acceptance or negotiation is to be made[2]. Terms such as 'first class', 'well known', 'qualified', 'independent', 'official', 'competent' are not to be used to describe the issuer and any issuer except the beneficiary may issue the document[3].

One original of each document is usually required and banks are to treat as original documents bearing an apparently original signature, mark, stamp or label unless there are indications that the document is not original[4].

Unless otherwise indicated, banks will also accept as original documents any documents appearing to be written, typed, perforated or stamped by the document issuer's hand or appearing to be on the latter's original stationery or stating that it is original[5].

Where copies of documents are required either originals or copies are permitted[6]. Credits that require multiple documents will be satisfied by the presentation of one original and the remaining number in copies except where indicated otherwise[7].

A requirement that a document be legalised, visaed, certified or similar, will be satisfied by any signature, mark, stamp or label on the document appearing to satisfy the requirement[8].

Documents may be dated prior to the issuance date of the credit but not later than its date of presentation[9].

1 As to the meaning of 'credit' see PARA 925 note 2.
2 See PARA 930.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 3 PARA 6; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 20(a). The 2007 Revision version is much simpler in language but appears to be of similar effect. See generally PARA 925 note 1.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 17(a), (b). There are no equivalent provisions in the 1993 Revision. See also note 5.

5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 17(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 20(b). The 1993 Revision version was rather different referring to documents produced by reprographic systems, or automated or computerised systems, as carbon copies, provided they are marked as original and, where necessary, appear to have been signed. These provisions address issues of originality (i e when original documents are required, what is an original, what is a copy and what is required when multiple copies are presented). The 2007 Revision version has some changes that reflect mistaken judicial interpretations of the 1993 Revision: see the ICC policy statement of July 1999. A document may be signed by handwriting, by facsimile signature, by perforated signature, by stamp, by symbol, or by any other mechanical or electronic method of authentication: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 3; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 20(b). See note 3. A signature is not a substitute for a marking as an original: *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135, CA. A document which is clearly the original, as it contains the relevant contract and is not itself a copy of some other document, is an original for the purposes of the rule: *Kredietbank Antwerp v Midland Bank plc; Karaganda Ltd v Midland Bank plc* [1999] 1 All ER (Comm) 801, CA, distinguishing *Glencore International AG v Bank of China* above. The position was codified by a policy statement issued by the ICC in July 1999, which was applied by the court in *Crédit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm), [2002] 2 All ER (Comm) 427.

6 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 17(d); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 20(c)(i). The provisions are of similar effect although differently worded. See notes 3, 5.

7 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 17(e); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 20(c)(ii). See notes 3, 5.

8 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 3; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 20(d). See notes 3, 5.

9 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(i); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 22. The 2007 Revision is rather simpler in language and forms part of a large new important provision (i e the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14) which represents a major reorganisation of many provisions from the 1993 Revision (e g the Uniform Customs and Practice for Documentary Credits (1993 Revision) arts 13, 14, 43, 21, 22, 30, 31) relating to general rules regarding compliance of documents.

938. **Doctrine of strict compliance.** The documents must conform strictly with the terms of the credit; and there is no room for documents which are almost the same or which will do just as well as those specified[1]. If, however, the documents conform with the terms of the credit, the banker is not concerned as to whether the documents for which the buyer has stipulated serve any useful commercial purpose or as to why the customer called for tender of a document of a particular description[2] or as to the legal effect of a document vis-à-vis the applicant[3]. It forms no part of the bank's function, when considering whether to pay against the documents presented to it, to speculate about the underlying facts[4].

Where the credit calls for shipping documents, they must so conform to accustomed shipping documents as to be reasonably fit to pass current in commerce[5]. If, however, a bill of lading is merchantable in this sense, it is not a requirement, unless expressly so stipulated, that the bill must be in usual form[6].

A tender of documents which, properly read and understood, call for further inquiry or are such as to invite litigation is clearly a bad tender[7].

1 *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Ll L Rep 49 at 52 per Lord Sumner; applied in *Kydon Compania Naviera SA v National Westminster Bank Ltd, The Lena* [1981] 1 Lloyd's Rep 68 at 75; *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 at 729–730, [1983] 1 All ER 1137 at 1141, CA, per Sir John Donaldson MR. See also *Credit Agricole Indosuez v Generale Bank (Seco Steel Trading Inc) (No 2)* [1999] 2 All ER (Comm) 1016; *Credit Agricole Indosuez v Chailease Finance Corpn* [2000] 1 All ER (Comm) 399, CA. As to discrepancies in transport documents, insurance documents and commercial invoices see PARA 939 et seq.

2 *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 279 at 286, [1972] 2 Lloyd's Rep 529, PC; *Kydon Compania Naviera SA v National Westminster Bank Ltd* [1981] 1 Lloyd's Rep 68 at 75.

3 *National Bank of Egypt v Hannevig's Bank* (1919) 1 Ll L Rep 69, CA; *British Imex Industries Ltd v Midland Bank Ltd* [1958] 1 QB 542, [1958] 1 All ER 264.

4 *Westpac Banking Corpn and Commonwealth Steel Co Ltd v South Carolina National Bank* [1986] 1 Lloyd's Rep 311 at 315, PC.

5 *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36 at 46, HL per Lord Sumner.

6 *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc, The Galatia* [1979] 2 All ER 726 at 739–740, [1980] 1 WLR 495 at 510–511 per Donaldson J; affd [1980] 1 All ER 501, [1980] 1 WLR 495, CA. As to bills of lading see SHIPPING AND NAVIGATION vol 43(2) (Reissue) PARA 1532 et seq.

7 *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36 at 46, HL; *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc, The Galatia* [1979] 2 All ER 726 at 739–740, [1980] 1 WLR 495 at 510–511 per Donaldson J (affd [1980] 1 All ER 501, [1980] 1 WLR 495, CA).

939. Transport documents. Unless a credit[1] calling for a transport document stipulates as such document a road, rail or inland waterway transport document, or a post receipt or certificate of posting[2], then, unless otherwise stipulated in the credit, banks must accept a document of the type called for, however named, which appears to indicate the name of the carrier and to have been signed by the carrier or his agent or indicate receipt by signature or otherwise[3]; and indicates the place of shipment and the place of destination stipulated in the credit[4]. In the absence of any indication on the transport document as to the numbers issued, banks will accept the transport documents presented as constituting a full set[5].

There are specific provisions accepting transhipment[6] even if the credit prohibits it[7].

There are also provisions governing multimodal transport documents (which are transport documents covering at least two different modes of transport)[8]; and provisions relating to air transport documents[9].

1 As to the meaning of 'credit' see PARA 925 note 2.

2 A courier receipt however named must appear to indicate: (1) the name of the courier service and to have been stamped by that service at the place from which the credit states the goods are to be shipped; (2) a date of pick-up or of receipt or similar wording: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 25(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 29(b). See generally PARA 925 note 1.

3 The date of issue will be deemed to be the date of shipment unless the transport document contains a reception stamp, in which case the date of the reception stamp will be deemed to be the date of shipment: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 25(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 29(a). At common law the bills of lading must indicate that the goods have been 'shipped', not merely 'received for shipment': *Diamond Alkali Export Corpn v Bourgeois* [1921] 3 KB 443; *Donald H Scott & Co Ltd v Barclays Bank Ltd* [1923] 2 KB 1; cf *Marlborough Hill (Ship) v Cowan & Sons* [1921] 1 AC 444. See also *Westpac Banking Corpn v South Carolina National Bank* [1986] 1 Lloyd's Rep 311, PC.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 24(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 28(a).

5 see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 25(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 28(b). See note 3.

6 For this purpose, 'transhipment' means unloading and reloading from one means of conveyance to another, in different modes of transport, during the course of carriage from the place of shipment to the place of destination stipulated in the credit: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 24(d); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 28(c).

7 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 24(e); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 28(d). See note 3.

8 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 19; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 26. The provisions are similar although the 2007 Revision version makes changes relating to providing the name of the master and transhipment.

9 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 23; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 27. The provisions are similar but the 2007 Revision version changes the rule in regard to the date of issuance where the air waybill states an actual date of shipment.

940. Bills of lading, non-negotiable sea waybills and charter party bills of lading. If a credit[1] calls for a bill of lading or a non-negotiable sea waybill covering a port-to-port shipment, then such a document must appear to: (1) indicate the name of the carrier and to have been signed by or on behalf of the carrier or his named agent or the master or his named agent; (2) indicate that the goods have been loaded on board or shipped on a named vessel[2]; (3) indicate the port of loading and the port of discharge stated in the credit; (4) be the sole original bill of lading or non-negotiable sea waybill or the full set as so indicated; (5) contain all of the terms and conditions of carriage or if necessary refer to another source of documents; and (6) contain no indication that it is subject to a charter party[3].

Unless transhipment[4] is prohibited by the terms of the credit, banks will accept a bill of lading or non-negotiable sea waybill which indicates that the goods will be transhipped, provided that the entire ocean carriage is covered by one and the same such document[5]. Transhipment may be permitted provided that the entire carriage is covered by one bill of lading or non-negotiable sea waybill, and even if the credit prohibits transhipment, a document will be acceptable if it indicates that transhipment will take place in containers, trailers or 'LASH' barges as evidenced by the document; clauses stating that the carrier reserves the right to tranship are to be disregarded[6].

A charter party bill of lading must appear to: (a) be signed by or behalf of the master or his named agent, the owner or his named agent or the charterer or his named agent; (b) indicate that the goods have been loaded on board or shipped on a named vessel[7]; (c) indicate shipment from the port of loading and the port; (d) be the sole original bill of lading or the full set of such bills[8]. Banks will not examine such charter party contracts[9].

It is essential that shipping documents so conform to accustomed shipping documents as to be reasonably and readily fit to pass current in commerce[10]. The documents must be in good merchantable order, so that, if the bank is not reimbursed, it has realisable documents from which it may reimburse itself[11]. The bill of lading must cover transit from the port of origin to the port of destination[12]. If the credit stipulates a particular time or date of shipment, the stipulation must be complied with[13].

1 As to the meaning of 'credit' see PARA 925 note 2.

2 Loading on board or shipment on a named vessel may be indicated by pre-printed wording on the bill of lading or non-negotiable sea waybill or by onboard notation with the relevant date: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 20(a)(ii),

21(a)(ii); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) arts 23(a)(ii), 24(a)(ii). The provisions are generally similar but there are new formulations of the rules in regard to signature and transhipment. See generally PARA 925 note 1.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 20(a), 21(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) arts 23(a), 24(a). See note 2.

4 'Transhipment' refers to unloading and reloading from one vessel to another vessel during the course of carriage from the port of loading to the port of discharge stipulated in the credit: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 20(b), 21(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) arts 23(b), 24(b). There is a slight change in the wording: see note 2.

5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 20(c), 21(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) arts 23(c), 24(c). See note 2.

6 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 20(c), (d), 21(c), (d); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) arts 23(b), 24(b). See note 2.

7 Loading on board or shipment on a named vessel may be indicated by pre-printed wording or onboard notation indicating the relevant date of shipment, and the date of issuance of the charter party bill of lading is deemed to be such date unless there is some contrary indication: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 22(a)(ii); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 25(a)(iv). See note 2.

8 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 22(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 25(a). See note 2.

9 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 22(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 25(b). See note 2.

10 *Hansson v Hamel & Horley Ltd* [1922] 2 AC 36 at 46, HL per Lord Sumner; *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc, the Galatia* [1979] 2 All ER 726, [1980] 1 WLR 495 (affd [1980] 1 All ER 501, [1980] 1 WLR 495, CA). A banker is not affected with knowledge of the custom and customary terms of particular trades: *Rayner & Co Ltd v Hambros Bank Ltd* [1943] KB 37 at 41, [1942] 2 All ER 694 at 701, CA, per Mackinnon LJ.

11 *Skandinaviska Akt v Barclays Bank* (1925) 22 Ll L Rep 523 (bank held entitled to reject a bill of lading which did not contain the name of the shipper and which was indorsed in an illegible manner). As to the distinction between merchantable documents and usual documents see PARA 938.

12 *E Clemens Horst Co v Biddell Bros* [1912] AC 18, HL; *Landauer & Co v Craven and Speeding Bros* [1912] 2 KB 94; *Brazilian and Portuguese Bank Ltd v British and American Exchange Banking Corpn Ltd* (1868) 18 LT 823; *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36, HL.

13 *Stein v Hambro's Bank of Northern Commerce* (1922) 10 Ll L Rep 529, CA; and see *Re General Trading Co and Van Stolk's Commissiehandel* (1911) 16 Com Cas 95; *Taylor & Sons Ltd v Bank of Athens* (1922) 91 LJKB 776. Unless called for by the credit, an acknowledgment that the provisions of a bill of lading have been met cannot be demanded: *British Imex Industries Ltd v Midland Bank Ltd* [1958] 1 QB 542, [1958] 1 All ER 264.

941. 'On deck', 'shipper's load and count', name of consignor. Banks will accept a transport document which contains a provision that the goods may be carried on deck, provided that it does not specifically state that they are or will be loaded on deck; bears a clause such as 'shipper's load and count' or 'said by shipper to contain'; or indicates as the consignor of the goods a party other than the beneficiary of the credit[1].

1 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 14(k), 20(a), (b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 31. The provisions are similar but with the 2007 Revision they have been reorganised and their application extended to all transport documents rather than only to those involving carriage by sea. See generally PARA 925 note 1.

942. Freight. A transport document may have a reference whether by stamp or otherwise to charges additional to the freight[1].

A transport document may be issued by any party other than a carrier, owner, master or charterer as long as the document meets other relevant requirements[2].

1 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 26(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 33. The provisions are similar but the 2007 Revision version is much reduced in size and complexity. See generally PARA 925 note 1.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(l); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 30. The 2007 Revision version is much shorter and simpler and is part of the radically reorganised art 14 on examination of documents which collects together in one place many of the previous general rules on compliance of documents: see also PARA 937. The other requirements referred to are those in other articles: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 19–24. As to transport documents see PARA 939.

943. Clean transport documents. A bank will only accept a clean transport document which is one which bears no clause or notation expressly declaring a defective condition of the goods or packaging[1]. To render a bill of lading defective, the clause or notation must declare the defect to have existed at the time of shipment[2].

1 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 27; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 33. 32(a). The provisions are very similar in effect although the 2007 Revision version is shorter and simpler and also states that it is unnecessary that the word 'clean' actually appear on the document for it to be 'clean on board'. See generally PARA 925 note 1. Where bills of lading bore clauses which 'so dealt with the condition of the meat or with what the ship said as to the condition of the meat for shipment as to seriously affect its price and its acceptability', the bills were not clean: *Westminster Bank Ltd v Banca Nazionale di Credito* (1928) 31 Ll L Rep 306 at 311 per Roche J. For a discussion as to the nature of a bill of lading (albeit not in a case involving a documentary credit) see *JI MacWilliam Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2005] UKHL 11, [2005] AC 423, [2005] 1 All ER (Comm) 393.

2 *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc, The Galatia* [1979] 2 All ER 726, [1980] 1 WLR 495; affd [1980] 1 All ER 501, [1980] 1 WLR 495, CA. See also *National Bank of Egypt v Hannevig's Bank* (1919) 1 Ll L Rep 69 at 70, CA, where Bankes LJ seemed to think that the position as to the acceptability of claused bills (i e bills bearing superimposed clauses) might depend upon the circumstances.

944. Insurance documents. Insurance documents must appear to be issued and signed by insurance companies or underwriters, or their agents[1]. If there is more than one original, all the originals must be presented[2]. Cover notes issued by brokers will not be accepted[3]. Banks will accept an insurance policy in lieu of a certificate or a declaration under an open cover[4].

Unless it is clear otherwise from the insurance document, the date of the document must be no later than the date of shipment[5].

The amount of coverage must be indicated and be in the same currency as the credit[6]. There are reworded provisions on minimum cover[7], including new provisions indicating that risks are covered at least between shipment and final destination[8].

Credits must stipulate the type of insurance required and, if any, the additional risks which are to be covered[9]. An insurance document may indicate that the cover is subject to a franchise or an excess (deductible)[10].

Where a credit stipulates insurance against 'all risks', banks must accept an insurance document which contains any 'all risks' notation or clause, whether or not under such a heading, without regard to any risk or risks being excluded[11].

1 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 34(a). There are new provisions on signature in the 2007 Revision version and also on coverage, risks and exclusions. The 2007 Revision has a new amalgamated art 28 about what constitutes a complying insurance document but corresponds in general terms to arts 34–36 in the 1993 Revision version. See generally PARA 925 note 1. Where a credit called for an 'approved insurance policy', it was held that a certificate which failed to state the terms of insurance was deficient: *Donald H Scott & Co Ltd v Barclays Bank Ltd* [1923] 2 KB 1, CA. As to the sufficiency at common law of an open cover see *South African Reserve Bank v Samuel & Co Ltd* (1931) 40 Ll L Rep 291, CA. As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 34(b). See note 1.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 34(c). See note 1.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(d); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 34(d). See note 1.

5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(e); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 34(e). See note 1.

6 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(f)(i); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 34(f)(i). See note 1.

7 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(f)(ii); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 34(f)(ii). See note 1. As to cif contracts see PARA 924.

8 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(f)(iii). See note 1.

9 If imprecise terms such as 'usual risks' or 'customary risks' are used, banks must accept insurance documents without responsibility for any risks not being covered: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(g); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 35(a). See note 1. Cf the position at common law as illustrated by *Borthwick v Bank of New Zealand* (1900) 17 TLR 2 (policy to pay 'total loss by total loss of vessel only' held inadequate in view of custom in meat trade to tender 'all risks' insurance).

10 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(j); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 35(c). See note 1.

11 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(h); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 36. See note 1.

945. Commercial invoices. Commercial invoices must appear to be issued by the beneficiary named in the credit[1], must be made out in the name of the applicant, must be in the same currency as the credit, and need not be signed[2]. In certain specified circumstances a nominated or confirming bank may accept a commercial invoice and its decision is binding upon all parties, provided that the bank has not honoured or negotiated for an amount in excess of that permitted by the credit[3]. The description of the goods, service or performance in the commercial invoice must correspond with the description in the credit; but, in other documents, the goods may be described in general terms not conflicting with the description in the credit[4]. The wording of the description in the invoice must follow the words of the credit, and this is so even where the beneficiary uses an expression which, although different from the words of the credit, has, as between buyer and seller, the same meaning as such words[5]. There is, however, a real distinction between an identification of goods and a description of goods. The latitude in relation to other documents extends only to description, and,

however general the description, the identification must be unequivocal[6]. A distinction exists between words of description and words relating to the condition of the described goods[7].

Linkage between documents is not, as such, necessary provided that each directly or indirectly refers unequivocally to the goods[8].

1 An exception is made in relation to transferable credit: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 38; the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 48; and PARA 935. As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 18(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 37(a). The 2007 Revision version of the provision covering commercial invoices (see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(e), (j), art 18) is similar despite some considerable reorganisation and the new added requirement that the invoice be in the same currency as the credit. See also note 4. See generally PARA 925 note 1.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 37(b). See note 3. As to the position at common law: see *Donald H Scott & Co Ltd v Barclays Bank Ltd* (1923) 28 Com Cas 253, CA, where it was suggested by Scrutton LJ at 263 that the tender is to be regarded as a request for collection so far as the excess is concerned.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 14(e), 18(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 37(c). Here there is a slight rewording with the 2007 Revision. See note 1. For an example see *Soproma SpA v Marine & Animal By-Products Corpn* [1966] 1 Lloyd's Rep 367 at 389, decided under the similarly worded Uniform Customs and Practice for Documentary Credits (1962 Revision) art 33 (description of goods in bill of lading as 'Chilean Fishmeal' held sufficient under credit describing goods as 'Chilean Fish Full Meal'). See also *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135, CA; *Credit Agricole Indosuez v Chailease Finance Corpn* [2000] 1 All ER (Comm) 399, CA; and the cases cited in notes 5–6.

5 *Kydon Compania Naviera SA v National Westminster Bank Ltd, The Lena* [1981] 1 Lloyd's Rep 68.

6 *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 at 732, [1983] 1 All ER 1137 at 1142–1143, CA, where Sir John Donaldson MR observed that the Uniform Customs and Practice for Documentary Credits (1983 Revision) art 41(c) (see now the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 37(c); and the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 14(e), 18(c)) was less strict than the common law, which requires that the description in other documents must be consistent and *only* consistent with the commercial invoice and the credit. See *Re Reinhold & Co and Hansloh Arbitration* (1896) 12 TLR 422, DC (certificate of quality which failed to mention that bags were marked with an 'F' held defective where bill of lading did refer to bags so marked); *Rayner & Co Ltd v Hambros Bank Ltd* [1943] KB 37, [1942] 2 All ER 694, CA (bill of lading covering 'machine-shelled ground-nut kernels' held defective under a credit calling for 'Coromandel ground nuts'); *Bank Melli Iran v Barclays Bank (Dominion, Colonial and Overseas)* [1951] 2 Lloyd's Rep 367 (certificate describing vehicles as 'in new condition' and 'new, good' held defective under credit calling for 'new' trucks); *Netherlands Trading Society v Wayne and Haylitt Co, Chan Soon Fat* (1952) 6 Legal Decisions Affecting Bankers 320, Hong Kong Sup Ct (bill of lading for '375 bales, gunny bags' held defective under credit calling for documents covering '375 bales, each containing 400 pieces New Indian Heavycee Bags ... '). As to whether these cases would be decided in the same way under later revisions of the Uniform Customs and Practice for Documentary Credits see the observations of Sir John Donaldson MR in *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* above at 732 and 1142–1143 (in relation to the provisions in the Uniform Customs and Practice for Documentary Credits (1983 Revision)); and see also *Soproma SpA v Marine & Animal By-Products Corpn* [1966] 1 Lloyd's Rep 367.

7 *Astro Exito Navegacion SA v Chase Manhattan Bank NA* [1986] 1 Lloyd's Rep 455 at 458; affd on appeal without affecting this point [1988] 2 Lloyd's Rep 217, CA.

8 *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 at 732, [1983] 1 All ER 1137 at 1142–1143, CA, per Sir John Donaldson MR.

946. Other documents. In the case of documents other than transport documents[1], insurance documents[2] and commercial invoices[3], to be acceptable

the content of the credit[4] must appear to fulfil the document's function and not be in conflict with data in the document, any other document referred to or the credit itself[5]. In documents other than commercial invoices, goods, services or performance may be described in general terms not conflicting with the description in the credit[6].

Previously if a credit called for an attestation or certification of weight in the case of transport other than by sea, banks had to accept a weight stamp or declaration of weight apparently superimposed on the transport document by the carrier or his agent unless the credit specifically stipulated that the attestation or certification of weight must be by means of a separate document[7]. A certificate by one expert is not sufficient where the credit calls for a certificate by 'experts'[8]. Where a credit calls for a certificate of inspection, the minimum requirement implicit in the ordinary meaning of the words is that the goods have been inspected, at any rate visually, by the person issuing the certificate. If it is intended that a particular method of inspection should be adopted or that particular information as to the result of the inspection should be recorded, this needs to be expressly stated[9].

1 As to transport documents see PARA 939 et seq.
2 As to insurance documents see PARA 944.
3 As to commercial invoices see PARA 945.
4 As to the meaning of 'credit' see PARA 925 note 2.
5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(d), (f); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 21. There is considerable rewording and reorganisation with the 2007 Revision and the provisions are now part of the new article comprising the standard for examination of documents but the effect is similar: see also PARA 937. See generally PARA 925 note 1.
6 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(e); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 37(c); and PARA 945.
7 See the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 38. There is no equivalent to art 38 in the 2007 Revision. See note 5.
8 *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Ll L Rep 49, HL.
9 *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 279 at 285, [1972] 2 Lloyd's Rep 529, PC.

947. Documents as security. The requirement of presentation of documents is for the protection of the banker or acceptor[1]. The bank looks to the documents as its security for any payment it may make; the delivery of the documents to the bank is an implied pledge[2].

1 *Banner v Johnston* (1871) LR 5 HL 157; and see *Re Suse, ex p Dever* (1884) 13 QBD 766, CA.
2 *Banner v Johnston* (1871) LR 5 HL 157; *Rosenberg v International Banking Corpn and Far East Gerhard and Hey Co* (1923) 14 Ll L Rep 344 at 347 per Scrutton LJ; *Ross T Smyth & Co Ltd v TD Bailey Son & Co* [1940] 3 All ER 60 at 68, HL. See also PARA 926.

E. LIABILITIES AND RESPONSIBILITIES

948. Matters for which banks are not liable. Banks assume no liability or responsibility:

(1) for such matters as the form, sufficiency, accuracy, genuineness, falsification or legal effect of any documents, or for the general and/or particular conditions stipulated in the documents or superimposed on them, or for such matters as the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance represented by any documents, or for the good faith

or acts and/or omissions, solvency, performance or standing of the consignors, the carriers, the forwarders, the consignees or the insurers of the goods, or any other person[1];

(2) for the consequences arising out of such matters as delay, loss in transit, mutilation or other errors arising in the transmission of any telecommunication, or for various errors in translation or interpretation of technical terms, and reserve the right to transmit credit terms without translating them[2];

(3) for the consequences arising out of the interruption of their business by acts of God, riots, civil commotions, insurrections, wars or any other causes beyond their control, or by any strikes or lockouts[3].

Banks using the services of another bank or banks to give effect to the instructions of the applicant for the credit do so for the account and at the latter's risk[4]. Banks assume no liability or responsibility should the instructions they transmit not be carried out by another bank[5]. A party instructing another party to perform services is liable for any charges incurred by the instructed party in connection with its instructions[6]. The applicant for the credit is bound by, and liable to indemnify the bank against, all obligations and responsibilities imposed by foreign laws and usages[7].

1 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 34; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 15. The provisions are very similar. See generally PARA 925 note 1.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 35; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 16. The provisions are similar but the 2007 Revision version qualifies the issuer's obligation where the method of transmission required by the credit is not followed and expands the provisions protecting beneficiaries and nominated banks when the documents are lost.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 36; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 17. The provisions are in similar terms.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 37; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 18(a). The provisions are in similar terms. See generally PARA 925 note 1.

5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 37(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 18(b). The provisions are in similar terms. See note 4.

6 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 37(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 18(c). The provisions are in similar terms but in the 2007 Revision version there is also a warning added that a credit or amendment should not stipulate that the advising to a beneficiary is conditional upon the receipt by the advising bank or second advising bank of its charges. See note 4.

7 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 37(d); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 18(d). The provisions are very similar. See note 4.

949. Issuing and paying banks. When a nominated bank (that is, the bank with which the credit[1] is available) decides that the presentation is in compliance and honours or negotiates, it must forward on the documents to the confirming bank (that is, the bank adding its confirmation to the credit) or the issuing bank (that is, the bank which issued the credit to start with)[2].

If a credit states that reimbursement is to be obtained by a nominated bank (the 'claiming bank') claiming on another bank (the 'reimbursing bank'), the credit must state whether the reimbursement is subject to the rules on bank-to-bank reimbursements[3] in effect on the issuance date of the credit; and if the credit does not so state other rules apply[4]. An issuing bank is not relieved

from any of its obligations to provide reimbursement itself if and when reimbursement is not made by the reimbursing bank[5]. The issuing bank is responsible to the claiming bank for any loss of interest in the event that reimbursement is not provided on first demand by the reimbursing bank in accordance with the credit[6]. Generally the reimbursing bank's charges are for the account of the issuing bank[7].

1 As to the meaning of 'credit' see PARA 925 note 2.
2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 15(c). This is new but follows on from the corresponding provision in the 1993 Revision (see the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14(a)) that the obligation of the issuer or confirming bank to reimburse a nominated bank is conditional on the complying documents being forwarded to the issuing bank or confirming bank. As to examination and rejection of documents see PARA 953. As to the obligation to reimburse see *Co-operative Centrale Raiffeisen-Boerenleenbank BA v Sumitomo Bank Ltd* [1987] 1 Lloyd's Rep 345 at 348; appeal allowed in part without affecting this point [1988] 2 Lloyd's Rep 250, CA.
3 Ie the Rules for Bank-to-Bank Reimbursements issued by the International Chamber of Commerce: see generally PARA 925 note 1.
4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 13(a), (b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 19(a), (b). The 2007 Revision version has been modified and expanded to recognise the International Chamber of Commerce's Rules for Bank-to-Bank reimbursements (see note 3) although where there is no such reference to these rules the provisions are similar to those under the 1993 Revision. As to such other rules see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 13(b)(i)–(iv).
5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 13(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 19(c).
6 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 13(b)(iii); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 19(d). See note 4.
7 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 13(b)(iv); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 19(e). The provisions are similar and there are also similar terms where the charges are for the account of another party. See note 4.

950. Credit stipulating state of fact but no document. Under the Uniform Customs and Practice for Documentary Credits, if a credit[1] contains conditions without stating the document or documents to be presented in compliance with the credit, banks deem such conditions as not stated and must disregard them[2].

This differs from the position at common law, which is that where a credit stipulates a state of fact but fails to specify a document or documents to be presented, the paying bank has to be satisfied of that fact and is entitled to insist upon reasonable documentary proof to establish its existence[3].

1 As to the meaning of 'credit' see PARA 925 note 2.
2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(h); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 13(c). See also PARA 953. The provisions are very similar and the 2007 Revision version is part of the new reorganised article on general rules regarding compliance of documents: see also PARA 937. See generally PARA 925 note 1.
3 *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 at 728, [1983] 1 All ER 1137 at 1140, CA; *Astro Exito Navegacion SA v Chase Manhattan Bank NA* [1986] 1 Lloyd's Rep 455 at 462–463 (affd without affecting this point [1988] 2 Lloyd's Rep 217, CA).

951. Ambiguity in the credit. If the instructions given by the customer to the issuing bank as to documents to be tendered by the beneficiary are ambiguous or are capable of covering more than one kind of document, the bank is not in default if it acts upon a reasonable meaning of the ambiguous expression or

accepts any kind of document which fairly falls within the wide description used[1]. The reason for this is that banks have to make quick decisions as to whether a document complies with the requirements of a credit at the risk of incurring liability to one or other of the parties to the transaction if the decision is wrong[2]. There are, however, limits to the operation of this principle, namely: (1) once a person enters into a contract, he is bound by its terms, which, in the event of dispute, will fall to be construed objectively; (2) a party relying on his own interpretation of the relevant instrument must have acted reasonably in all the circumstances in so doing, and, if the ambiguity is patent on the face of the document, it may well be right, especially with the facilities of modern communications, for an agent to have his instructions clarified by his principal, if time permits, before acting on them[3].

1 *Midland Bank Ltd v Seymour* [1955] 2 Lloyd's Rep 147; approved in *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 279 at 286, [1972] 2 Lloyd's Rep 529, PC. See also *Ireland v Livingston* (1872) LR 5 HL 395; *Miles v Haslehurst & Co* (1906) 23 TLR 142; *Samuel Montagu & Co v Banco de Portugal* (1924) 19 Ll L Rep 99, HL; *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Ll L Rep 49, HL; *MA Sassoon & Sons Ltd v International Banking Corpn* [1927] AC 711, PC; *Credit Agricole Indosuez v Muslim Commercial Bank Ltd* [2000] 1 All ER (Comm) 172, [2000] 1 Lloyd's Rep 275, CA. The principle established by these cases is subject to the obligation of a bank which receives incomplete or unclear instructions to advise, confirm or amend a credit to request the issuing bank to provide the necessary information: see the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 12; and PARA 930, although there is no direct equivalent in the Uniform Customs and Practice for Documentary Credits (2007 Revision). See generally PARA 925 note 1.

2 *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36 at 46, HL, per Lord Sumner; *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 279 at 286, [1972] 2 Lloyd's Rep 529, PC; *Credit Agricole Indosuez v Muslim Commercial Bank Ltd* [2000] 1 All ER (Comm) 172, [2000] 1 Lloyd's Rep 275, CA.

3 *European Asian Bank AG v Punjab & Sind Bank (No 2)* [1983] 2 All ER 508 at 517–518, [1983] 1 WLR 642 at 656, CA, per Robert Goff LJ.

952. Documents to be examined with reasonable care. Banks must examine all documents referred to in the credit[1] with reasonable care to ascertain whether or not they appear to be in compliance with the terms and conditions of the credit[2]. Documents not required by the credit will be returned to the presenter[3]. Although data in the document when read with the document and international standard banking practice need not be identical it must not be in conflict with such data, the credit or any other documents referred to[4]. The duty is owed by the issuing bank to its customer and perhaps by a bank authorised to pay, accept or negotiate to the issuing bank; but the duty is not owed to the beneficiary[5]. If the documents do not appear on their face to be in accordance with the credit, the beneficiary is not entitled to be paid[6] and the paying bank is not entitled to be reimbursed if it does pay[7].

1 As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 19(a), (b) art 13(a). See further PARA 953. The 2007 Revision version is similar (although it uses the phrase 'on the basis of the documents alone' while the 1993 Revision version uses the phrase 'on their face' in reference to the documents: but see also art 14(b); and PARA 953) and is part of the new reorganised article on general rules regarding compliance of documents: see also PARA 937. See generally PARA 925 note 1.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(g); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 13(a). The 2007 Revision version is much simpler and also makes reference to the document being 'disregarded'. See note 2.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(d)); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 13(a). The 2007 Revision version is again much simpler but similar in effect. See note 2. See *Crédit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm) [2002] 2 All ER (Comm) 427. See also *Oliver v Dubai Bank Kenya Ltd* [2007] EWHC 2165 (Comm), [2007] All ER (D) 135 (Sep).

5 *Kydon Compania Naviera SA v National Westminster Bank Ltd, The Lena* [1981] 1 Lloyd's Rep 68 at 78.

6 As to the terms of the undertakings constituted by the issue and confirmation of a credit see PARA 933.

7 As to the terms of the issuing bank's reimbursement obligation see PARA 930. See also *English, Scottish and Australian Bank Ltd v Bank of South Africa* (1922) 13 Ll L Rep 21 at 24 per Bailhache J; *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Ll L Rep 49, HL; *Rayner & Co Ltd v Hambros Bank Ltd* [1943] KB 37, [1942] 2 All ER 694, CA.

953. Examination and rejection of documents. The issuing bank, the confirming bank, if any, or a nominated bank, must determine on the basis of the documents alone whether or not they appear on their face to be in compliance with the credit[1].

The issuing bank, the confirming bank, if any, or a nominated bank acting on its nomination, each have a certain time following the receipt of the documents, within which to determine compliance[2]. In the event of refusal to honour or negotiate the issuing bank, the confirming bank, if any, or a nominated bank acting on its nomination must give the relevant notice to that effect by telecommunication or, if that is not possible, by other expeditious means within a certain time[3]. The issuing bank or confirming bank, if any, is then entitled to claim from the remitting bank refund, with interest, of any reimbursement which may have been made to that bank[4]. The disposal notice is not required to use a precise form of words; it suffices that it is made clear that the documents are not being accepted[5].

If the issuing bank or confirming bank fails to act in accordance with the provisions described above[6] then it is precluded from claiming that the documents are not in compliance[7].

1 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14(b). As to the meaning of 'credit' see PARA 925 note 2. The wording of the two provisions is different but the effect is similar. See also *Bankers Trust Co v State Bank of India* [1991] 1 Lloyd's Rep 587; affd [1991] 2 Lloyd's Rep 443, CA. If the issuing bank determines that the documents are not in compliance, it may in its sole judgment approach the applicant for a waiver of the discrepancies: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 16(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14(c). This does not extend the relevant period: see the text and note 2. See generally PARA 925 note 1.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 13(b). While the 1993 Revision version refers to 'a reasonable time not to exceed seven banking days' following receipt the 2007 Revision version provides instead for 'a maximum of five banking days following the day of presentation' which is not affected by any subsequent expiry date or last day for presentation. Although the bank has a reasonable time (i e under the 1993 Revision version), it must act promptly: see *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36 at 46, HL, per Lord Sumner; *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 at 730, [1983] 1 All ER 1137 at 1141, CA, per Sir John Donaldson MR; c f *Bank Melli Iran v Barclays (Dominion, Colonial and Overseas)* [1951] 2 Lloyd's Rep 367. As to what may amount to a reasonable time see *Bankers Trust Co v State Bank of India* [1991] 1 Lloyd's Rep 587; affd [1991] 2 Lloyd's Rep 443, CA.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 16(c), (d), (e); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14(d)(i), (ii). The 2007 Revision version refers to the notice needing to be received no later than the close of the fifth banking day following the day of presentation while the 1993

Revision version refers to such notice needing to be received without delay but no later than the close of the seventh banking day after receipt of the documents. In addition there has been considerable further modification with the 2007 Revision particularly in regard to what must be stated in the notice. Where a senior official of the beneficiary under whose aegis documents are presented is present at the bank to receive notice, a term has to be implied that notice can then and there be given in person rather than electronically: *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36, CA. See also *Bankers Trust Co v State Bank of India* [1991] 1 Lloyd's Rep 587; affd [1991] 2 Lloyd's Rep 443, CA; *Crédit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm) [2002] 2 All ER (Comm) 427.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 16(g); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14(d)(iii). The provisions appear to be similar in both wording and effect.

5 *Co-operative Centrale Raiffeisen-Boerenleenbank BA v Sumitomo Bank Ltd* [1988] 2 Lloyd's Rep 250, CA.

6 Ie the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 16; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14: see the text and notes 1–5; and PARA 949.

7 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 16(f); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14(e). The 2007 Revision version is simpler in wording. See also *Rafsanjan Pistachio Producers Co-operative v Bank Leumi (UK) plc* [1992] 1 Lloyd's Rep 513.

954. Estoppel, waiver and ratification. The provisions relating to examination and rejection of documents[1] provide an estoppel against a bank which fails to act in accordance with them, and/or fails to hold the documents at the disposal of, or to return them to, the presenter. An estoppel may also arise between the beneficiary and the confirming or issuing bank[2], or between a bank authorised to pay and the issuing bank[3].

Under the Uniform Customs and Practice for Documentary Credits, a rejection notice must state all the discrepancies in respect of which the bank refuses the documents[4]. It follows that a bank cannot subsequently rely on a discrepancy which was not stated in its rejection notice. This differs from the position at common law, which is that the mere statement of a particular reason or reasons for rejecting documents is not alone enough to found a representation, waiver or promissory estoppel in relation to reasons not so stated[5]. A bank is entitled to rely upon a ground of rejection not relied upon at the time of rejection even where the ground actually relied upon is subsequently abandoned, although in such a case the bank lacks the practical support which it can derive from an actual rejection on the ground relied upon[6].

Where a discrepancy is waived, the position appears to be just as if the document tendered had always conformed with the credit[7].

Unreasonable delay by the issuing bank or the beneficiary may amount to ratification[8].

1 Ie the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 14(a), 15(c), 16; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14: see PARA 953. See generally PARA 925 note 1.

2 See eg *Floating Dock Ltd v Hong Kong and Shanghai Banking Corpn* [1986] 1 Lloyd's Rep 65 (estoppel as between beneficiary and issuing bank). As to estoppel generally see ESTOPPEL.

3 See eg *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508, [1983] 1 WLR 642, CA (issuing bank estopped from denying plaintiff's authority to negotiate the credit).

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 16(c); the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14(d)(ii); and PARA 953.

5 *Kydon Compania Naviera SA v National Westminster Bank Ltd, The Lena* [1981] 1 Lloyd's Rep 68 at 79; and see also *Skandinaviska Akt v Barclays Bank* (1925) 22 Ll L Rep 523.

6 See eg *Westpac Banking Corpn and Commonwealth Steel Co Ltd v South Carolina National Bank* [1986] 1 Lloyd's Rep 311 at 315, PC.

7 *Co-operative Centrale Raiffeisen-Boerenleenbank BA v Sumitomo Bank Ltd* [1987] 1 Lloyd's Rep 345 at 353; varied on appeal without affecting this point [1988] 2 Lloyd's Rep 250, CA. As to waiver generally see CONTRACT vol 9(1) (Reissue) PARA 1025 et seq.

8 *Orr & Barber v Union Bank of Scotland* (1854) 1 Macq 513, HL (SC); *Eigtved & Co v National Bank of Scotland* (1926) 25 Ll L Rep 99; *Westminster Bank Ltd v Banca Nazionale di Credito* (1928) 31 Ll L Rep 306; *Bank Melli Iran v Barclays Bank (Dominion, Colonial and Overseas)* [1951] 2 Lloyd's Rep 367. As to ratification generally see AGENCY vol 1 (2008) PARA 57 et seq.

955. Forged documents. Banks assume no liability or responsibility for, inter alia, the accuracy, genuineness or falsification of any documents[1]. Accordingly, a bank is entitled to reimbursement where it pays against an inaccurate or forged document which appears on its face to be in accordance with the terms and conditions of the credit[2]. In the absence of fraud on the part of the beneficiary[3], the obligation to take up apparently conforming documents exists even where at the time of presentation the documents are known by the beneficiary or the bank to be inaccurate or forged[4]. The beneficiary does not warrant to the paying bank the genuineness of third party documents tendered[5]. If a banker has given his acceptance to a draft, he is liable to a holder in due course notwithstanding the subsequent discovery of fraud[6].

1 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 34; the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 15; and PARA 948. See generally PARA 925 note 1.

2 See *Woods v Thiedemann* (1862) 1 H & C 478; *Ulster Bank v Synott* (1871) IR 5 Eq 595; *Guaranty Trust Co of New York v Hannay & Co* [1918] 2 KB 623; *Basse and Selve v Bank of Australia* (1904) 90 LT 618; *Gian Singh & Co Ltd v Banque de l'Indochine* [1974] 2 All ER 754, [1974] 1 WLR 1234, PC; *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168, [1982] 2 All ER 720, HL; *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 at 514, [1983] 1 WLR 642 at 652, CA. At common law, the buyer is entitled to reject a document which has obviously been altered: *Re Salomon & Co and Naudszus* (1899) 81 LT 325. Quaere whether the position is the same under the Uniform Customs and Practice for Documentary Credits.

3 Fraud on the part of the beneficiary is within the fraud exception: see PARA 958.

4 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168, [1982] 2 All ER 720, HL.

5 See *Guaranty Trust Co of New York v Hannay & Co* [1918] 2 KB 623. It makes no difference that the third party fraud results in the document being a complete nullity: *Montrod Ltd v Grundkötter Fleischvertriebs GmbH* [2001] EWCA Civ 1954, [2002] 3 All ER 697, [2002] 1 All ER (Comm) 257 at PARAS [58], [59] per Potter LJ.

6 *Robinson v Reynolds* (1841) 2 QB 196; *Thiedemann v Goldschmidt* (1859) 1 De GF & J 4.

956. Payment under reserve or against indemnity. It commonly happens that documents tendered by the beneficiary are alleged by the confirming bank to contain discrepancies[1]. In such an event, a number of procedures are available: (1) the beneficiary may request the applicant to waive the discrepancies before the documents are remitted to the issuing bank; (2) the beneficiary may request an amendment to the credit; (3) the confirming bank may pay the beneficiary under reserve or against an indemnity in respect of specified discrepancies, whereupon the documents are forwarded to the issuing bank in the hope or expectation that they will be taken up[2].

Payment under reserve creates a contract by which, in consideration for payment by the confirming bank, the beneficiary agrees to repay on demand in the event that the issuing bank rejects the documents in reliance upon some or all of the identified discrepancies[3]. Where payment is made against an indemnity,

the indemnity will normally be contained in an undertaking by the beneficiary to be fully responsible for the discrepancies[4].

If the remitting bank draws the attention of the issuing bank or the confirming bank, if any, to the discrepancies in the documents or advises such banks that it has paid, incurred a deferred payment undertaking, accepted drafts or negotiated under reserve or against an indemnity in respect of such discrepancies, the issuing bank or confirming bank is not thereby relieved from any of its obligations regarding the examination and rejection of documents[5]; such reserve or indemnity concerns only the relations between the remitting bank and the party towards whom the reserve was made, or from whom, or on whose behalf, the indemnity was obtained[6]. Where the issuing bank fails within a reasonable time to examine the documents and to determine whether to claim that payment, acceptance or negotiation was not effected in accordance with the terms and conditions of the credit, the cause of any loss suffered by the confirming bank by way of financing costs in respect of such delay is the issuing bank's breach of its obligations, and such loss will generally not be recoverable under the beneficiary's indemnity in respect of discrepancies[7].

Whether the confirming bank may demand payment in the event that the issuing bank rejects the documents in reliance upon discrepancies not identified by the confirming bank is undecided[8].

1 In *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 at 733, [1983] 1 All ER 1137 at 1144, CA, it appeared from expert evidence at the trial that as many as two-thirds of presentations of documents against confirmed credits in London are thought to be discrepant.

2 It is important from the beneficiary's standpoint that the discrepancies be identified in order to prevent the repayment obligation being open-ended.

3 *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711, [1983] 1 All ER 1137, CA.

4 See eg *Co-operative Centrale Raiffeisen-Boerenleenbank BA v Sumitomo Bank Ltd* [1988] 2 Lloyd's Rep 250, CA.

5 Ie under the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 14(a), 15, 16; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14(a)–(e): see PARA 953. See generally PARA 925 note 1.

6 Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14(f). There is no equivalent to art 14(f) in the Uniform Customs and Practice for Documentary Credits (2007 Revision) although it seems that this omission would not affect any obligation to pay by the issuer or confirmer in regard to documents appearing to comply with the credit.

7 *Co-operative Centrale Raiffeisen-Boerenleenbank BA v Sumitomo Bank Ltd* [1988] 2 Lloyd's Rep 250, CA.

8 In *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 at 734, [1983] 1 All ER 1137 at 1144, CA, where it was not necessary to decide the point, Kerr LJ inclined to the view that, to entitle the confirming bank to repayment, the issuing bank's grounds of rejection must include at least one of the grounds on which the confirming bank had relied.

957. Acceptance and non-acceptance of the bill. On the bank's accepting the bill and the documents coming to its hands, it acquires a pledge and lien over and qualified property in the goods they represent[1]. What it does with the documents of title depends on its relation or arrangement with its customer (that is, the buyer) but, if it has to pay the acceptance, it may, if necessary, realise the goods; but it is advisable to apply to the customer for reimbursement and to give him notice of intention to sell if the application is not complied with[2]. In the absence of special agreement, the bank is not, however, entitled to sell before the due date in order to put itself in funds to meet the bill[3]. The statement on the face of a bill that it is drawn against specific cargo, goods, or credit, however

minutely the same may be described, does not, without the documents of title, create any charge over or claim to the goods in favour of a holder in the event of the dishonour of the bill[4]. Nor would it appear that such a statement on the bill conveys to the acceptor any right over the goods apart from the documents of title[5].

A bank which has accepted documentary bills is in no sense a trustee for the holder of the bills with respect to the goods or documents of title, and the bill holders have no right to question the bank's dealing with such goods or securities[6].

If the issuing bank accepts the bill drawn by the seller or other beneficiary of the credit on the drawer's undertaking to forward bills of lading (which would be rare), the bank acquires an equitable claim to the bills of lading, valid against the customer's trustee in bankruptcy, but not against a third person who took them in good faith, and for value[7].

If the bank does not accept a bill of exchange drawn under the credit, it has no right to retain any documents, and no property in the goods represented by them passes to him[8].

1 See the Sale of Goods Act 1979 s 19; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 370, 373. He does not acquire absolute property in them, but a sufficient interest and right of disposition to constitute them sufficient security for his acceptance: see *Banner v Johnston* (1871) LR 5 HL 157; *Re Howe, ex p Brett* (1871) 6 Ch App 838; and contrast *The Odessa, The Wooston* [1916] 1 AC 145, PC, with *The Prinz Adalbert* [1917] AC 586, PC.

2 *Banner v Johnston* (1871) LR 5 HL 157.

3 *Banner v Johnston* (1871) LR 5 HL 157 is not an authority to the contrary.

4 *Inman v Clare* (1858) John 769; *Robey & Co's Perseverance Ironworks v Ollier* (1872) 7 Ch App 695; *Re Suse, ex p Dever* (1884) 13 QBD 766 at 777, CA, per Lindley LJ. Cf *Brown Shipley & Co v Kough* (1885) 29 ChD 848, CA.

5 See *Phelps Stokes & Co v Comber* (1885) 29 ChD 813 at 819, CA, per Cotton LJ.

6 *Banner v Johnston* (1871) LR 5 HL 157 at 168 per Lord Hatherley.

7 *Lutscher v Comptoir d'Escompte de Paris* (1876) 1 QBD 709.

8 See the Sale of Goods Act 1979 s 19(3); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 373. Cf *Cahn and Mayer v Pockett's Bristol Channel Steam Packet Co* [1899] 1 QB 643, CA.

958. The fraud exception. The obligation of the confirming bank to the seller under a confirmed credit to pay against documents which appear on their face to be in accordance with its terms and conditions is subject to one established exception, that is to say, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank[1] documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue[2]. The fraud must be that of the beneficiary[3], but where it is, and the bank knows that the documents are forged or fraudulent, the bank is entitled to refuse payment if it finds out before payment, and to recover the money as paid under a mistake if it finds out after payment[4]. The principle also applies to performance bonds[5].

The fraud must be clearly established, both as to the fact and as to the bank's knowledge, and it would not normally be sufficient that this rests upon the uncorroborated statement of the customer[6]. The court will generally expect the beneficiary to have been given an opportunity to answer the allegation of fraud and to have failed to provide any adequate answer in circumstances where one could be properly expected[7]. The bank's knowledge must be shown to exist prior to payment to the beneficiary[8].

The exception for fraud on the part of the beneficiary is a clear application of the maxim *ex turpi causa non oritur actio* (fraud unravels all) and the courts will not allow their process to be used by a dishonest person to carry out a fraud[9].

1 In principle, the exception must also apply where documents are fraudulently presented to the issuing bank.
2 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 183, [1982] 2 All ER 720 at 725, HL, per Lord Diplock, approving the principle stated in *Sztejn v J Henry Schroder Banking Corpn* 31 NYS 2d 631 (1941), New York Ct of Appeals. See also *KBC Bank v Industrial Steels (UK) Ltd* [2001] 1 All ER (Comm) 409.
3 As to the position where the fraud is not that of the beneficiary see PARA 955.
4 *Bank Russo-Iran v Gordon Woodroffe & Co Ltd* (1972) Times, 4 October; *Edward Owen (Engineering) Ltd v Barclays Bank International Ltd* [1978] QB 159, [1978] 1 All ER 976, CA; *Establissement Esefka International Anstalt v Central Bank of Nigeria* [1979] 1 Lloyd's Rep 445, CA; *Banco Santander SA v Bayfern Ltd* [2000] 1 All ER (Comm) 776, CA; *Montrod Ltd v Grundkötter Fleischvertriebs GmbH* [2001] EWCA Civ 1954, [2002] 3 All ER 697, [2002] 1 All ER (Comm) 257.
5 *Edward Owen (Engineering) Ltd v Barclays Bank International Ltd* [1978] QB 159, [1978] 1 All ER 976, CA; *Deutsche Ruckversicherung v Walbrook Insurance Co Ltd* [1994] 4 All ER 181, [1995] 1 WLR 1017, DC (in an application for an injunction to restrain a reinsured from effecting payment under a letter of credit, it must be established that the reinsured would be acting fraudulently, in that it would be claiming payment to which it knew it had no entitlement). See also *SAFA v Banque du Caire* [2000] 2 All ER (Comm) 567, CA; *Solo Industries UK Ltd v Canara Bank* [2001] EWCA Civ 1059, [2001] 2 All ER (Comm) 217, [2001] 1 WLR 1800.
6 *Edward Owen (Engineering) Ltd v Barclays Bank International Ltd* [1978] QB 159, [1978] 1 All ER 976, CA; *Bolivinter Oil SA v Chase Manhattan Bank* [1984] 1 All ER 351n, [1984] 1 WLR 392n, CA (reported in full at [1984] 1 Lloyd's Rep 251); *Society of Lloyd's v Canadian Imperial Bank of Commerce* [1993] 2 Lloyd's Rep 579; *Deutsche Ruckversicherung v Walbrook Insurance; Group Josi Reinsurance Co SA v Walbrook Insurance* [1994] 4 All ER 181, [1995] 1 WLR 1017, DC. Strong corroborative evidence is required to establish fraud and usually takes the form of contemporary documents: *Sunderland Association Football Club Ltd v Uruguay Montevideo FC* [2001] 2 All ER (Comm) 828.
7 *United Trading Corpn SA and Murray Clayton Ltd v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554n at 561, CA, per Ackner LJ. Where fraud is relied on as a defence to an application for summary judgment in relation to obligations under a performance bond, the party must prove the defence has a real prospect of success: *Banque Saudi Fransi v Lear Siegler Services Inc* [2006] EWCA Civ 1130, [2007] 1 All ER (Comm) 67.
8 *United Trading Corpn SA and Murray Clayton Ltd v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554n at 560, CA. See also the observations of Sir John Donaldson MR in *Bolivinter Oil SA v Chase Manhattan Bank* [1984] 1 Lloyd's Rep 251 at 256.
9 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 183, [1982] 2 All ER 720 at 725, HL, per Lord Diplock.

959. Restraint of payment and drawing. The court will ordinarily[1] not grant an injunction to restrain payment under a letter of credit or a performance bond. Where such an application is made, the court should ask itself whether there is any challenge to the validity of the letter or bond itself. If there is not or if the challenge is not substantial, prima facie no injunction should be granted and the bank should be left free to honour its contractual obligation, although restrictions may well be imposed upon the freedom of the beneficiary to deal with the money after he has received it. The wholly exceptional case where an injunction may be granted is where the fraud exception is made out[2].

On an application for relief based upon the fraud exception, what has to be established is a good arguable case that the only realistic inference is fraud[3]. Even then the application may fail on the ground that the cause of action is tenuous[4] or that the balance of convenience weighs against the granting of an injunction[5]. An order made without notice restraining the beneficiary from drawing on the credit may be discharged on the application of the bank[6].

The court will not recognise the order of a foreign court restraining payment under a letter of credit on the application of the buyer where the foreign court, applying a law which is not the proper law of the credit, has made a restraining order contrary to the principles described above[7].

The Court of Appeal has granted an injunction to restrain beneficiaries from drawing on a demand guarantee[8].

1 For a case in which payment on a demand guarantee was prohibited by legislation see *Shanning International Ltd v Lloyds TSB Bank plc* [2001] UKHL 31 [2001] 1 WLR 1462.

2 *Bolivinter Oil SA v Chase Manhattan Bank* [1984] 1 All ER 351n, [1984] 1 WLR 392, CA; *Deutsche Ruckversicherung v Walbrook Insurance* [1994] 4 All ER 181, [1995] 1 WLR 1017, DC. See also *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 1 All ER (Comm) 890 (even where the fraud exception was alleged, there was a balance of convenience in the bank's favour in the absence of exceptional circumstances; ex parte injunction discharged). A dispute as to a party's entitlement to draw down the total amount guaranteed by the bond will not give rise to grounds for granting an injunction: *TTI Team Telecom International Ltd v Hutchinson 3G UK Ltd* [2003] EWHC 762 (TCC), [2003] 1 All ER (Comm) 914. See also PARA 926. As to the fraud exception see PARA 958.

3 *United Trading Corpn SA and Murray Clayton Ltd v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554n at 561, 565, CA.

4 See e g *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, [1977] 2 All ER 862.

5 See e g *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, [1977] 2 All ER 862; *Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd* [1978] 1 Lloyd's Rep 161 at 165, CA; *United Trading Corpn SA and Murray Clayton Ltd v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554n at 565–566, CA; *Tukan Timber Ltd v Barclays Bank plc* [1987] 1 Lloyd's Rep 171 at 177; *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 1 All ER (Comm) 890

6 *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, [1977] 2 All ER 862; *Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd* [1978] 1 Lloyd's Rep 161 at 165–166, CA.

7 *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607, [1981] 1 WLR 1233, CA. As to the proper law of credits see PARA 966.

8 See *Themehelp Ltd v West* [1996] QB 84, [1995] 4 All ER 215, CA. This decision was, however, doubted in *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 2 Lloyd's Rep 187, [1999] 1 All ER (Comm) 890.

960. Damages on breach of contract. Where a banker is liable for breach of contract to pay under a credit, the measure of damages is in principle that which it could reasonably have been foreseen would flow[1] from the breach[2]. They are not simply the damages for non-payment of money[3]. However, special considerations, unless known to him or which he ought to have known, will not give rise to special damages for the damage which may flow from them[4].

In principle, the beneficiary must take reasonable steps to mitigate his loss, but there are statements to the contrary[5].

1 Ie on the basis of the decision in *Hadley v Baxendale* (1854) 9 Exch 341; c f *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, [1949] 1 All ER 997, CA. See DAMAGES vol 12(1) (Reissue) PARA 941 et seq.

2 *Prehn v Royal Bank of Liverpool* (1870) LR 5 Exch 92; and see *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, [1952] 1 All ER 970, CA (buyers' failure to procure letter of credit; buyers being aware that sellers could not obtain goods unless credit provided, sellers were entitled to damages representing loss of profit). As to the foreseeability of losses caused by fluctuations in foreign currency exchange rates see *Ozalid Group (Export) Ltd v African Continental Bank Ltd* [1979] 2 Lloyd's Rep 231. See also note 4.

3 *Urquhart, Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 KB 318; *Belgian Grain and Produce Co Ltd v Cox & Co (France) Ltd* (1919) 1 Ll L Rep 256, CA; but see the judgment of Rowlatt J in *Stein v Hambros Bank of Northern Commerce* (1921) 9 Ll L Rep 507 (revsd without affecting this point (1922) 10 Ll L Rep 529, CA).

4 *Hammond & Co v Bussey* (1887) 20 QBD 79, CA; *British Columbia and Vancouver's Island Spar Lumber and Saw Mill Co Ltd v Nettleship* (1868) LR 3 CP 499; *Hydraulic Engineering Co v McHaffie, Goslette & Co* (1878) 4 QBD 670, CA; *Re R and H Hall Ltd and WH Pim Jnr & Co's Arbitration* (1928) 139 LT 50, HL; *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, [1952] 1 All ER 970, CA.

5 See *Stein v Hambros Bank of Northern Commerce* (1921) 9 Ll L Rep 507 (revsd without affecting this point (1922) 10 Ll L Rep 529, CA); *Urquhart Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 KB 318. Since the amount payable under the credit is a contractual debt, there are very strong arguments to the effect that no duty to mitigate should arise.

F. MISCELLANEOUS PROVISIONS

961. Quantity and amount. Such words or expressions as 'about', 'approximately', 'circa' used in connection with the amount of the credit[1] or the quantity or the unit price stated in the credit are to be construed as allowing a difference not to exceed ten per cent more or ten per cent less than the relevant amount or quantity or unit price[2].

A tolerance of five per cent more or five per cent less is permissible in the quantity of goods referred to, provided that the amount of the drawings does not exceed the amount of the credit and that this tolerance does not apply when the credit states the quantity in terms of a particular number of packing units or individual items[3]. Even when partial shipments are not permitted, a tolerance of five per cent less in the amount of the drawing is allowed, provided that if the credit states the quantity of the goods, such quantity of goods is shipped in full, and if the credit stipulates a unit price, such price is not reduced[4].

1 As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 30(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 39(a). The provisions are in almost identical terms. See generally PARA 925 note 1. As to the position where the commercial invoice is for an amount in excess of the credit amount see PARA 945.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 30(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 39(b). The provisions are similar. See note 2. For examples of differences in specified amounts see *Moralice (London) Ltd v ED & F Man* [1954] 2 Lloyd's Rep 526; *Astro Exito Navegacion SA v Chase Manhattan Bank NA* [1986] 1 Lloyd's Rep 455 at 460–461 (affd on appeal without affecting this point [1988] 2 Lloyd's Rep 217, CA). See also *London and Foreign Trading Corpn v British and Northern European Bank* (1921) 9 Ll L Rep 116 (bills of lading for 5,895 bags held defective under credit calling for documents covering 500 tons of metal).

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 30(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 39(c). The provisions are very similar. See note 2. This provision does not apply when certain expressions (see the text to notes 1–2) are used in the credit.

962. Partial and instalment drawings and shipments. Partial drawings or shipments are permitted[1].

Transport documents which appear to indicate that shipment has been made on the same means of conveyance and for the same journey, provided they indicate the same destination, will not be regarded as covering partial shipments, even if the transport documents indicate different dates of shipment or different ports of loading, places of taking in charge, or despatch[2].

Shipments made by post or by courier are not to be regarded as partial shipments if the relevant receipts, certificates or dispatch notes appear to have been stamped, signed by the same courier or postal service at the same place and date and for the same ultimate destination[3].

If drawings or shipments by instalments within given periods are stated in the credit[4] and any instalment is not drawn or shipped within the period allowed, the credit ceases to be available for that and any subsequent instalments[5].

1 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 31(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 40(a). The provisions are similar. See generally PARA 925 note 1.
2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 31(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 40(b). The provisions are similar although the 2007 Revision version adds further provisions indicating the date of shipment where there are multiple transport documents that are not partial shipments and clarifying what is included within a partial shipment.
3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 31(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 40(c). The provisions are similar.
4 As to the meaning of 'credit' see PARA 925 note 2.
5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 32; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 41. The provisions are very similar. As to dating and date terms see PARA 965.

963. Expiry date and place for presentation of documents. All credits[1] must state an expiry date (and an expiry date stated for honour or negotiation is deemed an expiry date for presentation) and a place for presentation of documents[2]; and, except as provided below[3], documents must be presented on or before such expiry date[4]. If an issuing bank states that the credit is to be available 'for one month', or for other such set periods, but does not specify the date from which the time is to run, the date of issue of the credit by the issuing bank is deemed to be the first day from which such time is to run[5].

It frequently happens that the validity of a credit is extended by consent of all parties; and such consent may be implied from the tender and acceptance of documents after the expiry date[6].

In addition to stipulating an expiry date for presentation of documents, every credit which calls for transport documents must also stipulate a specified period of time after the date of shipment[7] during which presentation must be made in compliance with the terms and conditions of the credit. If no such period of time is stipulated, banks must refuse documents presented to them later than 21 days after the date of shipment. In every case, however, documents must be presented not later than the expiry date of the credit[8].

If the expiry date of the credit or the last day for presentation falls on a day on which the bank to which presentation has to be made is closed for reasons other than those of force majeure[9], the expiry date or the last day for presentation of documents, as the case may be, is extended to the first following banking day[10]. The bank to which presentation is made on such first following business day must provide a statement that the documents were presented within the time limits extended in accordance with the above provisions[11].

Banks are under no obligation to accept presentation of documents outside banking hours[12].

1 As to the meaning of 'credit' see PARA 925 note 2.
2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 6(d); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 42(a). As to dating and date terms see PARA 965. The provisions are similar although the 2007 Revision version is expanded to restate a fundamental principle that a beneficiary can always make presentation to the issuer at the place where it issued the credit. See generally PARA 925 note 1.
3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 29(a); the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 44(a); and the text to notes 9–10.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 6(e); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 42(b). The provisions are similar. Where a letter of credit provides for documents 'to be accepted as presented', the time condition for presentation must still be complied with: *Credit Agricole Indosuez v Credit Suisse First Boston (Zurich)* [2001] 1 All ER (Comm) 1088.

5 Uniform Customs and Practice for Documentary Credits (1993 Revision) art 42(c). This way of indicating an expiry date was specifically discouraged in the 1993 Revision version and there appears to be no equivalent to art 42(c) in the Uniform Customs and Practice for Documentary Credits (2007 Revision).

6 *Co-operative Centrale Raiffesisen-Boerenleen Bank BA v Sumitomo Bank Ltd* [1988] 2 Lloyd's Rep 250, CA.

7 In cases in which the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 40(b) applies (see PARA 962), the date of shipment will be considered to be the latest shipment date on any of the transport documents presented: art 43(b). As to the meaning of 'shipment' see PARA 964. There appears to be no equivalent to art 43(b) in the Uniform Customs and Practice for Documentary Credits (2007 Revision).

8 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 43(a). The provisions are in similar terms on this point but see note 7.

9 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 36; the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 17; and PARA 948.

10 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 29(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 44(a). The latest date for shipment is not extended as a result: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 29(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 44(b). These provisions are broadly similar.

11 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 29(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 44(c). The provisions appear to be broadly similar in effect although they are differently worded. The provisions referred to in the text are those of the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 29(a) or the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 44(a): see the text to notes 9–10. As to the effect of failure to provide the required statement see *Bayerische Vereinsbank Aktiengesellschaft AG v National Bank of Pakistan* [1997] 1 Lloyd's Rep 59.

12 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 33; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 45.

964. Shipment. Unless otherwise stipulated in the credit[1], the expression 'shipment' used in stipulating an earliest or a latest shipment date is to be understood to include such expressions as 'loading on board', 'dispatch', 'accepted for carriage', 'date of post receipt', 'date of pick-up', and, in the case of a credit calling for a multimodal transport document, to include the expression 'taking in charge'[2]. The use of such expressions as 'prompt', 'immediately', 'as soon as possible' should not be used; and if used will be disregarded[3]. If such expressions as 'on or about' are used, they are interpreted as a stipulation that an event is to take place during the period from five days before to five days after the specified date, both such dates to be included[4].

1 As to the meaning of 'credit' see PARA 925 note 2.

2 Uniform Customs and Practice for Documentary Credits (1993 Revision) art 46(a). There does not seem to be an equivalent to art 46(a) in the Uniform Customs and Practice for Documentary Credits (2007 Revision).

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 3; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 46(b). The provisions appear to be broadly similar.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 3; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 46(c). The provisions appear to be broadly similar.

965. Dating and date terms. A document may be dated before the issuance date of the credit[1], but not later than its date of presentation[2].

Such words as 'to', 'until', 'till', 'from' referring to a period of shipment include the date mentioned; and the words 'before' and 'after' exclude such date[3].

The terms 'first half' and 'second half' of a month are construed respectively as the first to the fifteenth, and the sixteenth to the last day of such month, inclusive[4]. The terms 'beginning', 'middle' or 'end' of a month are construed respectively as from the first to the tenth, the eleventh to the twentieth and the twenty-first to the last day of such month, inclusive[5].

1 As to the meaning of 'credit' see PARA 925 note 2.
2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(i); the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 22; and PARA 937. As to time limits see PARA 963.
3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 3; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 47(a), (b). These interpretation provisions are very similar. See generally PARA 925 note 1.
4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 3; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 47(c). See note 3.
5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 3; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 47(d). See note 3.

966. Proper law. Where a letter of credit contains no express provision as to its proper law, the law applicable is the law with which the transaction has its closest and most real connection[1]. This will ordinarily be the law of the territory in which the seller's draft is to be presented to the banker for acceptance or payment[2]. A debt under a letter of credit is situated in the place where it is in fact payable against documents[3].

1 *Offshore International SA v Banco Central SA* [1976] 3 All ER 749, [1977] 1 WLR 399; approved in *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607, [1981] 1 WLR 1233, CA. See further CONFLICT OF LAWS vol 8(3) (Reissue) PARA 410.
2 *Offshore International SA v Banco Central SA* [1976] 3 All ER 749, [1977] 1 WLR 399; *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607, [1981] 1 WLR 1233, CA.
3 *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607, [1981] 1 WLR 1233, CA.

(xii) Lending and Security

967. Lending by way of overdraft. A customer may borrow from a bank by way of a loan or by way of overdraft. A loan is a matter of special agreement. In the absence of agreement, express or implied from a course of business, a bank is not bound to allow his customer to overdraw[1]. An agreement for an overdraft must be supported by good consideration[2], and it may be express or implied[3].

Drawing a cheque or accepting a bill payable at a bank where there are not funds sufficient to meet it amounts to a request for an overdraft[4].

1 *Cunliffe Brooks & Co v Blackburn and District Benefit Building Society* (1884) 9 App Cas 857 at 864, HL, per Lord Blackburn; *Cumming v Shand* (1860) 5 H & N 95 (course of business entitling to overdraw). Circumstances may justify a bank in withdrawing the right to overdraw: *Parkinson v Wakefield & Co* (1889) 5 TLR 646, CA (security disturbed by customer). In practice, it would be difficult to establish an implied agreement because the modern practice is to record in an overdraft facility letter the terms on which an overdraft is granted.
2 *Fleming v Bank of New Zealand* [1900] AC 577, PC. An implied contract to pay interest would be sufficient consideration.

3 *Armfield v London and Westminster Bank* (1883) Cab & El 170; *Ritchie v Clydesdale Bank* (1886) 13 R 866 Ct of Sess. It is not inconsistent for a lender to grant a facility which both it and the borrower envisage will last for some time, but with the caveat that the lender retains the right to call for repayment at any time on demand: *Lloyds Bank plc v Lampert* [1999] 1 All ER (Comm) 161, CA. See also *Bank of Ireland v AMCD (Property Holdings) Ltd* [2001] 2 All ER (Comm) 894.

4 *Cuthbert v Robarts, Lubbock & Co* [1909] 2 Ch 226, CA; *Eaton v Bell* (1821) 5 B & Ald 34; *Cunliffe Brooks & Co v Blackburn and District Benefit Building Society* (1884) 9 App Cas 857, HL. See also *Royal Bank of Scotland plc v Fielding* [2003] EWHC 986 (Ch), [2003] All ER (D) 36 (May) (affd sub nom *Fielding v Royal Bank of Scotland* [2004] EWCA Civ 64, [2004] All ER (D) 183 (Feb)), where the bank was entitled to advance a loan which exceeded the authorised overdraft limit; and note that *London Chartered Bank of Australia v McMillan* [1892] AC 292, PC, is distinguishable, as the overdraft arose from the unauthorised act of an agent, and the circumstances should have put the bank on inquiry. As to the power to borrow see eg COMPANIES vol 7(2) (2004 Reissue) PARA 1517 et seq; CORPORATIONS vol 9(2) (2006 Reissue) PARA 1238; LOCAL GOVERNMENT vol 29(1) (Reissue) PARA 594 et seq; MORTGAGE vol 32 (2005 Reissue) PARAS 382–383; PARTNERSHIP vol 35 (Reissue) PARA 49. As to a minor's power to borrow see PARA 820.

968. Interest. By the universal custom of bankers, a banker has the right to charge simple interest at a reasonable rate on all overdrafts[1]. An unusual rate of interest can be justified, in the absence of express agreement, only where the customer is shown or must be taken to have agreed to the account being kept on that basis[2]. A customer who requests an overdraft impliedly consents to pay the bank's usual overdraft rate of interest[3].

An implied term entitling a bank to charge interest is not restricted to accounts which are current for mutual transactions, nor is it terminated by a bank's demand for repayment, the commencement of legal proceedings, or the closing of the account[4].

The taking of a mortgage to secure a fluctuating balance of an overdrawn account, is not, however, inconsistent with the relation of banker and customer, so as to displace a previously accrued right to charge compound interest[5].

It is the practice of bankers to debit accrued interest to the borrower's current account at regular periods; where the current account is overdrawn or becomes overdrawn as the result of the debit, the effect is to add the interest to the principal, in which case it loses its quality of interest and becomes capital[6].

1 *National Bank of Greece v Pinios Shipping Co* [1990] 1 AC 637 at 679, [1990] 1 All ER 78 at 85, HL, per Lord Goff of Chieveley, approving the decision, but not the reasoning, in *Crosskill v Bower, Bower v Turner* (1863) 32 LJ Ch 540; *Guyn v Godby* (1812) 4 Taunt 346, Ex Ch. A banker was held not to be entitled to interest and bank charges in respect of an overdraft where the money had been applied for the maintenance of a person of unsound mind and his family in *Re Beavan, Davies Banks & Co v Beavan* [1912] 1 Ch 196. See PARA 821. See also *Lloyds Bank plc v Voller* [2000] 2 All ER (Comm) 978, CA. As to the distinction between computing and compounding interest see *Kitchen v HSBC Bank plc* [2000] 1 All ER (Comm) 787, CA. A default rate of interest, i e one which operates after a borrower is in default, is often charged by a bank: see eg *Lordsvale Finance plc v Bank of Zambia* [1996] QB 752, [1996] 3 All ER 156. See also PARA 969.

2 *Fergusson v Fyffe* (1841) 8 Cl & Fin 121; *Spencer v Wakefield* (1887) 4 TLR 194; *London Chartered Bank of Australia v White* (1879) 4 App Cas 413, PC.

3 *Lloyds Bank plc v Voller* [2000] 2 All ER (Comm) 978, CA. See also *Emerald Meats (London) Ltd v AIB Group plc* [2002] EWCA Civ 460, [2002] All ER (D) 43 (Apr) where a term was implied into the contract between bank and customer allowing the bank to credit interest to the customer, on funds received by it as collecting bank, in accordance with its own standard practices.

4 *National Bank of Greece v Pinios Shipping Co* [1990] 1 AC 637, [1990] 1 All ER 78, HL.

5 *National Bank of Australasia v United Hand in Hand and Band of Hope Co* (1879) 4 App Cas 391 at 409, PC.

6 *National Bank of Greece v Pinios Shipping Co* [1990] 1 AC 637 at 683–684, [1990] 1 All ER 78 at 88–89, HL, per Lord Goff of Chieveley; *Lloyds Bank plc v Voller* [2000] 2 All ER (Comm) 978, CA. See also *IRC v Holder* [1931] 2 KB 81, CA; affd without deciding this point sub nom *Holder v IRC* [1932] AC 624, HL. This decision as to constructive payment applies only as between banker and customer: *Paton v IRC* [1938] AC 341, [1938] 1 All ER 786, HL (where it was also held that, when the interest charge is added to the existing indebtedness, the interest is not paid). See also *Imperial Life Assurance Co of Canada v Efficient Distributors Ltd* [1992] 2 AC 85, [1992] 2 WLR 503, PC. The compounding of interest on overdrawn accounts was held to be legitimate in *Yourell v Hibernian Bank Ltd* [1918] AC 372, 87 LJPC 1, 117 LT 729, HL.

969. Charges, commissions and costs. The right of a banker to charges and commissions would seem, in the absence of an express agreement by the customer to pay them, to depend on the universal custom of bankers, as in the case of his right to charge interest on overdrafts[1]. It is doubtful whether the right can be based on acquiescence in the charges and commissions as disclosed in the bank statement, in view of the doubts cast on the existence of any obligation on the part of the customer to examine his bank statement[2].

It is common for a bank's security documentation to contain an express provision for the payment of all costs, charges and expenses incurred by the bank in enforcing or obtaining payment of sums due to it. Such a provision does not oust the court's discretion as to costs, but, in exercising that discretion, the court starts from the position that the parties have contracted for payment of the bank's costs on an indemnity basis[3].

Bank charges which were allegedly excessive were challenged by the Office of Fair Trading[4] in early 2008. Where a charge is made following a default, the charge may be unforceable as a penalty unless it is a reasonable pre-estimate of the bank's likely loss as a result of the increased credit risk[5].

1 See PARA 968.

2 See PARA 874. Furthermore, in *National Bank of Greece v Pinios Shipping Co* [1990] 1 AC 637 at 675, [1990] 1 All ER 78 at 82, HL, per Lord Goff of Chieveley, it was noted that resort to supposed acquiescence in the context of a bank's right to interest was an agreeable fiction whose only function had been to circumvent the usury laws, and that once the usury laws were repealed in 1854, there was no sensible basis on which the fiction should have been allowed to survive.

3 *Bank of Baroda v Panessar* [1987] Ch 335 at 355–357, [1986] 3 All ER 751 at 765–766 per Walton J.

4 As to the Office of Fair Trading see TRADE, INDUSTRY AND INDUSTRIAL RELATIONS vol 47 (2001 Reissue) PARA 504 et seq.

5 See eg *Lordsvale Finance plc v Bank of Zambia* [1996] QB 752, [1996] 3 All ER 156.

970. Relation between bank and party giving security. Banks must be on inquiry as to whether a third party giving security has been improperly influenced whenever there is a non-commercial relationship between the bank's customer and the third party[1]. The principle rarely, if ever, applies in a commercial relationship as those engaged in business can be regarded as capable of looking after themselves and understanding the risks involved in the giving of security[2].

A bank is always on inquiry when a wife provides security for her husband's debts or vice versa, or where the bank is aware of a relationship between the parties, either heterosexual or homosexual[3]. The bank must also be on inquiry where a person in such a relationship becomes surety for the debts of a company in which the other person has an interest, even if the person providing security is a shareholder, director or secretary of the company[4]. Once a bank has been put on inquiry it must take steps to bring home to the wife or other third party the

risk she is running by standing as surety and advise her or him to take independent advice[5]. A bank can rely on confirmation from a solicitor acting for the wife or other third party that he has advised her or him appropriately[6]. Where a bank is relying on confirmation from a solicitor that it has advised a third party as to risk the bank is entitled to proceed on the assumption that the solicitor has done his job properly unless the bank knows that this is not the case[7].

On the general law of agency, a bank which instructs an agent to obtain security for it is liable for any fraudulent misrepresentation made by the agent in achieving that end, including any continuing misrepresentation made earlier and not corrected[8] and also, presumably, any innocent misrepresentation.

1 As to the equitable doctrine of undue influence see CONTRACT vol 9(1) (Reissue) PARAS 712–716; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 839–853. The doctrine has been defined as the unconscientious use by one person of power possessed by him over another in order to induce the other to enter into a contract: see CONTRACT vol 9(1) (Reissue) PARA 712. Where a person's consent is procured by undue influence the person is not bound by the agreement: see CONTRACT vol 9(1) (Reissue) PARA 715.

2 See *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [88], [2002] 2 AC 773 at [88], [2001] 4 All ER 449 at [88] per Lord Nicholls of Birkenhead.

3 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [44]–[48], [2002] 2 AC 773 at [44]–[48], [2001] 4 All ER 449 at [44]–[48] per Lord Nicholls of Birkenhead.

4 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [49], [2002] 2 AC 773 at [49], [2001] 4 All ER 449 at [49] per Lord Nicholls of Birkenhead.

5 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [50], [2002] 2 AC 773 at [50], [2001] 4 All ER 449 at [50] per Lord Nicholls of Birkenhead, explaining *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL.

6 See *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [78], [2002] 2 AC 773 at [78], [2001] 4 All ER 449 at [78] per Lord Nicholls of Birkenhead, where at [79] he sets out the following conclusions: (1) the bank should check directly with the wife the name of the solicitor she wishes to act for her and inform her that it requires written confirmation from the solicitor that he has fully explained to her the nature of the documents and their implications and that she will then not be able to dispute that she is legally bound by the documents; (2) if the bank is not willing to explain the financial situation to the wife, it must provide her solicitor with the financial information he requires to do so and the consent of the husband must be obtained for this purpose or the transaction cannot proceed; (3) if the bank believes or suspects that the wife is being misled or is not acting of her own free will it must inform the wife's solicitors; (4) the bank must obtain a written confirmation from the solicitor that he has given the required explanations and advice.

7 See *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [78], [2002] 2 AC 773 at [78], [2001] 4 All ER 449 at [78] per Lord Nicholls of Birkenhead. The solicitor is not the bank's agent for this purpose: *Royal Bank of Scotland plc v Etridge (No 2)* above at [77] per Lord Nicholls of Birkenhead.

8 *Kingsnorth Trust Ltd v Bell* [1986] 1 All ER 423 at 427, [1986] 1 WLR 119 at 123, CA, per Dillon LJ. See MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 754.

971. Effect of mortgage. The position of a banker taking a mortgage does not differ from that of any other mortgagee[1]. The taking of a legal mortgage for a definite amount may terminate the relationship of banker and customer as to that amount[2]. Where, however, a mortgage is taken to secure a floating balance, the relation of banker and customer still continues[3]. In taking security over a fund in court or subject to litigation, bankers are deemed to have notice, if they know a claim is pending, of the possible rights of solicitors to charging orders on, for example, the claimant's interest; and, if a charging order is made, it will ordinarily have priority to the bank's charge[4].

The merger of a simple contract debt into a specialty debt depends on the intention of the parties, to be gathered from the documents they have signed. Where a person owes an existing simple contract debt and gives security for it

and a charge on his property, then the simple contract debt is merged in the specialty unless there is express provision to the contrary. When, however, security is given for payment of amounts due, or to become due, on a running account, the doctrine of merger, if it applies at all, would at most apply only to the indebtedness which existed at the date when the security was taken and the charge given[5].

Where a bank chooses to advise a customer as to the nature and effect of a mortgage in its favour prior to the customer executing the mortgage, the bank owes a contractual duty to exercise reasonable skill and care in so doing[6].

1 As to legal mortgages (including charges by way of legal mortgage), equitable mortgages (including deposit of deeds), and the subject matter of mortgages and charges, see MORTGAGE.

2 See eg *Fergusson v Fyffe* (1841) 8 Cl & Fin 121; *Williamson v Williamson* (1869) LR 7 Eq 542; *London Chartered Bank of Australia v White* (1879) 4 App Cas 413, PC.

3 See PARA 968.

4 *Wimbourne v Fine* [1952] Ch 869 at 878, [1952] 2 All ER 681 at 687 per Harman J. As to solicitors' charging orders on property recovered or preserved in litigation see SOLICITORS vol 44(1) (Reissue) PARA 259 et seq.

5 *Barclays Bank Ltd v Beck* [1952] 2 QB 47 at 53, [1952] 1 All ER 549 at 552, CA, per Denning LJ.

6 See eg *Cornish v Midland Bank plc* [1985] 3 All ER 513, CA.

The requirements of the Financial Services and Markets Act 2000 must now be complied with in relation to the provision of financial services: see PARA 792.

972. Further advances secured on unregistered land. A banker holding a mortgage, whether or not made expressly for securing advances, may make further advances to rank in priority to subsequent mortgages, whether legal or equitable: (1) if an arrangement has been made to that effect with subsequent mortgagees[1]; (2) if he has had no notice[2] of such subsequent mortgages at the time when the further advance was made by him[3]; or (3) whether he has had such notice or not, where the mortgage imposes on the banker an obligation to make such further advances[4]. In the case of a mortgage made expressly for securing a current account or further advances, the banker is, in relation to the making of further advances, not deemed to have notice of a mortgage merely by reason that it was registered as a land charge if it was not so registered at the time when the original mortgage was created or when the last search, if any, by or on behalf of the banker was made, whichever last happened[5]. Subject to this, subsequent advances will be postponed to the later mortgage of which the banker has notice[6]. Specific performance will not be decreed of an agreement to make a loan[7].

1 Law of Property Act 1925 s 94(1)(a).

2 As to what amounts to notice see LAND CHARGES vol 26 (2004 Reissue) PARA 616; MORTGAGE vol 32 (2005 Reissue) PARA 410.

3 Law of Property Act 1925 s 94(1)(b); *Hopkinson v Rolt* (1861) 9 HL Cas 514; *Union Bank of Scotland v National Bank of Scotland* (1886) 12 App Cas 53, HL.

4 Law of Property Act 1925 s 94(1)(c).

5 Law of Property Act 1925 s 94(2) (amended by the Law of Property (Amendment) Act 1926 Schedule; and the Law of Property Act 1969 Sch 2 Pt 1).

6 See *Deeley v Lloyds Bank Ltd* [1912] AC 756. These provisions apply to mortgages created before or after 1925, but do not apply to charges on registered land: Law of Property Act 1925 s 94(4) (amended by the Land Registration Act 2002 Sch 11 para 2(1), (9)). As to charges on registered land see PARA 973.

7 *South African Territories v Wallington* [1898] AC 309, HL; *Kuala Pahi Rubber Estates Ltd v Mowbray* (1914) 111 LT 1072, CA; *Larios v Bonany y Gurety* (1873) LR 5 PC 346. See SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 834.

973. Further advances secured on registered land. As regards registered land, registered charges on the same registered estate, or on the same registered charge, are to be taken to rank as between themselves in the order shown in the register and not according to the order in which they are created[1]. A banker may make a further advance on the security of the charge ranking in priority to a subsequent charge if: (1) he has not received from the subsequent chargee notice of the creation of the subsequent charge; (2) the advance is made in pursuance of an obligation and at the time of the creation of the subsequent charge the obligation was entered in the register; and (3) the parties to the prior charge have agreed a maximum amount for which the charge is security and at the time of the creation of the subsequent charge the agreement was entered in the register[2].

1 See the Land Registration Act 2002 s 48; and LAND REGISTRATION vol 26 (2004 Reissue) PARA 944. In the case of the creation of a charge, the chargee, or his successor in title, must be entered in the register as the proprietor of the charge: see s 27, Sch 2; and LAND REGISTRATION vol 26 (2004 Reissue) PARA 911 et seq.

2 See the Land Registration Act 2002 s 49; and LAND REGISTRATION vol 26 (2004 Reissue) PARA 948.

974. Change of parties. A security may cease to be effectual as cover for future advances by reason of a change in the personality of the borrower, such as a change in the constitution of a firm[1].

1 *Royal Bank of Scotland v Christie* (1840) 8 Cl & Fin 214; *Re Laurence, ex p M'Kenna, City Bank Case* (1861) 3 De GF & J 629 (where a person deposited title deeds for advances to be made to him, and it was held that the security did not cover advances made to him and others whom he took into partnership). If securities are deposited with a partnership or other unincorporated association for advances made by it, any change in the constitution of that organisation, such as the retirement of one partner and admission of another, would render the securities ineffective as cover for future advances: *Ex p Kensington* (1813) 2 Ves & B 79 at 83. As to partnerships generally see PARTNERSHIP.

975. Deposit by partner. A partner has implied authority to deposit title deeds of property, whether real or personal, belonging to the firm, as security for advances to the firm; and, when the partnership is terminated by the death of the last surviving partner but one, the banker is entitled to treat a subsequent deposit of such deeds as being in the course of winding up the partnership affairs and so legitimate[1].

1 *Re Bourne, Bourne v Bourne* [1906] 2 Ch 427, CA. See PARTNERSHIP vol 35 (Reissue) PARA 50. Note that, in consequence of the Law of Property (Miscellaneous Provisions) Act 1989 s 2(1), a mere deposit of title deeds does not create an equitable mortgage: see MORTGAGE vol 32 (2005 Reissue) PARA 325 et seq.

976. Deposit of negotiable securities. Where a banker takes in good faith fully negotiable securities[1] as cover for an advance or overdraft, he is entitled to retain them until his debt is satisfied, notwithstanding that the borrower had no property in, and was wrongfully dealing with, the securities[2]. Knowledge that the customer is a stockbroker or occupies a fiduciary position, and that the securities may possibly not be his own, does not put the banker on inquiry, if he has no reason to doubt the honesty of the person tendering them as security, and the latter purports to deal with them as his own property[3].

Where the banker takes fully negotiable securities in the above circumstances, he is entitled either to have them redeemed by the true owner, or to satisfy his advances by means of them on default, or, where no time is fixed for repayment, on giving reasonable notice to the depositor[4].

1 As to what securities other than bills, notes and cheques are fully negotiable so as to come within this principle see PARAS 1610–1619.
2 *London Joint Stock Bank v Simmons* [1892] AC 201, HL; *Bentinck v London Joint Stock Bank* [1893] 2 Ch 120; *Earl of Sheffield v London Joint Stock Bank* (1888) 13 App Cas 333, HL, explained and distinguished in *London Joint Stock Bank v Simmons* above.
3 *London Joint Stock Bank v Simmons* [1892] AC 201, HL; *Fuller v Glyn Mills Currie & Co* [1914] 2 KB 168. Contrast *Jameson v Union Bank of Scotland* (1913) 109 LT 850 (relationship of solicitor and client held to put a bank on inquiry where the solicitor, who at the time owed the bank £16,000, purported to pledge his client's securities for securing his own loan account).
4 *Deverges v Sandeman, Clark & Co* [1902] 1 Ch 579, CA.

977. Deposit by agent. If a principal entrusts his agent with securities which, though not fully negotiable, purport on the face of them to convey all rights by mere transfer, especially if he holds out the agent as clothed with authority to transfer them as negotiable, the principal will be estopped from disputing the title of a banker who has taken the securities in good faith and for value from the agent, though the agent is acting for his own ends and in fraud of his principal[1]. In each case, the test is whether the possession by the agent and the terms of the document combined amount to a representation that the agent is invested with disposing power of a professedly negotiable instrument[2].

1 *Goodwin v Robarts* (1876) 1 App Cas 476 at 489–490, HL; *Easton v London Joint Stock Bank* (1886) 34 ChD 95 at 113–114, CA, per Bowen LJ; *Colonial Bank v Cady and Williams* (1890) 15 App Cas 267 at 285, HL, per Lord Herschell ('If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it, and who has received it in good faith and for value'). See also *Lloyds Bank Ltd v Cooke* [1907] 1 KB 794, CA, which was distinguished in *Smith v Prosser* [1907] 2 KB 735, CA. See also *Paine v Bevan and Bevan* (1914) 110 LT 933 (drawer of a cheque held not estopped from saying, as against a donee not being a holder for value, that the cheque had been wrongfully filled up by an agent in excess of his authority). As to agency generally see AGENCY. As to choses or things in action see CHOSES IN ACTION.
2 *Colonial Bank v Cady and Williams* (1890) 15 App Cas 267 at 273, HL, per Lord Halsbury; *Farquharson Bros & Co v King & Co* [1902] AC 325 at 330, HL, per Lord Halsbury; *Fuller v Glyn, Mills, Currie & Co* [1914] 2 KB 168. See further AGENCY vol 1 (2008) PARAS 24, 145.

978. Security by transfer or deposit. Stock and shares may be utilised as security by transferring them to the banker or by merely depositing the relevant certificates[1]. The method of transfer depends on the nature of the stock or shares. In order to avoid the danger that the person transferring may be in a fiduciary position and not the beneficial owner, it is essential that the banker should not only take the stock or shares bona fide and for value, but also acquire the legal estate by registration[2].

1 See PARA 982.
2 As to the effect of notice of the trust on the part of the person who takes a transfer of the legal estate see *Bank of Montreal v Sweeny* (1887) 12 App Cas 617, PC; and contrast *Bentinck v London Joint Stock Bank* [1893] 2 Ch 120. As to registration see PARA 979.

979. Registration. In addition to actual transfer, registration in the register kept by the registrar of stocks and shares transferred is necessary to render the banker's title indefeasible or good against parties other than the pledgor who have beneficial interests in them[1], or, failing registration, the transferee must have acquired a present absolute and unconditional right to be registered before he is affected with notice of the prior equitable title[2]. Registration does not, however, perfect a transfer which is in itself inoperative[3].

1 *Shropshire Union Rlys and Canal Co v R* (1875) LR 7 HL 496.

2 *Société Générale de Paris and Colladon v Walker* (1885) 11 App Cas 20, HL; *Moore v North Western Bank* [1891] 2 Ch 599; *Ireland v Hart* [1902] 1 Ch 522. No court has defined what constitutes such a right, and it would not be safe to rely on its existence apart from registration.
3 *Powell v London and Provincial Bank* [1893] 2 Ch 555 at 566, CA. See also *Burgis v Constantine* [1908] 2 KB 484, CA.

980. Blank transfers. Where stock or shares may be transferred only by deed[1], a blank transfer will not be effective to pass the legal title[2]. Such a transfer may be validated by redelivery after the blanks are filled up, but an agent cannot effect the delivery unless himself authorised by deed[3]. Where the transfer is not necessarily by deed, a blank transfer operates as an authority to the transferee to fill up all necessary blanks, and, when so filled up, operates as an effective transfer without redelivery[4]. However, to preclude the rights of third parties, the transfer must in its then condition purport to carry to any person taking it in good faith for value a full immediate and absolute title to the subject matter[5].

1 As to the transfer of the stock or shares of a company see COMPANIES vol 7(1) (2004 Reissue) PARA 856. A company's articles may or may not provide that the transfer is to be by deed: see *Re Tahiti Cotton Co, ex p Sargent* (1873) LR 17 Eq 273. Title to securities may now be evidenced and transferred without a written instrument: see the Uncertificated Securities Regulations 2001, SI 2001/3755; and COMPANIES.
2 *Hibblewhite v McMorine* (1840) 6 M & W 200; *Swan v North British Australasian Co* (1863) 2 H & C 175, Ex Ch. 'We all know that both at common law and under these statutes, if you execute a transfer in blank, that instrument with the blanks is not a deed': *Powell v London and Provincial Bank* [1893] 2 Ch 555 at 560, CA, per Lindley LJ. See also *Coleman v London County and Westminster Bank Ltd* [1916] 2 Ch 353. See further COMPANIES vol 7(1) (2004 Reissue) PARA 874. As to restrictions on the circulation of blank transfers see STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1115.
3 *Powell v London and Provincial Bank* [1893] 2 Ch 555 at 565, CA; *Société Générale de Paris and Colladon v Walker* (1885) 11 App Cas 20, HL.
4 *Ireland v Hart* [1902] 1 Ch 522 at 527.
5 *Colonial Bank v Cady and Williams* (1890) 15 App Cas 267, HL; *Fuller v Glyn, Mills, Currie & Co* [1914] 2 KB 168.

981. Power of sale or return of stock and shares. Where stock or shares have been effectually transferred to a banker as security, even though not by deed, he has an implied power of sale on default. If no time is fixed for repayment, he must give the borrower reasonable notice of his intention to sell unless repaid. A month's notice would be sufficient[1].

The bank must return to the customer the identical shares deposited[2], except, of course, so far as they have been sold under the power of sale.

1 *Deverges v Sandeman, Clarke & Co* [1902] 1 Ch 579, CA. The memorandum of deposit usually gives the banker authority to sell upon the borrower's default.
2 *Crerar v Bank of Scotland* 1921 SC 736; affd 1922 SC (HL) 137 (but judgment was given for the bank on the ground of acquiescence by the customer in the course pursued by the bank). The liability to return the identical shares is right in principle, but it is difficult to see what damage the customer would sustain by the bank's failure to return the identical shares. As to damages see *Rosenthal v Alderton & Sons Ltd* [1946] KB 374, [1946] 1 All ER 583, CA; *Sachs v Miklos* [1948] 2 KB 23, [1948] 1 All ER 67, CA; *Munro v Willmott* [1949] 1 KB 295, [1948] 2 All ER 983.

982. Deposit of certificates. The mere deposit of stock certificates or share certificates constitutes only an equitable mortgage of the stock or shares which the court will enforce by order for transfer and foreclosure[1]. The mortgagee is not deprived of his remedy for foreclosure merely because the personal remedy to recover the debt is barred by lapse of time[2], though the right to foreclosure may itself become barred, normally 12 years after the right accrued[3].

1 *Harrold v Plenty* [1901] 2 Ch 314. Such certificates are not negotiable. The equitable mortgagee may obtain an injunction against transfer in fraud of his rights: *Société Générale de Paris v Tramway Union Co Ltd* (1884) 14 QBD 424 at 453 per Lindley LJ. Note that it is no longer possible to create an equitable mortgage of land by mere deposit of deeds: see further MORTGAGE vol 32 (2005 Reissue) PARA 325 et seq.
2 *London and Midland Bank v Mitchell* [1899] 2 Ch 161. See further MORTGAGE.
3 See the Limitation Act 1980 s 20(2); and LIMITATION OF ACTIONS vol 28 (Reissue) PARA 1021.

983. Forged transfers. If a transfer to a banker proves to have been forged, the banker has no title to the stock or shares, his name will be removed from the register and that of the original holder restored, and he will be liable to refund to the company all dividends received[1].

If the banker has parted with the stock or shares, and his transferee has been registered and had certificates issued to him, the banker is liable to indemnify the company[2], which is estopped from disputing the title of such transferee. The company would be obliged to restore the original holders to the register and their rights, possibly having to buy in the stock or shares in order to do so; the price of the stock purchased, together with back dividends since that date, would be the measure of the banker's liability[3].

The liability being based on indemnity, though the sending in of the transfer for registration by the company may also import warranty[4], the cause of action against the banker does not arise until the company is compelled to reinstate the original holder; and the banker may accordingly be sued any time within six years of that date[5]. It is immaterial that he may have retransferred the shares. Nor is it any defence that the company on registration of the transfer issued certificates to him[6].

1 *Re Bahia and San Francisco Rly Co* (1868) LR 3 QB 584; *Sheffield Corpn v Barclay* [1905] AC 392, HL.
2 *Sheffield Corpn v Barclay* [1905] AC 392, HL; applied in *Yeung Kai Yung v Hong Kong and Shanghai Banking Corpn* [1981] AC 787, [1980] 2 All ER 599, PC. Had the latter case arisen in England, it might have been necessary to consider whether, in the light of the Civil Liability (Contribution) Act 1978 (see DAMAGES vol 12(1) (Reissue) PARA 837 et seq), the rule in *Sheffield Corpn v Barclay* above should be reviewed: *Yeung Kai Yung v Hong Kong and Shanghai Banking Corpn* above at 799–800 and 607–608 per Lord Scarman.
3 *Sheffield Corpn v Barclay* [1905] AC 392, HL. Cf *Bank of England v Cutler* [1907] 1 KB 889; affd [1908] 2 KB 208, CA. As to the certification of transfers see now the Companies Act 2006 s 775; and COMPANIES.
4 *Sheffield Corpn v Barclay* [1905] AC 392, HL; *Yeung Kai Yung v Hong Kong and Shanghai Banking Corpn* [1981] AC 787, [1980] 2 All ER 599, PC.
5 *Sheffield Corpn v Barclay* [1905] AC 392, HL. As to the limitation period see the Limitation Act 1980 s 5; and LIMITATION OF ACTIONS vol 28 (Reissue) PARA 892.
6 Certificates had been issued to the banker in *Sheffield Corpn v Barclay* [1905] AC 392, HL. Cf *A-G v Odell* [1906] 2 Ch 47, CA. The banker cannot claim an estoppel produced by his own misrepresentation: see *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188, CA (distinguished in *Balkis Consolidated Co Ltd v Tomkinson* [1893] AC 396, HL, and *Dixon v Kennaway & Co* [1900] 1 Ch 833). As to whether the same liabilities would attach to a banker sending in a forged transfer on behalf of a customer see *Starkey v Bank of England* [1903] AC 114, HL.

984. Advances on life policies. A policy on his own life effected by the debtor may be assigned as security for advances. Notice of the assignment should be given to the insurance company; and, if no notice is given, payment by the company before notice is good as against the assignee[1].

The mere deposit of a policy as cover gives the banker the rights of an equitable mortgagee[2].

Where a policy has been so deposited, even without a memorandum, and the depositor becomes bankrupt, his trustee cannot claim it without satisfying the debt to the banker[3].

1 See the Policies of Assurance Act 1867 s 3. As to legal mortgages of life assurance policies see MORTGAGE vol 32 (2005 Reissue) PARA 438 et seq.
2 *Spencer v Clarke* (1878) 9 ChD 137. As to the rights of an equitable mortgagee see MORTGAGE.
3 *Re Wallis, ex p Jenks* [1902] 1 KB 719.

985. Banker's insurable interest. While a banker may take out an insurance policy on the life of a person indebted to him[1], it is more usual for the debtor to utilise as security a policy which he has taken out himself[2].

1 For the general law of life assurance see INSURANCE vol 25 (2003 Reissue) PARAS 525–566.
2 See PARA 984.

986. Goods as security. A banker may advance money on the security of goods or of documents of title to goods otherwise than by the acceptance of documentary bills or payment pursuant to an irrevocable credit[1].

If his customer is the real owner of the goods and entitled to the documents, the transaction amounts to a pledge of the goods, with the resulting rights of a pledgee[2], or it may give rise to an equitable charge[3]. Since neither goods nor documents of title to goods[4] are negotiable, the banker's title as pledgee at common law must depend on that of the pledgor.

A banker paying or accepting pursuant to an irrevocable credit becomes pledgee of the documents of title accompanying the draft[5].

1 As to letters of credit see PARA 923 et seq.
2 See PLEDGES AND PAWNS vol 36(1) (2007 Reissue) PARA 122 et seq. The ordinary letter of trust on the terms of which the banker redelivers the documents of title to the pledgor, and by which the pledgor undertakes to hold the goods when received and the proceeds when sold as the banker's trustee and to remit the entire proceeds when realised, does not amount to a bill of sale and, if it did, would be a document used in the ordinary course of business: see *Re David Allester Ltd* [1922] 2 Ch 211. Where a bank (pledgee) surrendered the documents to the pledgors as trustees for sale, the latter became mercantile agents under the Factors Act 1889, and their subsequent unauthorised pledge was valid as against the bank: see *Lloyds Bank Ltd v Bank of America National Trust and Savings Association* [1938] 2 KB 147, [1938] 2 All ER 63, CA. As to the position of a banker pledgee giving a delivery order for goods see *Alicia Hosiery Ltd v Brown Shipley & Co Ltd* [1970] 1 QB 195, [1969] 2 All ER 504; and BAILMENT vol 3(1) (2005 Reissue) PARA 39.
3 *Mercantile Bank of India Ltd v Chartered Bank of India, Australia and China and Strauss & Co Ltd (No 2)* [1937] 4 All ER 651 (receipts for goods were given to the bank as security for advances; although called trust receipts these documents did not create a trust (within the Indian Trusts Act 1882) of the goods, but an equitable charge on them). Cf *Re Kent and Sussex Sawmills Ltd* [1947] Ch 177, [1946] 2 All ER 638 (where a letter instructing the debtor to remit money to the creditor's bank, and expressed to be irrevocable, was held to constitute a charge on the book debt). See also PARA 1674 et seq.
4 There is a possible exception at common law for bills of lading: see *Lickbarrow v Mason* (1794) 5 Term Rep 683. 'The words of the special verdict in *Lickbarrow v Mason* admittedly overstate the law': see *Burdick v Sewell* (1884) 13 QBD 159 at 173, CA, per Bowen LJ; and see *Sewell v Burdick* (1884) 10 App Cas 74 at 98, HL, per Lord Blackburn. If fully negotiable there would have been no reason for including bills of lading with other documents of title in the Factors Act 1889 s 1(4) (see AGENCY vol 1 (2008) PARA 148) and the Sale of Goods Act 1979 s 61(1) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 157), whereas they are so included. See further on this point SHIPPING AND NAVIGATION vol 43(2) (Reissue) PARA 1533.
5 See *Ross T Smyth & Co Ltd v TD Bailey Son & Co* [1940] 3 All ER 60 at 68 per Lord Wright.

987. Protection to banker. In some cases, where the title of the borrower to goods pledged is defective, the banker may, under certain conditions, have

statutory protection. The goods or documents of title to goods must be in the possession either of an unpaid vendor, a purchaser who has not paid for them, or a 'mercantile agent' within the broad definition given to that term by the legislation[1]. Moreover, the goods or the documents of title must have originally remained in or come into the possession of the person with whom the banker is dealing with the consent of the real owner[2]. In the case of a mercantile agent, a pledge of the documents for an antecedent debt would entitle the pledgee to acquire such rights only as the pledgor could have enforced at the time of the pledge[3], and the same rule probably applies to purchasers or persons who have agreed to purchase[4]; in such a case the security would not be effective.

1 See the Factors Act 1889 s 1(1); and AGENCY vol 1 (2008) PARA 12.
2 See the Factors Act 1889 s 2; and AGENCY vol 1 (2008) PARA 148. See also *Cahn and Mayer v Pockett's Bristol Channel Steam Packet Co* [1899] 1 QB 643 at 658, CA; *National Employers' Mutual General Insurance Association Ltd v Jones* [1990] 1 AC 24, [1988] 2 All ER 425, HL.
3 See the Factors Act 1889 s 4; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 160.
4 See *Cahn and Mayer v Pockett's Bristol Channel Steam Packet Co* [1899] 1 QB 643 at 654, CA, per AL Smith LJ.

988. Discounting of bills. When a banker discounts a bill, he buys it for its face value less a sum representing interest for the period which the bill has to run. The banker takes the bill as transferee for value, and has the holder's normal right to sue on the bill if it is dishonoured. In the case of a customer, the amount of the bill, less discount, is normally carried to current account, and, if the bill is unpaid, the current account is normally debited and the bill is returned to the customer. If the banker wishes to retain his right of recourse to other parties because his customer's account cannot meet the debit, the banker retains the bill and debits a suspense account. Whether the bill is taken from a customer for collection or as security, or is discounted for him, is a question of fact[1].

The presumption in favour of a bill being taken by way of absolute transfer rather than of pledge or security is not so appropriate in the case of banker and customer as in other cases. Indorsement of a specially indorsed bill is as necessary for collection as for transfer. Even indorsement by the customer of a bill indorsed generally is consistent with his merely putting his name on it as extra security[2].

There is some doubt[3] whether the entry of the amount of such bills, less discount, as cash in the banker's books would be evidence of the banker having taken them as transferee. Possibly inferences might be drawn from whether the bank held itself out as a discounting bank or not[4]. Where the transaction is really one of discounting, the banker is, of course, at liberty to deal with the bill as he pleases, rediscounting or transferring it.

1 See PARAS 862, 890. As to the meaning of the word 'discount' where the discount is not paid to the discountee see *Hamilton Finance Co Ltd v Coverley Westray Walbaum and Tosetti Ltd, and Portland Finance Co Ltd* [1969] 1 Lloyd's Rep 53 at 60–62.
2 See *Re Firth, ex p Schofield* (1879) 12 ChD 337.
3 See *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL; cf *Dawson v Isle* [1906] 1 Ch 633.
4 See *Gaden v Newfoundland Savings Bank* [1899] AC 281 at 286, PC. As to the distinction between lending and discounting see *Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] AC 209, [1961] 3 All ER 1163, PC.

989. Remedies of banker against customer. Where the banker has the customer's indorsement on the bill, he has the remedies of an indorsee against

him; otherwise, he has only the remedies of a transferee by delivery[1]. Whether mere dishonour of a bill not indorsed by the customer gives the banker a right to debit the customer's account or to proceed against him on the bill must depend upon the terms on which the bill was delivered to him, that is to say, for collection, discount or otherwise. As a collecting agent the bank would have an agent's right to indemnity[2].

Instead of indorsing each bill for discount separately, the customer may give to the banker a general guarantee of all bills discounted for him, which has, in relation to the banker, the same operation as specific indorsement in each case[3].

1 As to the transferee's remedies see PARA 1490. Save in the event of the customer's insolvency, the banker has no right to set off a credit balance on current account against the customer's future or contingent liability as acceptor or indorser of a bill of exchange: see PARA 835.
2 As to an agent's right to indemnity see AGENCY vol 1 (2008) PARA 111 et seq. The dicta as to debiting a dishonoured cheque, though credited as cash, in *Capital and Counties Bank Ltd v Gordon* [1903] AC 240 at 248, HL, could not be applied to a discounted bill.
3 *Re Fox Walker & Co, ex p Bishop* (1880) 15 ChD 400, CA.

990. Banker's remedies on bills or promissory notes. Where bills or promissory notes are deposited as security, and not absolutely transferred in consideration of the advance, the banker's position is that of pledgee, analogous to that which he holds by virtue of his lien[1]. If he took the bill or note without notice of any defect in the customer's title, he may in any event sue all parties to it to the extent of his advance[2]. If the customer had a good title, the banker may sue all parties for the full amount, holding the balance, if any, over and above the amount advanced as trustee for the customer[3].

Although there are dicta that, in certain states of the account, a banker may negotiate bills or notes of a customer in his hands[4], in the absence of any agreement to the contrary, the banker is probably not entitled to adopt this course where the instruments are security for an advance repayable at a definite date which has not arrived, or where the security is for existing or future overdrafts, without having made a prior request for payment. The usual and proper course is to keep the documents and present them for payment at maturity, and set off the proceeds against the advance. If instruments payable at a fixed date are not duly presented, the banker will have to bear any loss incurred by the omission[5].

Where a bill or note is given strictly as collateral security, it does not, even while current, suspend the remedy on the debt; and, in the absence of any agreement to the contrary, the banker is entitled to sue for the advance pending the currency of the bill or note[6]. Where a bill or note is strictly collateral security, satisfaction of the debt does not necessarily discharge the bill or note[7].

1 A banker's lien is an implied pledge: see PARA 863. As to a banker's lien see PARA 860 et seq; and see LIEN. As to pledge see PLEDGES AND PAWNS.
2 See the Bills of Exchange Act 1882 s 27(3); and PARA 1487.
3 *Barclay's Bank Ltd v Aschaffenburger Zellstoffwerke AG* [1967] 1 Lloyd's Rep 387, CA. It would appear, however, that any such surplus stands on the same footing as a credit balance on current account as regards the banker's right of set-off: see *Jones v Peppercorne* (1858) John 430; *Inman v Clare* (1858) John 769; *Re Bowes, Earl of Strathmore v Vane* (1866) 33 ChD 586; *Re London and Globe Finance Corpn Ltd* [1902] 2 Ch 416; *Baker v Lloyd's Bank Ltd* [1920] 2 KB 322. As to the banker's right of set-off see PARA 867.
4 See PARA 888 note 2.
5 *Peacock v Pursell* (1863) 14 CBNS 728.
6 *Peacock v Pursell* (1863) 14 CBNS 728.
7 *Jenkins v Tongue* (1860) 29 LJ Ex 147; *Glasscock v Balls* (1889) 24 QBD 13, CA. In both cases, discharge of the debt was obtained by the holder of the security; there was no direct payment by

the borrower, but this does not seem to affect the principle that payment of a debt does not discharge a note given as security for the debt if the note is in the hands of a holder for value in good faith. In *Jenkins v Tongue* above the note was being enforced by the payee, but the principle ought arguably to be confined to a holder from the payee in good faith: see *Glasscock v Balls* above. It would be inequitable that the payee, having satisfied himself, should still be able to sue on the security.

(xiii) Guarantees

991. Guarantees and consideration. A pre-existing debt is not a good consideration for a guarantee[1]. Where no stipulation for future advances is made in a guarantee, the consideration must be supplied by forbearance to sue for the existing debt at the guarantor's request. This may be implied from the nature of the transaction and from the fact of forbearance[2]. Forbearance for a definite period is not essential[3]. If one only of several accounts is to be covered by a particular guarantee, this must be clearly expressed. The term 'ultimate balance' by itself signifies the ultimate balance owing, combining all accounts[4].

Where the document is not a formal guarantee, but a letter of comfort, it is a matter of construction whether the document is intended to be legally binding, or whether it gives rise to a moral responsibility only[5].

1 See *National Bank of Nigeria Ltd v Oba MS Awolesi* [1964] 1 WLR 1311, PC. As to guarantees or indemnities given in the context of payment against discrepant documents tendered under a letter of credit see PARA 956. As to performance bonds see PARA 927. The discussion as to guarantees here (i e in this paragraph and in PARAS 992–997) is in a banking context: as to guarantee and indemnity generally see PARA 1013 et seq.

2 *Fullerton v Provincial Bank of Ireland* [1903] AC 309 at 316, HL; *Glegg v Bromley* [1912] 3 KB 474 at 491, CA, per Parker J. Cf *Miles v New Zealand Alford Estate Co* (1886) 32 ChD 266 at 290, CA, per Bowen LJ.

3 *Miles v New Zealand Alford Estate Co* (1886) 32 ChD 266, CA. It is, however, advisable to have such consideration expressed in the guarantee.

4 *Mutton v Peat* [1900] 2 Ch 79, CA.

5 *Kleinwort Benson Ltd v Malaysia Mining Corpn Bhd* [1989] 1 All ER 785, [1989] 1 WLR 379, CA.

992. Disclosure by banker to intending guarantor. Subject to the requirement of disclosure where the guarantor is in a non-commercial relationship with the debtor[1], a banker is not bound to volunteer to an intending guarantor information as to the state of the account or whether the customer was or was not in the habit of overdrawing[2]. If asked by the intending guarantor, however, he must give the information, this being sufficient reason for disclosing the customer's account[3]. During the continuance of a guarantee for an overdraft the banker is bound, on request, to acquaint the guarantor with the amount of his then liability, but not to give further information as to the account or to allow inspection of it[4].

A guarantor whose signature to a guarantee has been obtained by the fraud of the borrowing customer is not estopped from denying that he had contracted to guarantee the account, if he can show both that there was a fundamental difference between the document he signed and that he thought he was signing, and that in signing he acted with reasonable care[5].

1 See PARA 970.

2 *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72 at 83, CA, per Farwell LJ; *National Provincial Bank of England Ltd v Glanusk* [1913] 3 KB 335; *Royal Bank of Scotland v Greenshields* 1914 SC 259, Ct of Sess; *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60 (nothing to indicate to the bank that information was material to the surety); *Cooper v National Provincial Bank Ltd* [1946] KB 1, [1945] 2 All ER 641 (where it was held that the bank was not

required to disclose to a surety that the husband of the borrower was an undischarged bankrupt and was empowered to draw on the account). See also *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449; *Levett v Barclays Bank plc* [1995] 1 WLR 1260. As to avoidance of a guarantee by concealment etc see PARA 1036 et seq. The discussion as to guarantees here (ie in this paragraph and in PARAS 991, 993–997) is in a banking context: as to guarantee and indemnity generally see PARA 1013 et seq.

3 See *Hamilton v Watson* (1845) 12 Cl & Fin 109 (approved per Vaughan Williams LJ in *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72, CA, and per Pollock MR in *Lloyds Bank Ltd v Harrison* (1925) 4 Legal Decisions Affecting Bankers 12, CA); *Welton v Somes* (1889) 5 TLR 184, CA; and contrast *Stone v Compton* (1838) 5 Bing NC 142. See also *Seaton v Burnand* [1900] AC 135, HL; *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60; *Cooper v National Provincial Bank Ltd* [1946] KB 1, [1945] 2 All ER 641; and PARA 910.

4 See *Hardy v Veasey* (1868) LR 3 Exch 107.

5 *Carlisle and Cumberland Banking Co v Bragg* [1911] 1 KB 489, CA. However, see also *Saunders (Executrix of the estate of Gallie) v Anglia Building Society (formerly Northampton Town and County Building Society)* [1971] AC 1004, [1970] 3 All ER 961, HL. Carelessness on the part of a person signing a document will preclude him later on from pleading *non est factum* on the principle that no man may take advantage of his own wrong: *Saunders (Executrix of the estate of Gallie) v Anglia Building Society* above (which, in so far as it decided that the guarantor's negligence was irrelevant in the absence of a specific duty to take care, overruled *Carlisle and Cumberland Banking Co v Bragg* above).

993. Guarantee limited in amount. When the guarantor's liability is limited to a specified sum, it depends on the wording of the guarantee whether the surety is surety for the whole debt with the specified limitation to his total liability, or whether he is surety for only part of the debt[1]. In the case of the bankruptcy of the principal debtor, the difference becomes material in determining whether the bank may prove for the whole indebtedness, even though the surety has paid the sum for which he is liable, or whether the surety may prove for that sum[2]. However, the question is usually decided in favour of the bank by special terms in the document.

The Banking Code[3] states that banks will not take unlimited or open-ended guarantees from private individuals: thus such guarantees should always stipulate a recovery limit.

1 See *Ellis v Emmanuel* (1876) 1 ExD 157, CA; *Re Houlder* [1929] 1 Ch 205. See further PARA 1088. The discussion as to guarantees here (ie in this paragraph and in PARAS 991–992, 994–997) is in a banking context: as to guarantee and indemnity generally see PARA 1013 et seq.

2 *Midland Banking Co v Chambers* (1869) 4 Ch App 398; *Re Rees, ex p National Provincial Bank of England* (1881) 17 ChD 98, CA; and see *Re Fernandes, ex p Hope* (1844) 3 Mont D & De G 720. These cases recognise the principle as to a surety for part of the debt, but in each case the surety had by the guarantee contracted himself out of his rights. See also *Re Sass, ex p National Provincial Bank of England Ltd* [1896] 2 QB 12 (where the security was for the whole debt). See further PARA 1088; BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 504.

3 As to the Banking Code generally see PARA 906.

994. Determination of guarantee. A guarantor is, in general, entitled to determine the guarantee as to future advances by giving notice and paying what is then due[1]. Where the guarantee was under seal, this right appeared to exist in equity[2], and was possibly recognised even though the guarantee was expressed to be for a definite period, if the banker was not under contract with the principal debtor to make further advances to him[3].

It appears that a continuing guarantee cannot be revoked so as to exclude outstanding liabilities properly undertaken by the banker on the faith of it, such as bills accepted by him current at the time of notice of revocation[4]. Whether a guarantee covers liabilities which at its expiry are future or contingent is a matter

of construction of the particular guarantee, there being no rule of law requiring a guarantee to contain specific wording to do so[5].

Whether a continuing guarantee is determined as to subsequent advances by the mere fact of death of the guarantor has never been finally decided[6]. It seems probable that it is not. Where there is no provision for giving notice of termination by representatives in the event of death, it may be taken that actual notice of the death given by a responsible person, such as an executor or administrator, terminates the guarantee so far as subsequent advances are concerned[7]. Where, however, the document provides for determination by the surety at the end of a period of notice to the bank, the bank has the right to continue advances up to that time[8]. Whether constructive notice of death is equivalent to actual notice is doubtful[9].

Where there is specific provision for notice of revocation by the guarantor or his representatives, notice of his death by executors or administrators will not terminate the guarantee. The notice must be one of revocation[10].

Whether the death of one joint surety terminates the liability of the other for subsequent advances is also doubtful[11]; but, where the guarantee is joint and several, the death of one guarantor does not affect the liability of the survivor for subsequent advances[12].

A guarantee ceases to be a continuing guarantee upon notice of the guarantor's mental incapacity[13].

Even where a guarantee is joint only, judgment against one guarantor does not operate as a bar to any claim against the other or others[14].

1 *Beckett v Addyman* (1882) 9 QBD 783 at 791, CA; *Lloyd's v Harper* (1880) 16 ChD 290 at 319, CA, per Lush LJ. As to determination of a guarantee generally see PARA 1189 et seq. The discussion as to guarantees here (i e in this paragraph and in PARAS 991–993, 995–997) is in a banking context: as to guarantee and indemnity generally see PARA 1013 et seq.

2 *Re Crace, Balfour v Crace* [1902] 1 Ch 733 at 738; and see *Lloyd's v Harper* (1880) 16 ChD 290, CA. A guarantee, if it is to take effect as a deed rather than as a simple contract, must now comply with the requirements for the execution of deeds contained in the Law of Property (Miscellaneous Provisions) Act 1989, which abolished the requirement of a seal: see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 7.

3 There is no direct authority for this proposition; but see *Lloyd's v Harper* (1880) 16 ChD 290 at 314, CA, per James LJ. It would not be equitable to determine the guarantee if the banker was bound to make further advances to the principal debtor; he is not released from such obligation by the withdrawal of the guarantee by the third party. In *Westminster Bank Ltd v Sassoon* (1926) 5 Legal Decisions Affecting Bankers 19, in which a guarantee finished 'This guarantee will expire on 30 June 1925', and the guarantor was called upon to pay in October 1925, it was held that the guarantee was a continuing one.

4 See *Hollond v Teed* (1848) 7 Hare 50 (where a guarantee given to a bank for advances and bills honoured, though terminated by the death of a partner in the bank, was held to apply to bills accepted by the bank, and current at his death).

5 *National House-Building Council v Fraser* [1983] 1 All ER 1090.

6 *Bradbury v Morgan* (1862) 1 H & C 249 (where the guarantee was held not determined by death); *Harriss v Fawcett* (1873) 8 Ch App 866 at 869 per Mellish LJ ('As mere matter of law, ... I am of opinion that this guarantee was not determined by the death. If one were to suppose a case, which might very easily happen, where a bank holding such a guarantee was not aware of the death, I should think it very hard upon the bank that a guarantee worded like this was terminated by the death of the guarantor'); *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA (where the question was treated as undecided). Cf *Coulthart v Clementson* (1879) 5 QBD 42; *Re Silvester, Midland Rly Co v Silvester* [1895] 1 Ch 573; *Re Crace, Balfour v Crace* [1902] 1 Ch 733 (all cases dealing with questions as to notice of death, but not deciding the effect of death by itself). See also *Bradford Old Bank Ltd v Sutcliffe* (1918) 34 TLR 299; affd on other grounds [1918] 2 KB 833, CA (notice of insanity of guarantor). See further PARA 1203.

7 See *Coulthart v Clementson* (1879) 5 QBD 42; *Re Silvester, Midland Rly Co v Silvester* [1895] 1 Ch 573; *Re Crace, Balfour v Crace* [1902] 1 Ch 733 (all discussing the effect of constructive notice, but assuming that actual notice would be sufficient). It would be hard if death involved unlimited liability on the estate.

8 As to the duty to behave equitably in such circumstances see *Hollond v Teed* (1848) 7 Hare 50.

9 Constructive notice was held to be equivalent to actual notice by Bowen J in *Coulthart v Clementson* (1879) 5 QBD 42; but the contrary view was taken by Romer J in *Re Silvester, Midland Rly Co v Silvester* [1895] 1 Ch 573, and by Joyce J in *Re Crace, Balfour v Crace* [1902] 1 Ch 733.

10 *Re Silvester, Midland Rly Co v Silvester* [1895] 1 Ch 573.

11 *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692 at 703–705, CA. See *Egbert v National Crown Bank* [1918] AC 903, PC.

12 *Beckett v Addyman* (1882) 9 QBD 783, CA.

13 *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA.

14 See the Civil Liability (Contribution) Act 1978 s 3.

995. Change of company or firm guaranteed. Where either the bank or the guaranteed party is a body corporate, joint stock or otherwise, internal change by transfer of shares, issue of new capital, change of directors or the like has no effect on a guarantee as regards future advances[1].

In the absence of any agreement to the contrary, any change in the constitution of a firm for which a guarantee is given will, however, revoke the guarantee as to future transactions[2]; and in the case of a bank which is a partnership, a change of partners would similarly nullify the guarantee as to future advances[3].

Where guarantees are given to a corporate bank, its absorption of another bank does not affect the guarantees[4], and guarantees given to the absorbed bank, so far as a definite amount is due at the date of absorption, inure for the benefit of the absorbing one[5]. Subject to contrary agreement[6], in the case of amalgamation as distinguished from absorption, guarantees given to either bank would probably be determined[7], except for ascertained and existing debts due at the time of the amalgamation and assigned by either to the joint body[8].

1 A company regulated by the Companies Act 1985 or the Companies Act 2006 is a separate and distinct entity from its members: see COMPANIES vol 7(1) (2004 Reissue) PARA 401. As to corporations generally see CORPORATIONS.

The discussion as to guarantees here (i e in this paragraph and in PARAS 991–994, 996–997) is in a banking context: as to guarantee and indemnity generally see PARA 1013 et seq.

2 Partnership Act 1890 s 18. The Act applies only to 'firms', i e partnerships: see ss 1(1), 4; and PARTNERSHIP vol 35 (Reissue) PARA 1.

3 Partnership Act 1890 s 18.

4 See *Capital and Counties Bank v Bank of England* (1889) 61 LT 516.

5 *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA. This judgment is carefully limited to existing and ascertained debts, and the principle is, therefore, inapplicable to subsequent advances by the absorbing bank.

6 *First National Finance Corpn Ltd v Goodman* [1983] BCLC 203, CA.

7 'An amalgamation between two banks need not necessarily cause the business thereafter carried on to be the same as was theretofore carried on by either': see *Prescott Dimsdale Cave Tugwell & Co Ltd v Bank of England* [1894] 1 QB 351 at 364–365, CA, per AL Smith LJ. See also *London Brighton and South Coast Rly Co v Goodwin* (1849) 3 Exch 320; *Eastern Union Rly Co v Cochrane* (1853) 9 Exch 197.

8 This is upon the principle of *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA (approving *Wheatley v Bastow* (1855) 7 De GM & G 261).

996. Interest on bankruptcy. Where a guarantee provides for payment of interest on 'money remaining due' from the principal debtor, no claim may be maintained against the principal debtor for interest accruing after the making of

a bankruptcy order[1] unless and until the bankrupt's estate pays 100 pence in the pound. However, a claim may be maintained where the words are 'until repayment of the principal sum'[2].

1 *Re Moss, ex p Hallet* [1905] 2 KB 307. The reasoning is not that a creditor's rights to submit a proof in respect of interest are limited, but that bankruptcy prevents the debt being recoverable against the bankrupt, so that it is not due and owing.

As to guarantees more generally (i e other than in a banking context) see PARA 1013 et seq.

2 *Re Fitzgeorge, ex p Robson* [1905] 1 KB 462. As to bankruptcy generally see BANKRUPTCY AND INDIVIDUAL INSOLVENCY.

997. Remedies of banker. The banker is not obliged to resort to securities in his hands before proceeding against the surety[1].

Where a continuing guarantee under hand is given for a running account, it is doubtful at what time a cause of action accrues. In one case it was held that a cause of action arises as soon as any advance has been made, and that each item would be barred when six years had elapsed[2]; but in another the mere existence of a debt, without balance struck or demand made on the guarantor, was held not to make time run from that date[3]. Normally guarantees to banks provide for determination on demand by the bank or at the end of a stated period of notice by the surety or his personal representatives. Payment by the debtor of interest on account of principal before the expiration of the limitation period binds all persons liable for the debt[4].

1 *Re Howe, ex p Brett* (1871) 6 Ch App 838 at 841 (laying down the rule that the surety has no right or interest in the securities until he has paid the debt); *Ewart v Latta* (1865) 4 Macq 983 at 987, 989, HL, per Lord Westbury. See also *Duncan Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 10, 14, HL, per Lord Selborne, and at 18, 20 per Lord Blackburn; the remarks of Lord Watson at 22, as to the creditor's duty to take payment from the person primarily liable, are explainable, inasmuch as the contest was not between the holder of the securities and the surety. As to the discharge of the surety by dealings with the principal, and as to the right of the surety to securities on payment of the debt, see PARA 1138 et seq. The discussion as to guarantees here (i e in this paragraph and in PARAS 991–996) is in a banking context: as to guarantee and indemnity generally see PARA 1013 et seq.

2 *Parr's Banking Co Ltd v Yates* [1898] 2 QB 460, CA. See also *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401 at 406. Cf the consideration of these cases in PARA 1013 et seq.

3 *Hartland v Jukes* (1863) 1 H & C 667. As to the unreasonableness of a bank granting an overdraft and immediately proceeding to sue for it see *Rouse v Bradford Banking Co Ltd* [1894] AC 586 at 596, HL, per Lord Herschell.

The difficulty may be avoided by taking a new guarantee before the end of the six years, or by specifying in the guarantee the liability of the surety to be to pay a certain time after demand. In *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA, it was held that no cause of action arose against the surety until demand had been made. The principle is recognised in *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110, CA. This view is probably the correct one. In *Lloyds Bank Ltd v Margolis* [1954] 1 All ER 734, [1954] 1 WLR 644, Upjohn J held that, where there was the relationship of banker and customer and the customer was allowed to overdraw against a legal charge providing for repayment on demand, that meant what it said (applying observations of Denning LJ in *Barclays Bank Ltd v Beck* [1952] 2 QB 47 at 54, [1952] 1 All ER 549 at 553, CA). See LIMITATION OF ACTIONS vol 28 (Reissue) PARA 874.

4 See the Limitation Act 1980 s 31(7); and LIMITATION OF ACTIONS vol 28 (Reissue) PARAS 1114, 1116. See also *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA. As to the appropriation of payments in the case of a guaranteed account see PARA 176.

(xiv) Freezing Injunctions

998. Nature of a freezing injunction. A freezing injunction[1] is an interim order of the court restraining a party from removing from the jurisdiction assets[2] located there, or restraining a party from dealing with[3] any assets whether

located within the jurisdiction or not[4]. The foundation of the court's jurisdiction is the need to prevent judgments of the court from being rendered ineffective, whether by the removal of the defendant's assets from the jurisdiction, or by dissipation[5].

The purpose of a freezing injunction is not to improve the position of the claimant in an insolvency; a freezing injunction is not a form of pre-trial attachment, but a relief in personam which prohibits certain acts in relation to the assets in question; and it is not the purpose of the freezing jurisdiction to freeze a defendant's assets to ensure that there are funds from which the claimant will be able to satisfy a judgment, regardless of the defendant's need to draw on the funds to meet his debts as they fall due[6].

A freezing injunction may be made without notice if it appears to the court that there are good reasons for not giving notice[7]. It is not uncommon for a claimant to apply at the same time for other interim remedies[8].

1 Freezing injunctions were formerly called Mareva injunctions, the term 'Mareva injunction' deriving from *Mareva Compania Naviera SA v International Bulkcarriers SA, The Mareva* [1980] 1 All ER 213n, CA. Such an injunction was first granted in *Nippon Yusen Kaisha v Karageorgis* [1975] 3 All ER 282, [1975] 1 WLR 1093, CA. See further INJUNCTIONS vol 24 (Reissue) PARA 866 et seq.

2 If there are no limitations put upon the word 'assets', it includes chattels such as motor vehicles, jewellery, objets d'art and other valuables as well as choses in action: *CBS United Kingdom Ltd v Lambert* [1983] Ch 37 at 42, [1982] 3 All ER 237 at 241, CA. A freezing injunction ordinarily covers any assets which are acquired between the granting of the order and the eventual execution of any judgment obtained in the proceedings or earlier discharge of the order: see *TDK Tape Distributor (UK) Ltd v Videochoice Ltd* [1985] 3 All ER 345 at 349, [1986] 1 WLR 141 at 145. As to choses or things in action see CHOSES IN ACTION.

3 The words 'dealing with' are to be given a wide meaning and are not to be construed as ejusdem generis with 'removing from the jurisdiction'; and the freezing injunction extends to cases where there is a danger that the assets will be dissipated in this country as well as by removal out of the jurisdiction: *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 571, [1982] 1 All ER 556 at 561, CA, per Lord Denning MR.

4 CPR 25.1(f). As to the circumstances in which an order will be made in respect of assets outside the jurisdiction see PARA 1000. For an example of a freezing injunction see *Practice Direction—Interim Injunctions* PD 25 PARA 6, Annex. As to the CPR generally see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 51 et seq.

5 See *Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210 at 253, [1977] 3 All ER 803 at 822, HL; *Iraqi Ministry of Defence v Arcepey Shipping Co SA, The Angel Bell* [1981] QB 65 at 70–72, [1980] 1 All ER 480 at 485–486 (and the cases there cited); *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923 at 941, [1981] 2 All ER 565 at 577, CA, per Ackner LJ, and at 947 and 580–581 per Griffiths LJ; *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 571, [1982] 1 All ER 556 at 561, CA, per Lord Denning MR, and at 584 and 571 per Kerr LJ; *Ninemia Maritime Corpn v Trave SchiffahrtsGmbH & Co KG, The Niedersachsen* [1984] 1 All ER 398 at 419–420, [1983] 1 WLR 1412 at 1423, CA. Banks owe no duty of care to ensure that funds held in accounts which are the subject of a freezing order are not dissipated, although they may be guilty of a contempt of court if the circumstances justify it: *Customs and Excise Comrs v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181, [2006] 4 All ER 256, [2006] 2 All ER (Comm) 831.

6 *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* [1978] 3 All ER 164, [1978] 1 WLR 966, CA; *Iraqi Ministry of Defence v Arcepey Shipping Co SA, The Angel Bell* [1981] QB 65, [1980] 1 All ER 480; *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923 at 942, [1981] 2 All ER 565 at 577, CA; *K/S A/S Admiral Shipping v Portlink Ferries Ltd* [1984] 2 Lloyd's Rep 166, CA. Cf *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 573, [1982] 1 All ER 556 at 562, CA, where Lord Denning MR described the injunction as a method of attaching the asset itself; the injunction operates in rem, but not so as to give a charge in favour of any particular creditor. This view can no longer be sustained in the light of later decisions: see *Babanaft International Co SA v Bassatne* [1990] Ch 13 at 25, [1989] 1 All ER 433 at 438, CA; *Derby & Co Ltd v Weldon (Nos 3 and 4)* [1990] Ch 65 at 82, [1989] 1 All ER 1002 at 1011; *Mercedes-Benz AG v Leiduck* [1996] AC 284 at 300, [1995] 3 All ER 929 at 939, PC.

7 See CPR 25.3; and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 867.

8 Such interim remedies include, for example: permission to issue and serve a claim form out of the jurisdiction (see eg *Third Chandris Shipping Corpn v Unimarine SA, The Pythia, The Angelic Wings, The Genie* [1979] QB 645, [1979] 2 All ER 972, CA); a search order (see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 862); permission to issue a writ ne exeat regno (see eg *Al Nahkel for Contracting and Trading Ltd v Lowe* [1986] QB 235, [1986] 1 All ER 729; *Allied Arab Bank Ltd v Hajjar* [1988] QB 787, [1987] 3 All ER 739; and see EQUITY vol 16(2) (Reissue) PARA 495); or an injunction to restrain the defendant from leaving the jurisdiction (see eg *Bayer AG v Winter* [1986] 1 All ER 733, [1986] 1 WLR 497, CA; *Re Oriental Credit Ltd* [1988] Ch 204, [1988] 1 All ER 892).

999. Jurisdiction to grant freezing injunctions. The power to grant freezing injunctions is statutory[1] and is exercisable in cases where a party to proceedings is, as well as in cases where he is not, domiciled, resident or present within the jurisdiction of the High Court[2].

A freezing injunction is an interim remedy and not a final order[3]. Subject to provisions of the Civil Jurisdiction and Judgments Act 1982[4], a right to obtain an interim remedy is not a cause of action, and it cannot stand on its own; it is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the claimant for the enforcement of which the defendant is amenable to the jurisdiction of the court[5].

A freezing injunction is ancillary to a substantive pecuniary claim for debt or damages[6]; and the court will not ordinarily grant a freezing injunction in support of a claim for purely declaratory relief[7].

However, the High Court in England and Wales or Northern Ireland has power to grant interim relief[8] where: (1) proceedings have been or are to be commenced in a Brussels or Lugano Contracting State or a Regulation State[9] other than the United Kingdom or in a part of the United Kingdom[10] other than that in which the High Court in question exercises jurisdiction; and (2) the proceedings are or will be proceedings within the scope of the 1968 Convention[11], whether or not that Convention has effect in relation to the proceedings[12].

A freezing injunction granted before enforcement may be continued in force in aid of enforcement[13]; and the court has power to grant a freezing injunction after judgment in aid of enforcement[14]. A freezing injunction is not, however, 'made for the purpose of enforcing a judgment' and therefore cannot be registered[15] as a land charge under the Land Charges Act 1972[16].

1 The power of the High Court is conferred by the Supreme Court Act 1981 s 37(1) (re-enacting with modifications the Supreme Court of Judicature (Consolidation) Act 1925 s 45); and the power of the county court is conferred by the County Courts Act 1984 s 38 (as substituted and amended): see COURTS vol 10 (Reissue) PARA 711. As from a day to be appointed, the Supreme Court Act 1981 is to be renamed as the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed. A freezing injunction may be granted in aid of arbitration proceedings: see the Arbitration Act 1996 s 44(2)(e); and ARBITRATION vol 2(3) (Reissue) PARA 52. See also *The Rena K* [1979] QB 377 at 406–411, [1979] 1 All ER 397 at 417–420; *Third Chandris Shipping Corpn v Unimarine SA, The Pythia, The Angelic Wings, The Genie* [1979] QB 645 at 663, [1979] 2 All ER 972 at 981, CA.

2 See the Supreme Court Act 1981 s 37(3). See note 1. As to the court's jurisdiction to grant a freezing injunction in respect of assets outside the jurisdiction see PARA 1000.

3 See CPR Pt 25. See also *Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210 at 253, [1977] 3 All ER 803 at 822, HL. As to the CPR generally see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 51 et seq.

4 Ie the Civil Jurisdiction and Judgments Act 1982 s 25: see the text and notes 8–12.

5 *Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210 at 256, [1977] 3 All ER 803 at 824, HL. See, however, *Mercedes-Benz v Leiduck* [1996] AC 284, [1995] 3 All ER 929,

PC. In exceptional cases the courts may grant a freezing injunction against a co-defendant against whom there is no claim, so long as it is ancillary and incidental to the claim against the other co-defendant: *TSB Private Bank International SA v Chabra* [1992] 2 All ER 245, [1992] 1 WLR 231; *Aiglon Ltd v Gau Shan Co Ltd* [1993] 1 Lloyd's Rep 164; *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366, [1994] 1 All ER 110, CA.

6 *Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210 at 253, [1977] 3 All ER 803 at 822, HL.

7 See eg *Steamship Mutual Underwriting Association (Bermuda) Ltd v Thakur Shipping Co Ltd* [1986] 2 Lloyd's Rep 439n, CA; *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428.

8 For the purposes of the Civil Jurisdiction and Judgments Act 1982 s 25, 'interim relief', in relation to the High Court in England and Wales or Northern Ireland, means interim relief of any kind which that court has power to grant in proceedings relating to matters within its jurisdiction, other than a warrant for the arrest of property, or provision for obtaining evidence: s 25(7). It includes the grant of a freezing injunction: see eg *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA; *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456, CA.

9 As to the meanings of 'Brussels Contracting State', 'Lugano Contracting State' and 'Regulation State' see the Civil Jurisdiction and Judgments Act 1982 ss 1, 50; and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 65.

10 'Part of the United Kingdom' means England and Wales, Scotland or Northern Ireland: Civil Jurisdiction and Judgments Act 1982 s 50. As to the meaning of 'United Kingdom' see PARA 2 note 3.

11 '1968 Convention' means the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Cmnd 7395), including the Protocol annexed to that Convention, signed at Brussels on 27 September 1968; and, unless the context otherwise requires, references to, or to any provision of, the 1968 Convention are references to that Convention as amended: see the Civil Jurisdiction and Judgments Act 1982 ss 1(1), (2)(a), 50; and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 65.

The proceedings must be within the scope of the 1968 Convention as determined by art 1: see the Civil Jurisdiction and Judgments Act 1982 s 25(1)(b); and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 138. The 1968 Convention art 1 applies in civil and commercial matters whatever the nature of the court or tribunal; and it does not extend, in particular, to revenue, customs or administrative matters: art 1. The 1968 Convention does not apply to: (1) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; (2) bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (3) social security; (4) arbitration: art 1.

12 Civil Jurisdiction and Judgments Act 1982 s 25(1) (amended by the Civil Jurisdiction and Judgments Act 1991 Sch 2 para 12; and SI 2001/3929). On an application for any interim relief under the Civil Jurisdiction and Judgments Act 1982 s 25(1), the court may refuse to grant that relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from s 25 in relation to the subject matter of the proceedings in question makes it inexpedient for the court to grant it: s 25(2). See *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, [1997] 3 All ER 724, CA.

13 *Stewart Chartering Ltd v C & O Managements SA, The Venus Destiny* [1980] 1 All ER 718, [1980] 1 WLR 460.

14 *Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Tarmac (UK) Ltd* [1985] 3 All ER 747, [1984] 1 WLR 1097.

15 Ie under the Land Charges Act 1972 s 6(1)(a): see LAND CHARGES vol 26 (2004 Reissue) PARA 654.

16 *Stockler v Fourways Estates Ltd* [1983] 3 All ER 501, [1984] 1 WLR 25.

1000. Freezing injunctions over assets outside the jurisdiction. The court has jurisdiction before or after judgment to grant a freezing injunction in respect of foreign assets[1].

The cases in which it will be appropriate to grant a freezing injunction, pending trial, over assets worldwide will be rare[2]. Factors which, in combination, have been held sufficient to justify such an injunction are: (1) the plain and admitted intention of defendants to move their assets out of the reach of courts of law; (2) the resources they have obtained and the skill they have

shown in doing so; and (3) the magnitude of the sums involved[3]. There are conflicting statements as to the relevance of evidence that a foreign court would be willing to make orders similar in effect to a freezing injunction[4].

It may be made a requirement of a pre-judgment worldwide freezing injunction that, by undertaking or proviso or a combination of both: (a) oppression of the defendant by way of exposure to a multiplicity of proceedings is avoided; (b) the defendant is protected against misuse of information gained from the ordinary order for disclosure in aid of a freezing injunction[5]; and (c) the position of third parties is protected[6].

A pre-judgment freezing injunction will more readily be granted in respect of assets outside the jurisdiction where the claimant asserts a proprietary or tracing claim[7].

The arguments against granting a freezing injunction extending to assets outside the jurisdiction are much weaker in a case where judgment has been obtained than in a case where an interim order is sought before trial, and there will be many cases where justice requires that, once judgment has been obtained, a successful claimant should be able to obtain the protection of a freezing injunction extending to all the assets of the defendant whether within or outside the jurisdiction[8]. After judgment the parties' positions are different in the important respect that the claimant may attach assets of the defendant against whom he has obtained judgment[9]. It may be appropriate for the court to exercise its ample jurisdiction by making a temporary 'holding' injunction against the judgment debtor, requiring him not to move or deal with his assets without giving to the judgment creditor the few days' notice which is the minimum reasonably required to enable the judgment creditor to invoke any assistance which the local court may afford to him in respect of his judgment debt[10]. A post-judgment freezing injunction should normally be of limited duration: the claimant should be encouraged to proceed with proper methods of execution[11].

The grant of worldwide freezing injunctions has given rise to the question as to how banks can be protected from committing an unintended contempt of court when they have branches abroad[12].

1 *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456, CA; *Derby & Co Ltd v Weldon* [1990] Ch 48, [1989] 1 All ER 469, CA; *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA; *Derby & Co Ltd v Weldon (No 3)* [1989] 3 All ER 118, [1989] 1 WLR 1244. See also *Ashtiani v Kashi* [1987] QB 888 at 901, [1986] 2 All ER 970 at 977, CA, per Dillon LJ, and at 904 and 979 per Neill LJ; *Allied Arab Bank Ltd v Hajjar* [1988] QB 787, [1987] 3 All ER 739. See the guidelines set out by the Court of Appeal in regard to applications to enforce a worldwide freezing order abroad in *Dadourian Group International Inc v Simms* [2006] EWCA Civ 399, [2006] 3 All ER 48 (in particular, permission to seek enforcement abroad of worldwide freezing order will be granted where there is a real prospect that there are assets in the country in which enforcement is sought); see also *Dadourian Group International Inc v Simms* [2006] EWCA Civ 1745, [2007] 2 All ER 329.

2 *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456, CA. For an example of a case where the court declined to grant a Mareva injunction (ie the predecessor to a freezing injunction) over an asset outside the jurisdiction see *Intraco Ltd v Notis Shipping Corpn, The Bhoja Trader* [1981] 2 Lloyd's Rep 256, CA.

3 *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456, CA.

4 Compare *Ashtiani v Kashi* [1987] QB 888 at 898–903, [1986] 2 All ER 970 at 975–979 with *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA.

5 See further PARA 1002.

6 See eg *Derby & Co Ltd v Weldon* [1990] Ch 48, [1989] 1 All ER 469, CA. As to the protection of third parties see further PARA 1003.

7 See *Ashtiani v Kashi* [1987] QB 888 at 901, [1986] 2 All ER 970 at 977, CA, per Dillon LJ, and at 905 and 980 per Neill LJ; *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA; *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456, CA.

8 *Babanaft International Co SA v Bassatne* [1990] Ch 13 at 41–43, [1989] 1 All ER 433 at 451–452, CA, per Neill LJ.
9 *Babanaft International Co SA v Bassatne* [1990] Ch 13 at 42, [1989] 1 All ER 433 at 452, CA, per Nicholls LJ.
10 *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA.
11 *Republic of Haiti v Duvalier* [1990] 1 QB 202 at 214, [1989] 1 All ER 456 at 465, CA, obiter per Staughton LJ.
12 See *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA; *Derby & Co Ltd v Weldon (No 4)* [1990] Ch 65, [1989] 1 All ER 1002, CA; *Baltic Shipping Co v Translink Shipping Ltd* [1995] 1 Lloyd's Rep 673; *Bank of China v NBM LLC* [2001] EWCA Civ 1933, [2002] 1 All ER 717.

1001. Guidelines for the grant of a freezing injunction. The guidelines[1] to be observed on an application for a freezing injunction are:

(1) the claimant should make full and frank disclosure of all matters in his knowledge which are material for the judge to know[2];

(2) the claimant should give particulars of his claim against the defendant, stating the ground of his claim and its amount, and fairly stating the points made against it by the defendant;

(3) the claimant should give some grounds for believing that the defendant has assets in the relevant place[3]; the existence of a bank account is enough, whether it is in overdraft or not;

(4) the claimant should give some grounds for believing that there is a risk of the defendant's assets being removed or dissipated[4] before the judgment or award is satisfied;

(5) the claimant will usually be required to give an undertaking in damages in case he fails in his claim or the injunction turns out to be unjustified; and in a suitable case this should be supported by a bond or security[5];

(6) the claimant must establish a good arguable case[6];

(7) the difference between a good arguable case and a serious question to be tried, which is incapable of definition, does not affect the applicability of the general principle that it is no part of the court's function at the interim stage to try to resolve factual disputes on which the claims of either party may ultimately depend, nor to decide difficult questions of law which call for detailed argument and mature consideration[7];

(8) the defendant should not be prevented from using his assets for a purpose which does not conflict with the purpose of a freezing injunction, for example the making of payments which the defendant in good faith considers he should make in the ordinary course of business[8];

(9) the order should normally specify a maximum sum, that is to say it should restrain removal or dissipation of assets save in so far as such assets exceed a specified sum[9];

(10) the order should not be used to prevent a defendant from living as he has always lived, or from paying legal costs to defend the proceedings[10];

(11) the order should make reasonable provision for the protection of third parties[11] and should include notice of their right to seek variation of the order[12].

1 The guidelines are based upon *Third Chandris Shipping Corpn v Unimarine SA, The Pythia, The Angelic Wings, The Genie* [1979] QB 645 at 668–669, [1979] 2 All ER 972 at 984–985, CA, per Lord Denning MR, as modified by later case law and with the modifications consequent on the replacement of the Mareva injunction with the freezing injunction (see PARA 998).

2 See *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428 at 437–438 (and the cases there cited); *Gulf Interstate Oil Corpn v ANT Trade & Transport Ltd of Malta, The Giovanna* [1999] 1 All ER (Comm) 97.
3 The words 'in the relevant place' have been substituted for 'here' to take account of the subsequent recognition of the court's jurisdiction to grant a freezing injunction over foreign assets: see PARA 1000.
4 The words 'or dissipated' have been added to take account of the now well-established principle that a freezing injunction may restrain not only the removal of assets from the jurisdiction but also dissipation of assets: see PARA 998.
5 In *Allen v Jambo Holdings Ltd* [1980] 2 All ER 502, [1980] 1 WLR 1252, CA, it was held that a claimant funded by legal aid could be granted a Mareva injunction (now a freezing injunction) even though his undertaking might be worth nothing. For the form of undertaking see *Practice Direction—Interim Injunctions* PD 25 PARA 6, Annex.
6 *Ninemia Maritime Corpn v Trave SchiffahrtsGmbH & Co KG, The Niedersachsen* [1984] 1 All ER 398 at 414–415, [1983] 1 WLR 1412 at 1417, CA.
7 *Derby & Co Ltd v Weldon* [1990] Ch 48 at 57, [1989] 1 All ER 469 at 475, CA, per Parker LJ. Any attempt to persuade the court to resolve disputes of fact or to determine difficult points of law should be discouraged by appropriate orders as to costs: *Derby & Co Ltd v Weldon* above.
8 *Iraqi Ministry of Defence v Arcepey Shipping Co SA, The Angel Bell* [1981] QB 65, [1980] 1 All ER 480. One means of protecting the defendant in this respect is for the order to restrain disposal of assets save in the ordinary course of business as carried on before the grant of the injunction: see eg *Garvin v Domus Publishing Ltd* [1989] Ch 335, [1989] 2 All ER 344. The court is not limited to funds to which the defendant has a legal right if there are reasonable grounds for believing that there are other funds available to him: see *Atlas Maritime v Avalon Maritime (No 3)* [1991] 4 All ER 783, [1991] 1 WLR 917, CA.
9 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 576, [1982] 1 All ER 556 at 565, CA, per Lord Denning MR, and at 589 and 574–575 per Kerr LJ.
10 *PCW (Underwriting Agencies) Ltd v Dixon* [1983] 2 All ER 158; appeal allowed by consent without affecting this point [1983] 2 All ER 697n, CA; *United Mizrahi Bank Ltd v Doherty* [1998] 2 All ER 230, [1998] 1 WLR 435.
11 See further PARA 1003.
12 *Guinness Peat Aviation (Belgium) NV v Hispania Lineas Aereas SA* [1992] 1 Lloyd's Rep 190.

1002. Disclosure in aid of a freezing injunction. There is inherent in the statutory power to grant a freezing injunction the power to make all such ancillary orders as appear to the court to be just and convenient to ensure that the freezing order achieves its purpose[1]. The court has express power to grant an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction[2].

An order for disclosure may, for example, require the defendant to disclose the nature, location and value of all his assets within and, in some cases, outside the jurisdiction, including the identity of any bank accounts whether held by the defendant in his own name or jointly or by nominees or otherwise howsoever, but excluding any asset the value of which is less than a specific sum[3]. The order may require the defendant to give disclosure himself or by a specified agent, such as his solicitor[4].

A defendant is liable to have permission to remove any further income or possessions out of the jurisdiction withdrawn unless and until he makes full and proper disclosure of his assets[5].

1 *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923, [1981] 2 All ER 565, CA, approving on this point *A v C* [1981] QB 956n, [1980] 2 All ER 347.
2 CPR 25.1(g). As to the CPR generally see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 51 et seq.
3 See eg the order made in *CBS United Kingdom Ltd v Lambert* [1983] Ch 37, [1982] 3 All ER 237. It appears that freezing injunctions issued in the Chancery Division include, almost as a matter of course, a direction for disclosure of assets: see *Ashtiani v Kashi* [1987] QB 888, [1986] 2 All ER 970, CA.

4 See eg *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456, CA. See also PARA 998.
5 *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923, [1981] 2 All ER 565, CA.

1003. Protection of third parties. The court must bear in mind not only the balance of convenience and justice between claimant and defendant, but above all also as between claimant and third parties. Where assets of a defendant are held by a third party incidentally to the general business of the third party, such as the accounts of the defendant held by a bank, or goods held by a bailee as custodian, for example in a warehouse, an effective indemnity in favour of the third party will adequately hold this balance, because service of the injunction will not lead to any major interference with the third party's business. However, where the effect of service must lead to interference with the performance of a contract between the third party and the defendant which relates specifically to the assets in question, the right of the third party in relation to his contract must clearly prevail over the claimant's desire to secure the defendant's assets for himself against the day of judgment[1]. Where the balance is in favour of the grant of an injunction, the claimant will normally be required to give such undertakings as the court considers reasonably necessary to protect third party interests. The claimant will normally be required to give undertakings: (1) to indemnify any third party affected by the order against all expenses reasonably incurred in complying with the order and all liabilities flowing from such compliance[2]; (2) in the case of a freezing injunction which may affect ships in port, an undertaking to pay the actual income lost to the relevant port authority as a consequence of the granting of the injunction[3]; (3) in the case of a freezing injunction over foreign assets, not to serve notice of the order on third parties outside the jurisdiction and/or not without permission of the court to take any action in any foreign jurisdiction in respect of any of the defendant's assets[4].

All freezing injunctions which are intended to be served on banks should contain a suitable proviso preserving the bank's rights of set-off[5].

An innocent third party will normally be permitted to intervene in the claim for the purpose of applying for a variation in a freezing order[6]. In such a case the claimant must expect to pay, and should in justice pay, all reasonable legal costs of a successful applicant[7].

1 *Galaxia Maritime SA v Mineralimportexport, The Eleftherios* [1982] 1 All ER 796 at 799–800, [1982] 1 WLR 539 at 542, CA, per Kerr LJ; *Lewis & Peat (Produce) Ltd v Almatu Properties Ltd* [1993] 2 Bank LR 45, CA.
2 See *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 577, [1982] 1 All ER 556 at 565–566, CA, per Lord Denning MR.
3 *Clipper Maritime Co Ltd of Monrovia v Mineralimportexport, The Marie Leonhardt* [1981] 3 All ER 664, [1981] 1 WLR 1262, where the order also contained a proviso giving the port authority a discretion for operational reasons to move or order the movement of the vessel.
4 See further PARA 1004.
5 *Oceanica Castelana Armadora SA of Panama v Mineralimportexport, The Theotokos* [1983] 2 All ER 65, [1983] 1 WLR 1294. See further PARA 1012.
6 See eg *Project Development Co Ltd SA v KMK Securities Ltd* [1983] 1 All ER 465, [1982] 1 WLR 1470.
7 See *Project Development Co Ltd SA v KMK Securities Ltd* [1983] 1 All ER 465, [1982] 1 WLR 1470. See also *Bank of China v NBM LLC* [2001] EWCA Civ 1933, [2002] 1 All ER 717.

1004. General effect of freezing injunctions on third parties. In accordance with general principles, a freezing injunction takes effect at the very moment it is pronounced, even though the order has not then been drawn up and even though it has not then been served on the defendant[1].

Every person who has knowledge of the order must do what he reasonably can to preserve the assets to which it relates. He must not assist in any way in the disposal of any such assets, for otherwise he is himself in contempt of court by aiding and abetting the contempt of the defendant[2]. This principle is one of the strengths of a freezing injunction, but its application to an injunction in respect of overseas assets causes a difficulty because it would be wrong for an English court, by making an order in respect of overseas assets against a defendant amenable to its jurisdiction, to impose or attempt to impose obligations on persons not before the court in respect of acts to be done by them abroad regarding property outside the jurisdiction[3].

To meet this difficulty, it is the practice of the court to insert in a freezing injunction over foreign assets a proviso to make it clear that third parties are not affected by the order[4]. On one wording of the proviso, the order does not affect third parties unless and to the extent that the order is enforced by the court of the states in which any of the defendant's assets are located[5]. On another wording, the claimant leaves to the English court any decision whether action should be taken by him in any foreign jurisdiction in respect of any of the defendant's assets[6]. The proviso need apply only to assets outside England and Wales[7]. There are conflicting views as to whether the proviso should or should not apply to individuals, that is to say natural persons, who are resident in England and Wales[8].

1 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 572, [1982] 1 All ER 556 at 562, CA, per Lord Denning MR; *Holtby v Hodgson* (1889) 24 QBD 103.

2 *Z Ltd v A-Z and AA-LL* [1982] QB 558, [1982] 1 All ER 556, CA, applying *Seaward v Paterson* [1897] 1 Ch 545; *Acrow (Automation) Ltd v Rex Chainbelt Inc* [1971] 3 All ER 1175, [1971] 1 WLR 1676, CA. See also *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA. See further PARA 1000 text and note 12.

3 *Babanaft International Co SA v Bassatne* [1990] Ch 13 at 44, [1989] 1 All ER 433 at 453, CA, per Nicholls LJ.

4 See *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA.

5 The wording was suggested by Kerr LJ in *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA, and was adopted in *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456, CA.

6 *Derby & Co Ltd v Weldon* [1990] Ch 48, [1989] 1 All ER 469, CA.

7 See *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456, CA.

8 Compare the observations of Nicholls LJ in *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA, with those of Staughton LJ in *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456, CA.

1005. Freezing injunctions against banks. The circumstances in which an application for a freezing injunction can properly be made against a bank are very rare. Two factors weigh against the grant of such an order: (1) a bank's stock in trade is money borrowed from its depositors and, in so far as the bank is called upon to repay its depositors, any reduction in the bank's assets will be in the ordinary course of its business; and (2) all banking business is dependent on the maintenance of confidence on the part of its customers and any order which could produce a run on the bank would be inimical to the purposes for which the jurisdiction to grant freezing injunctions exists[1].

1 *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769 at 786, CA, per Lord Donaldson MR. See also *Camdex International Ltd v Bank of Zambia (No 2)* [1997] 1 All ER 728, [1997] 1 WLR 632, CA.

A bank, notified by a third party of a freezing injunction granted to the third party against one of the bank's customers affecting an account held by the customer with the bank, owed no

duty to the third party to take reasonable care to comply with the terms of the injunction: see *Customs and Excise Comrs v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181, [2006] 4 All ER 256.

1006. Effect on bank of a freezing injunction against a customer. By far the greatest burden of policing freezing injunctions falls on banks[1]. The effect on a bank of a freezing injunction against a customer has been judicially considered in relation to: (1) searching for accounts maintained by the defendant[2]; (2) joint accounts and accounts in the name of third parties[3]; (3) maximum sum orders[4]; (4) honouring of cheques and cheque or credit cards[5]; (5) letters of credit and performance bonds[6]; and (6) the banker's right of set-off[7].

1 *Oceanica Castelana Armadora SA of Panama v Mineralimportexport, The Theotokos* [1983] 2 All ER 65 at 71, [1983] 1 WLR 1294 at 1302.
2 See PARA 1007.
3 See PARA 1008.
4 See PARA 1009.
5 See PARA 1010.
6 See PARA 1011.
7 See PARA 1012.

1007. Searching for accounts maintained by defendant. If the claimant is able to identify bank accounts maintained by the defendant, he should do so with as much precision as is reasonably practicable[1], and normally any such account will be specified in the order itself.

If the claimant cannot identify a bank account, he may request the bank to conduct a search so as to see whether it holds any assets of the defendant, provided that he undertakes to pay the cost of the search[2]. Service of a freezing injunction on a bank obliges the bank, as a matter of self-defence for the purpose of complying with the order, to carry out a search throughout all its branches in order to see whether it holds any assets of the particular defendant[3].

Where it is intended to serve a freezing injunction on a bank, it should be made clear that its terms do not apply, save in the case of assets specifically referred to, to shares or title deeds which a bank may hold as security, to articles in a safe deposit which the bank may hold in the name of the defendant, or to assets which come within the control of the bank subsequently to the date on which a copy of the order is served on the bank and after its ascertainment of the assets which it then holds[4].

1 *Searose Ltd v Seatrain (UK) Ltd* [1981] 1 All ER 806, [1981] 1 WLR 894; *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 575, [1982] 1 All ER 556 at 564, CA, per Lord Denning MR.
2 *Searose Ltd v Seatrain (UK) Ltd* [1981] 1 All ER 806, [1981] 1 WLR 894; *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 575, [1982] 1 All ER 556 at 564, CA, per Lord Denning MR.
3 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 586, [1982] 1 All ER 556 at 573, CA, per Kerr LJ. In practice, banks are normally requested by the claimant to limit the search to a particular branch or to branches within a particular locality.
4 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 590–592, [1982] 1 All ER 556 at 576–577, CA, per Kerr LJ.

1008. Joint accounts and accounts in the name of third parties. Any freezing injunction which it is intended to serve on a bank is not applicable to a joint account in the name of the defendant and of some other person or persons unless the order is so drafted as to make it clear that it is intended to apply to it, but this would be justifiable only in rare cases[1]. Where the other holder of a joint account is not a party, the order should include reference to the joint account, and a copy of the order should be served on the other holder[2].

The position in relation to accounts in the name of a third party is as follows:

(1) where a claimant invites the court to include within the scope of a freezing injunction assets which appear on their face to belong to a third party, for example a bank account in the name of a third party, the court should not accede to the invitation without good reason for supposing that the assets are in truth the assets of the defendant;

(2) where the defendant asserts that the assets belong to a third party, the court is not obliged to accept that assertion without inquiry, but may do so depending on the circumstances; and the same applies where it is the third party who makes the assertion, on an application to intervene;

(3) in deciding whether to accept the assertion of a defendant or a third party without further inquiry, the court will be guided by what is just and convenient, not only as between the claimant and the defendant, but also as between the claimant, the defendant and the third party;

(4) where the court decides not to accept the assertion without further inquiry, it may order an issue to be tried between the claimant and the third party in advance of the main proceedings, or it may order that the issue await the outcome of the main proceedings, again depending in each case on what is just and convenient[3].

1 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 577, [1982] 1 All ER 556 at 565, CA, per Lord Denning MR, and at 591 and 576 per Kerr LJ. The principles which have been established in relation to accounts in the names of third parties (see heads (1)–(4) in the text) presumably apply mutatis mutandis to joint accounts.

2 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 591, [1982] 1 All ER 556 at 576, CA, per Kerr LJ.

3 *SCF Finance Co Ltd v Masri* [1985] 2 All ER 747 at 753, [1985] 1 WLR 876 at 884, CA, per Lloyd LJ; approved in *Allied Arab Bank Ltd v Hajjar* [1989] Fam Law 68, CA.

1009. Maximum sum orders. It is normal practice for a freezing injunction to restrain removal or disposal of or dealing with the defendant's assets save in so far as they exceed a maximum sum. A maximum sum order is preferable to an order which freezes all assets because: (1) it represents no more than what a claimant may justifiably request from the court; and (2) an order which freezes all assets is, in the ordinary case, bound to lead to an outcry from the defendant and to the need for an amendment, at any rate if he is resident or carries on business within the jurisdiction, and such an order cannot be justified in principle, save in wholly exceptional cases, unless it is clear that the defendant's assets within the jurisdiction are insufficient to meet the claim, and that he is neither resident nor carries on business within the jurisdiction[1].

A maximum sum order is, however, unworkable so far as any individual bank is concerned because it cannot know what assets the defendant may or may not have elsewhere. To meet this difficulty, the first paragraph of an order which it is intended to serve on a bank should restrain the defendant up to the maximum sum in question, but the second paragraph should then qualify the first by providing that, so far as specified accounts are concerned, the defendant is not to be entitled to draw upon any of them except to the extent that any of them exceeds the maximum sum, or so as to reduce the balance below that sum[2].

In calculating the amount which is not caught by a freezing injunction, a bank need make no provision in respect of future instalments of interest and repayment of principal due to it from the defendant[3].

1 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 589, [1982] 1 All ER 556 at 575, CA, per Kerr LJ.

2 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 590, [1982] 1 All ER 556 at 575, CA, per Kerr LJ.

3 *Oceanica Castelana Armadora SA of Panama v Mineralimportexport, The Theotokos* [1983] 2 All ER 65 at 71, [1983] 1 WLR 1294 at 1301.

1010. Honouring of cheques; cheque or credit cards. Unless payment can be made out of funds in excess of the sum, if any, specified in the order[1], a bank is not entitled to honour cheques drawn on the account whether before or after the making of the order[2].

If, however, the defendant has used a cheque card or credit card[3] so as to give rise to obligations on the part of a bank to third parties, the bank is entitled, and indeed bound, to honour such obligations to the third parties concerned[4]. The order should not preclude the debiting of the defendant's account in respect of any cheque card or credit card transaction effected by the defendant prior to the date when the order is served on the bank[5] but the position in relation to transactions effected after that date may depend on whether the bank has taken reasonable steps to withdraw the card facilities from the defendant[6].

1 As to maximum sum provisions see PARA 1009.
2 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 574, [1982] 1 All ER 556 at 563, CA, per Lord Denning MR.
3 As to cheque guarantee cards and credit cards see PARAS 903–905.
4 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 592–593, [1982] 1 All ER 556 at 576–577, CA, per Kerr LJ.
5 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 592, [1982] 1 All ER 556 at 577, CA, per Kerr LJ; and see the observations of Lord Denning MR at 574 and 563.
6 See *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 592, [1982] 1 All ER 556 at 577, CA, per Kerr LJ.

1011. Letters of credit; performance bonds. A freezing injunction will not be granted to restrain payment under a letter of credit or a performance bond, but a freezing injunction may apply to the proceeds as and when received by or for the defendant[1]. This can be achieved by confining the terms of the order, so far as it affects the defendant's bank accounts, to the accounts themselves, without extending it to the defendant's assets generally in so far as these may be under the control of banks on which a copy of the order is served[2].

1 *Intraco Ltd v Notis Shipping Corpn, The Bhoja Trader* [1981] 2 Lloyd's Rep 256, CA; *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607 at 613, [1981] 1 WLR 1233 at 1241–1242, CA; *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 574, [1982] 1 All ER 556 at 563, CA, per Lord Denning MR. As to restraint of payment under letters of credit and performance bonds generally see PARA 959. As to letters of credit generally see PARA 923 et seq.
2 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 591, [1982] 1 All ER 556 at 576, CA, per Kerr LJ. See also PARA 1009.

1012. Banker's right of set-off. There is a doubt whether, in the absence of express provision, a bank is entitled under a freezing injunction to exercise its right of set-off[1] so as to reduce or extinguish a credit balance on an account maintained by the defendant[2]. In order to avoid the necessity of banks going to court for variations to freezing injunctions, and in order to save court time, it is desirable that all freezing injunctions which are intended to be served on banks should contain a suitable proviso[3].

1 As to a banker's right of set-off see PARAS 867–868.
2 *Oceanica Castelana Armadora SA of Panama v Mineralimportexport, The Theotokos* [1983] 2 All ER 65 at 71, [1983] 1 WLR 1294 at 1301.
3 *Oceanica Castelana Armadora SA of Panama v Mineralimportexport, The Theotokos* [1983] 2 All ER 65 at 71, [1983] 1 WLR 1294 at 1301.

The sample orders annexed to CPR *Practice Direction—Interim Injunctions* PD 25 PARA 6 include the following provision: 'this injunction does not prevent any bank from exercising any right of set off it may have in respect of any facility which it gave to the respondent before it was notified of this order'. See also the wording approved in *Oceanica Castelana Armadora SA of Panama v Mineralimportexport, The Theotokos* above. As to the CPR generally see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 51 et seq.

4. GUARANTEE AND INDEMNITY

(1) THE CONTRACT OF GUARANTEE

(i) The Nature of a Guarantee

A. DEFINITIONS

1013. Guarantee. A guarantee is an accessory[1] contract[2] by which the promisor[3] undertakes to be answerable[4] to the promisee[5] for the debt, default or miscarriage[6] of another person[7], whose primary liability to the promisee must exist or be contemplated[8].

As in the case of any other contract[9], a valid guarantee requires an agreement[10], made between parties intending to create legal relations[11] and having the capacity to contract[12], supported by consideration, actual or implied[13]. An additional statutory requirement is that the contract must either be in writing or be evidenced by a written note or memorandum signed by or on behalf of the party to be charged[14].

A guarantee is often termed a 'collateral' or 'conditional' contract, in order to distinguish it from one that is 'original' or 'absolute'[15]. However, both of these expressions may be misleading. The word 'collateral' does not occur in the Statute of Frauds (1677)[16], and cannot, therefore, safely be accepted as affording a certain criterion whether a promise is or is not within that enactment[17]. Nor is the obligation of a guarantor necessarily, or even usually, conditional, except in the broad sense that he will be discharged if the principal debtor performs the obligation guaranteed[18].

A continuing guarantee is one which extends to a series of transactions and is not exhausted by nor confined to a single credit or transaction[19].

Whether any particular contractual promise is to be classified as a guarantee so as to attract all or any of the legal consequences which flow from that classification depends upon the words in which the parties have expressed the promise. The use of the word 'guarantee' is not itself conclusive[20]. In commercial usage, the word 'guarantee' is often applied to obligations that do not fall within the narrow legal definition[21]. With the exception of performance bonds (or performance guarantees), which are discussed below[22], such usages fall outside the scope of this title. Also outside the scope of this title are cheque guarantee cards[23], export credit guarantees[24], protection and indemnity ('P & I') club guarantees[25] and the modern law of bail in which the concept of suretyship is employed[26].

1 See PARA 792.

2 'Suretyship arises out of contract': *Re Stratton, ex p Salting* (1883) 25 ChD 148 at 151, CA, per Fry LJ. 'The law of guarantee is part of the law of contract': *Moschi v Lep Air Services Ltd* [1973] AC 331 at 346, [1972] 2 All ER 393 at 400, HL, per Lord Diplock.

3 The promisor is usually referred to as the guarantor or surety: see PARA 1017.

4 'Translated into modern legal terminology 'to answer for' is 'to accept liability for'': *Moschi v Lep Air Services Ltd* [1973] AC 331 at 347, [1972] 2 All ER 393 at 400–401, HL, per Lord Diplock. See further PARA 1052.

5 The promisee is usually referred to as the creditor: see PARA 1016.

6 The words 'debt, default or miscarriage' are taken from the Statute of Frauds (1677) s 4; '...'debt, default or miscarriage' is descriptive of failure to perform legal obligations, existing or future, arising from any source, not only from contractual promises, but in any other factual situations capable of giving rise to legal obligations such as those resulting from bailment, tort

or unsatisfied judgments': *Moschi v Lep Air Services Ltd* [1973] AC 331 at 347–348, [1972] 2 All ER 393 at 401, HL, per Lord Diplock. See PARA 1052 note 5.

7 This person is usually referred to as the principal debtor: see PARA 1015.

8 The definition in the text was cited with approval by Phillips J in *City of London v New Hampshire Insurance Co* (18 January 1991, unreported), QBD, but summarised at (1991) 3 JIBFL 144; revsd sub nom *Mercers Co v New Hampshire Insurance Co* [1992] 3 All ER 57n, sub nom *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 1 WLR 792n, [1992] 2 Lloyd's Rep 365, CA. A list of other definitions of 'guarantee' may be found in *Re Conley, ex p Trustee v Barclays Bank Ltd, Re Conley, ex p Trustee v Lloyds Bank Ltd* [1938] 2 All ER 127 at 130–131, CA.

9 See CONTRACT vol 9(1) (Reissue) PARA 629 et seq.

10 See PARAS 1023–1026.

11 See PARAS 1027–1028.

12 See PARAS 1029–1032.

13 See PARAS 1047–1051.

14 See the Statute of Frauds (1677) s 4; and PARA 1052 et seq, where the principles for determining the promises of guarantee to which that provision applies are considered.

15 See *Birkmyr v Darnell* (1704) 1 Salk 27; *Gordon v Martin* (1731) Fitz-G 302 at 303; *Kirkham v Marter* (1819) 2 B & Ald 613 at 616; *Re Albert Life Assurance Co, ex p Western Life Assurance Society* (1870) LR 11 Eq 164 at 177; and PARA 1059.

16 Statute of Frauds (1677) s 4: see PARA 1052.

17 See *Harris v Huntbach* (1757) 1 Burr 373 at 375 per Lord Mansfield CJ, which has often been discussed in cases where the incidence of a mortgage debt was in controversy. According to these cases, the strict literal interpretation of 'collateral' is 'parallel' or 'additional' (*Re Athill, Athill v Athill* (1880) 16 ChD 211 at 222, CA), and it does not carry the signification 'secondary', unless the circumstances of the case justify such a construction (*Re Athill, Athill v Athill* at 222, 225). Neither does it necessarily of itself bear the meaning 'auxiliary' (*Early v Early, Williams v Early* (1878) 16 ChD 214n at 215 per Hall V-C), although 'further security' has been interpreted to do so (see *Stringer v Harper* (1858) 26 Beav 33). A security described as 'collateral' may, nevertheless, in view of its covenants and other provisions and the surrounding circumstances of the case, be held to be a complete, perfect and independent security (*Re Athill, Athill v Athill* above), although, where the words used by the parties, together with the facts of the case, indicate an intention to regard a particular security as 'collateral', it will be so construed by the court (see *Marquis of Bute v Cunynghame* (1826) 2 Russ 275; *Lipscomb v Lipscomb* (1868) LR 7 Eq 501; *De Rochefort v Dawes* (1871) LR 12 Eq 540). To describe a guarantee as a 'collateral contract' does not sufficiently emphasise its accessory character, although it would seem that the words 'collateral security' might do so, as the word 'security', even by itself, ordinarily means something auxiliary to an antecedent obligation: *National Telephone Co v IRC* [1899] 1 QB 250 at 258, CA, per AL Smith LJ; affd [1900] AC 1, HL.

18 In *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255 at 258–259, Lloyd J distinguished between two classes of guarantee: a promise which becomes effective if the debtor fails to perform his obligations, and a promise that the debtor will perform his obligations. Guarantees in the latter class are effectively unconditional, for the creditor (unless he has agreed to the contrary) may pursue either the principal debtor or the guarantor, as he chooses: *Jackson v Digby* (1854) 2 WR 540; *Ewart v Latta* (1865) 4 Macq 983, HL; *Carter v White* (1883) 25 ChD 666 at 670, CA, per Cotton LJ; *Morrison v Barking Chemicals Co Ltd* [1919] 2 Ch 325; *Moschi v Lep Air Services Ltd* [1973] AC 331 at 356–357, [1972] 2 All ER 393 at 408–409, HL, per Lord Simon of Glaisdale; *NRG Vision Ltd v Churchfield Leasing Ltd* [1988] BCLC 624 at 635, 4 BCC 56 at 64–65; and see PARAS 1090 et seq, 1189 et seq. Cf *Amott v Holden* (1852) 18 QB 593 at 607–608; *White v Corbett* (1859) 1 E & E 692, Ex Ch; *Re Parrott, ex p Whittaker* (1891) 63 LT 777.

19 See PARA 1108 et seq.

20 *Moschi v Lep Air Services Ltd* [1973] AC 331 at 349, [1972] 2 All ER 393 at 402, HL, per Lord Diplock.

21 'It is often used loosely in commercial dealings to mean an ordinary warranty. It is sometimes used to misdescribe what is in law a contract of indemnity and not of guarantee': *Moschi v Lep Air Services Ltd* [1973] AC 331 at 349, [1972] 2 All ER 393 at 402, HL, per Lord Diplock. See eg *VAI Industries (UK) Ltd v Bostock & Bramley* [2003] EWCA Civ 1069, [2003] BLR 359, [2003] All ER (D) 384 (Jul), where the terms of a clause in a contract for the sale of goods headed 'Guarantee', but in the nature of a warranty, are set out at [5]. See also *Adams v Richardson and Starling Ltd* [1969] 2 All ER 1221, [1969] 1 WLR 1645, CA; *Heisler v Anglo-Dal Ltd* [1954] 2 All ER 770 at 772, [1954] 1 WLR 1273 at 1276, CA, per Somervell LJ

(where, on the construction of a particular commercial contract, a party's undertaking to furnish a guarantee was held to have been satisfied by his own personal guarantee).

22 See PARA 1271 et seq.

23 As to cheque guarantee cards see PARA 903.

24 Under the Export and Investment Guarantees Act 1991 s 1, the Secretary of State may make arrangements with a view, inter alia, to facilitating, directly or indirectly, supplies by persons carrying on business in the United Kingdom of goods or services to persons carrying on business outside the United Kingdom (see s 1(1)) and for the purpose of rendering economic assistance to countries outside the United Kingdom (see s 1(2)). The arrangements that may be so made are arrangements for providing financial facilities or assistance for, or for the benefit of, persons carrying on business; and the facilities or assistance may be provided in any form, including guarantees, insurance, grants or loans: s 1(4). These powers are exercised by the Export Credits Guarantee Department (ECGD) whose functions in relation to short-term export credit insurance were privatised in December 1991. As to the power to make a scheme for the transfer of functions see TRADE, INDUSTRY AND INDUSTRIAL RELATIONS vol 47 (2001 Reissue) PARA 807 et seq. The ECGD maintains an internet site on the World Wide Web where details of its products and services may be found. At the date at which this title states the law, this site was accessible at www.ecgd.gov.uk.

For these purposes, 'guarantee' includes indemnity: s 4(3). As to the meaning of 'United Kingdom' see PARA 2 note 3. For these purposes, however, references to the United Kingdom include the Isle of Man and the Channel Islands: Export and Investment Guarantees Act 1991 s 4(4). See further TRADE, INDUSTRY AND INDUSTRIAL RELATIONS vol 47 (2001 Reissue) PARA 801 et seq.

25 In admiralty cases, where a vessel has been arrested as a means of obtaining security, one method of obtaining its release is for the shipowner to arrange for his protection and indemnity ('P & I') insurers to provide a club guarantee. A P & I club guarantee is a letter of undertaking to pay any amount found to be due from the defendant and not paid by him and is usually accepted in lieu of bail or payment into court. As to P & I club guarantees and other forms of security in admiralty cases such as bail bonds see ADMIRALTY vol 1(1) (2001 Reissue) PARA 389 et seq. As to applications for arrest see CPR 61.5; *Practice Direction—Admiralty Claims* PD61 PARA 5; and as to security in claims in rem see CPR 61.6.

26 As to bail in criminal cases see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1166 et seq.

1014. The principal obligation. An agreement will not be a guarantee unless there exists or is contemplated some other, principal, obligation of some other, principal, obligor[1], to which the guarantee is to be ancillary and subsidiary[2]. Although the principal obligation guaranteed is usually contractual, there can be a valid guarantee of non-contractual liabilities, such as those resulting from bailment, tort or unsatisfied judgments[3].

Because a guarantee is an accessory contract, the principal obligation will not merge in the guarantee even if the principal obligation is merely a simple contract and the guarantee is made by deed[4].

Unless the guarantee provides to the contrary[5], the guarantee will be determined if the principal obligation is changed without the guarantor's consent[6] or if the principal obligation is itself determined[7]. Where, however, a lease is disclaimed as onerous property by a lessee's or assignee's trustee in bankruptcy or liquidator, it does not come to an end for all purposes[8]. Thus where a company is the original tenant, the liability of persons who have guaranteed the due payment of rent under the lease and the performance of other covenants contained in it is not affected by such disclaimer, although the guarantor's obligations will cease once the landlord retakes possession[9]; and similarly, a guarantor's contractual obligation to take up a new lease in the event of a liquidator of the tenant company disclaiming the lease survives disclaimer but comes to an end on the landlord retaking possession[10].

1 If this is a contract of guarantee, the background must be one in which there is a principal debtor and a secondary debtor: *General Surety and Guarantee Co Ltd v Francis Parker Ltd*

(1977) 6 BLR 16 at 21 per Donaldson J. There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of a transaction by matters ex post facto, and need not be so at the time, but until there is a principal debtor there can be no suretyship; nor can a person guarantee anybody else's debt unless there is a debt of some other person to be guaranteed: *Lakeman v Mountstephen* (1874) LR 7 HL 17 at 24–25 per Lord Selborne LC.

2 A guarantee is essentially a contract of an accessory nature, being always ancillary and subsidiary to some other contract or liability on which it is founded, without the support of which it must fail: see *Mountstephen v Lakeman* (1871) LR 7 QB 196 at 202, Ex Ch, per Willes J; affd sub nom *Lakeman v Mountstephen* (1874) LR 7 HL 17. See also *Swan v Bank of Scotland* (1836) 10 Bli NS 627, HL; *Lougher v Molyneux* [1916] 1 KB 718.

3 *Moschi v Lep Air Services Ltd* [1973] AC 331 at 347–348, [1972] 2 All ER 393 at 400–401, HL, per Lord Diplock; *Kirkham v Marter* (1819) 2 B & Ald 613 at 616 per Abbott CJ, and at 617 per Holroyd J; *Re Young and Harston's Contract* (1885) 31 ChD 168, CA.

4 *White v Cuyler* (1795) 6 Term Rep 176; *Clarke v Henty* (1838) 3 Y & C Ex 187 at 189 per Lord Abinger CB. An arrangement under which the promisor undertakes an obligation which replaces and/or extinguishes the principal debtor's liability, whether by novation or otherwise, is not a guarantee: *Browning v Stallard* (1814) 5 Taunt 450; *Re International Life Assurance Society and Hercules Insurance Co, ex p Blood* (1870) LR 9 Eq 316; *Guild & Co v Conrad* [1894] 2 QB 885, CA.

5 Modern guarantees usually contain clauses preserving the guarantor's liability in these circumstances. See *Perry v National Provincial Bank of England* [1910] 1 Ch 464, CA; and PARAS 1216–1217.

6 See PARA 1235 et seq; *General Steam-Navigation Co v Rolt* (1858) 6 CBNS 550; *Blest v Brown* (1862) 4 De GF & J 367; *Holme v Brunskill* (1878) 3 QBD 495, CA; *National Bank of Nigeria Ltd v Awolesi* [1964] 1 WLR 1311, [1965] 2 Lloyd's Rep 389, PC; *Coal Distributors Ltd v National Westminster Bank Ltd* (4 February 1981, unreported), QBD; *Vavasseur Trust Co v Ashmore* [1976] CA Transcript 157; *National Westminster Bank plc v Riley* [1986] BCLC 268, CA.

7 See PARA 1189 et seq; and see *D Morris & Sons Ltd v Jeffreys* (1932) 148 LT 56; *Re Lennard, Lennard's Trustee v Lennard* [1934] Ch 235 at 242–243; *Re Moss, ex p Hallet* [1905] 2 KB 307; *Hastings Corpn v Letton* [1908] 1 KB 378, DC, where it was held that a lease vested in a corporation determined on the dissolution of the corporation, and did not vest in the Crown as bona vacantia, with the result that the sureties' liability for the rent was also determined. See also *Re Wells, Swinburne-Hanham v Howard* [1933] Ch 29, CA; *Warnford Investments Ltd v Duckworth* [1979] Ch 127, [1978] 2 All ER 517. As to the effect of the dissolution of a corporation see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1304.

8 See *Hill v East & West India Dock Co* (1884) 9 App Cas 448, HL, followed in *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70, [1996] 1 All ER 737, HL. See also *Scottish Widows plc v Tripipatkul* [2003] EWHC 1874 (Ch), [2004] 1 P & CR 461, [2003] All ER (D) 24 (Aug).

9 *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70, [1996] 1 All ER 737, HL, overruling *Stacey v Hill* [1901] 1 KB 660, CA (a bankruptcy case). In order to avoid the effect of *Stacey v Hill*, leases sometimes included a clause to the effect that, in the event of disclaimer, a surety would take a new lease; such clauses are valid: *Re Yarmarine (IW) Ltd* [1992] BCLC 276, [1992] BCC 28; *Murphy v Sawyer-Hoare (Stacey and Bowie, third parties)* [1993] 2 EGLR 61, [1994] 2 BCLC 59; and see the text and note 10.

10 *Active Estates Ltd v Parness* [2002] EWHC 893 (Ch), [2002] 3 EGLR 13, [2002] 36 EG 147. See also *Scottish Widows plc v Tripipatkul* [2003] EWHC 1874 (Ch), [2004] 1 P & CR 461, [2003] All ER (D) 24 (Aug).

1015. The principal debtor. The person primarily liable to the creditor for the obligation guaranteed is usually referred to as the principal debtor[1].

Although sometimes bound by the same instrument as his guarantor, the principal debtor is not a party to the guarantor's contract to be answerable to the creditor. There is not necessarily any privity between the guarantor and the principal debtor; they do not constitute one person in law, and are not as such jointly liable to the creditor, with whom alone the guarantor contracts[2].

The same person cannot be both sole principal debtor and guarantor[3]. However, one of two or more principal co-debtors will have some of the rights

and liabilities of a guarantor[4] if it is agreed[5] between the co-debtors that the liability of one is to be secondary to that of the others[6]. Those rights and liabilities will exist between the co-debtors from the time that agreement is made[7]. In the absence of notice of the arrangement, however, the creditor is entitled to continue to treat all co-debtors as principals[8]. Once the creditor becomes aware[9] of the arrangement, he is obliged to respect the rights of the co-debtor who has assumed the position of guarantor[10].

1 Though the obligation guaranteed need not be a debt: see PARA 1013 note 6.
2 *Bain v Cooper* (1841) 1 Dowl NS 11 at 14 per Parke B; *Rawstone v Parr* (1827) 3 Russ 539 at 541 per Lord Eldon LC; *Moschi v Lep Air Services Ltd* [1973] AC 331, [1972] 2 All ER 393, HL.
3 See *Lakeman v Mountstephen* (1874) LR 7 HL 17 at 24–25 per Lord Selborne LC, cited in PARA 1014 note 3. See also *Re Smith, ex p Bright* (1879) 10 ChD 566, CA, where the fact that consignees of goods guaranteed the payment of the purchase price of the goods to the consigning manufacturers established that the consignees were acting as agents for sale and were not themselves purchasing as principals: but cf *Heisler v Anglo-Dal Ltd* [1954] 2 All ER 770, [1954] 1 WLR 1273, CA, discussed in PARA 1013 note 21.
4 In such circumstances, there is suretyship in equity though not at common law: *Wauthier v Wilson* (1912) 28 TLR 239, CA.
5 The agreement may be express or implied and may be made at or before the time the principal obligation is undertaken, or at any time thereafter: see *Rouse v Bradford Banking Co* [1894] AC 586, HL.
6 Where a person incurs a joint liability with others, having done so only for the purpose of providing security for them, he will nevertheless not thereby be severally liable as a surety: *Other v Iveson* (1855) 3 Drew 177 at 182 per Kindersley V-C; and see *Jones v Beach* (1852) 2 De GM & G 886; *Rawstone v Parr* (1827) 3 Russ 539; *Richardson v Horton* (1843) 6 Beav 185; *Strong v Foster* (1855) 17 CB 201; *Pooley v Harradine* (1857) 7 E & B 431; but cf *Thorpe v Jackson* (1837) 2 Y & C Ex 553. In such circumstances, and also where two joint debtors subsequently agree, to the knowledge of the creditor, that one shall be surety only for the other (see *Rouse v Bradford Banking Co* [1894] AC 586, HL; *Oakeley v Pasheller* (1836) 4 Cl & Fin 207, HL; *Ashbee v Pidduck* (1836) 1 M & W 564; and see PARA 1130), the suretyship created, while it obliges the creditor to respect the rights of the surety (see eg *Rouse v Bradford Banking Co* above at 598 per Lord Watson; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 12, HL), leaves the surety still a joint debtor although possessed of certain surety's rights. Cases of joint liability are outside the Statute of Frauds (1677) s 4: see PARA 1059.
7 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 12, HL.
8 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 12, HL; *Nicholas v Ridley* [1904] 1 Ch 192, CA; and see *Kova Establishment v Sasco Investments Ltd* [1998] 2 BCLC 83.
9 It is not necessary that the principal debtor should consent to the arrangement, only that he should have notice of it, for the guarantor's rights in these circumstances are rights which arise in equity and not from contract; see eg *Rouse v Bradford Banking Co* [1894] AC 586, HL. To the extent that *York City and County Banking Co v Bainbridge* (1880) 43 LT 732 suggests the contrary, it is probably no longer good law. However, the creditor may (and often does) exclude the guarantor's equitable rights by the express terms of the guarantee: see PARAS 1216–1217.
10 *Rouse v Bradford Banking Co* [1894] AC 586, HL; *Hollier v Eyre* (1842) 9 Cl & Fin 1, HL; *Overend, Gurney & Co Ltd (liquidators) v Oriental Finance Corpn Ltd (liquidators)* (1874) LR 7 HL 348; *Goldfarb v Bartlett and Kremer* [1920] 1 KB 639. Parol evidence is admissible to show that the creditor was aware of the true relationship between the co-debtors: *Mutual Loan Fund Association v Sudlow* (1858) 5 CBNS 449.

1016. The creditor. The person to whom the obligations of the principal debtor and the guarantor are owed is usually referred to as the creditor[1].

The same person cannot be both creditor and surety[2].

1 The obligation guaranteed need not, however, be a debt: see PARA 1013 note 6.
2 The Law of Property Act 1925 s 82 abrogated the common law rule that a covenant or agreement between a person and himself and others jointly was void and unenforceable: see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 264. Even so, it is doubtful

whether a person can guarantee the payment of a debt which is due to himself and others jointly: see *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84 at 97, 99, CA.

1017. The guarantor. The person who engages with the creditor of a third party to be answerable, in the second degree[1], for some debt, default or miscarriage[2] for which the third party then is, or may or is intended to become, primarily liable to the creditor is called the guarantor[3] or surety[4].

The assumption of personal liability is not a necessary element in suretyship. A person who provides a pledge or security for the performance of another's obligation makes himself a surety for that other by means of that pledge or security, just as much as if he pledges his personal credit[5].

1 The liability is 'secondary' whenever the promise to be answerable for another leaves that other primarily liable: *Mallet v Bateman* (1865) LR 1 CP 163, Ex Ch. The primary liability need not, however, be legally enforced before having recourse to the surety unless the surety has so stipulated: see PARA 1104. See also *Johannesburg Municipal Council v D Stewart & Co (1902) Ltd* (1909) 47 SLR 20, HL.

2 The words 'debt, default or miscarriage' are taken from the Statute of Frauds (1677) s 4: see PARA 1013 note 6, PARA 1052.

3 In English legal usage, the words 'guarantor' and 'surety' are interchangeable. However, in many American jurisdictions, the terms are distinguished to signify different types of obligation undertaken: see Laurence Simpson *Handbook of the Law of Suretyship* (1950) and *WT Rawleigh Co v Oversteet* 32 SE 2d 574 (1944). Here 'guarantor' is generally used unless the context requires otherwise.

4 A person generally takes the position of guarantor from a desire to assist the principal debtor, and not as the result of any distinct bargain between him and the creditor, or in consideration of any direct remuneration passing to him from the creditor: *Seaton v Heath, Seaton v Burnand* [1899] 1 QB 782 at 793, CA, per Romer LJ; revsd, without reference to this point, sub nom *Seaton v Burnand, Burnand v Seaton* [1900] AC 135, HL; and see *Ex p Minet* (1807) 14 Ves 189 at 190 per Lord Eldon LC. In an old Scottish case it was held to be an unlawful agreement for the cautioner (the guarantor) to stipulate for a valuable consideration: *King v Ker* (1711) 23 Mor Dict 9461; and see PARA 1047 et seq, dealing with the consideration for the guarantor's promise. A pledge or surety was, originally, a hostage delivered over to slavery, but subject to redemption: see 2 Pollock and Maitland's History of English Law at 186, 189, 209 and 211. The relationship between the guarantor and the creditor remained, juristically, that of the body-pledge down to the end of the thirteenth century, although the nature of the relation was obscured by the fact that the creditor had recourse to the surety's property rather than his person upon default: see T Hewitson *Suretyship: Its Origin and History in Outline* (1927) at p 118; and WD Morgan 'The History and Economics of Suretyship' (1927) 12 Corn LQ 153.

5 *Re Conley, ex p Trustee v Barclays Bank Ltd, Re Conley, ex p Trustee v Lloyds Bank Ltd* [1938] 2 All ER 127 at 131, CA, per Sir Wilfrid Greene MR; *Re a Debtor (No 24 of 1971), ex p Marley v Trustee of the Property of the Debtor* [1976] 2 All ER 1010 at 1013, [1976] 1 WLR 952 at 954–955 per Foster J. See also *Smith v Wood* [1929] 1 Ch 14, CA; *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL.

1018. Classes of suretyship. It is important to distinguish between three kinds of case to which the principles of the law of guarantees may apply:

(1) those in which there is an agreement to constitute, for a particular purpose, the relation of principal debtor and guarantor, to which agreement the creditor secured by it is a party;

(2) those in which there is a similar agreement between the principal debtor and guarantor only, to which the creditor is a stranger; and

(3) those in which, without any such contract of guarantee, there is a primary and a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid[1].

It is only to the first of these classes that the doctrines evolved in equity for the protection of guarantors apply in their full extent[2]. Only in the first two of these classes is there any contract of guarantee. However, the relationship between the primary and secondary obligor in cases in the third class is sufficiently analogous to that of principal and surety to bring some of those doctrines into effect. In particular, if the person secondarily liable pays the debt to the creditor, he is not only entitled to reimbursement from the person principally liable, but also to take over by subrogation any securities or rights which the creditor may have against the person primarily liable[3].

1 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 10–11, HL, per Lord Selborne LC.
2 See note 1.
3 *Re Downer Enterprises Ltd* [1974] 2 All ER 1074 at 1082, [1974] 1 WLR 1460 at 1468. This right of reimbursement, which carries with it the right of subrogation, is not confined to the case of a guarantee, but applies in any case where there is a primary and secondary liability for the same debt: *Re Downer Enterprises Ltd.* See also *Selous Street Properties Ltd v Oronel Fabrics Ltd* [1984] 1 EGLR 50, 270 Estates Gazette 643; *Becton Dickinson UK Ltd v Zwebner* [1989] QB 208, [1988] 3 WLR 1376; and PARA 1020 note 4.

1019. Instances where suretyship arises. The acceptor of an accommodation bill is a guarantor for the payment by the drawer. If the holder, knowing that the acceptor is an accommodation acceptor, enters into a binding agreement with the drawer to give time for payment, the acceptor is thereby discharged[1], unless either the accommodation party consents to the giving of time[2] or the holder expressly reserves his rights against the accommodation party when time is given[3]. Similarly the maker of an accommodation note is in the position of a guarantor, with all the guarantor's rights[4].

Although the drawer of an ordinary bill of exchange is not strictly a guarantor for the acceptor, who is primarily liable[5], the drawer may be in the nature of a guarantor[6], and an indorser of a bill or note with notice of its dishonour becomes a guarantor to the holder for the acceptor or maker[7], and entitled as such to the rights of a guarantor[8]. There is no distinction in this respect between the ordinary case of suretyship and that of suretyship arising out of a bill transaction[9].

After the creditors have been notified of his retirement, a retired partner is in the position of a guarantor for the continuing members of the firm in respect of the partnership debts existing at the time of his retirement[10].

Persons who join in mortgages for the purpose of guaranteeing the payment of principal and interest, or of interest alone, and the performance of covenants entered into by the mortgagor are guarantors, and, as such, are entitled as against the mortgagor, on payment of the mortgage debt in whole or in part, to a charge on the mortgaged estate[11], and to have the benefit of all the remedies and advantages which the mortgagee possessed against the mortgagor[12].

A person who was not originally a guarantor may be converted into one without the creditor's consent[13]. A guarantor may also be converted into a principal debtor[14]. If so, he loses the rights he previously possessed as a surety[15].

1 *Re Acraman, ex p Webster* (1847) De G 414; *Bailey v Edwards* (1864) 4 B & S 761; *Ewin v Lancaster* (1865) 6 B & S 571; *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corpn Ltd (liquidators)* (1874) LR 7 HL 348. As to what constitutes the giving of time see PARA 1227. As to the meaning of 'accommodation party' see the Bills of Exchange Act 1882 s 28(1). See also PARAS 1482, 1562–1565.
2 *Clark v Devlin* (1803) 3 Bos & P 363; *Atkins v Revell* (1860) 1 De GF & J 360; *Polak v Everett* (1876) 1 QBD 669, CA.

3 *Owen and Gutch v Homan* (1853) 4 HL Cas 997 at 1037; *Oriental Financial Corpn v Overend, Gurney & Co* (1871) 7 Ch App 142 at 150 (affd sub nom *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corpn Ltd (liquidators)* (1874) LR 7 HL 348); *Jones & Co v Whitaker* (1887) 57 LT 216, CA; *Mahant Singh v U Ba Yi* [1939] AC 601, PC.

4 *Greenough v McClelland* (1860) 2 E & E 429, Ex Ch; *Bechervaise v Lewis* (1872) LR 7 CP 372.

5 See PARA 1456.

6 *Ex p Yonge* (1814) 3 Ves & B 31 at 40, HL, per Lord Eldon LC; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 14 per Lord Selborne LC; *Re Conley, ex p Trustee v Barclays Bank Ltd, Re Conley, ex p Trustee v Lloyds Bank Ltd* [1938] 2 All ER 127 at 131, CA, per Sir Wilfrid Greene MR.

7 See *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL; and see also *Macdonald v Whitfield* (1883) 8 App Cas 733, PC; the Bills of Exchange Act 1882 s 55(2); and PARA 1577 et seq.

8 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL.

9 See note 8.

10 *Rouse v Bradford Banking Co* [1894] AC 586, HL; *Goldfarb v Bartlett and Kremer* [1920] 1 KB 639; and see PARA 1130. As to the liability of a retired partner see further *Stevens v Britten* [1954] 3 All ER 385, [1954] 1 WLR 1340, CA; and PARTNERSHIP vol 35 (Reissue) PARAS 70–71.

11 *Gedye v Matson* (1858) 25 Beav 310; *Allen v De Lisle* (1856) 3 Jur NS 928; and see *Kennedy v Campbell* [1899] 1 IR 59.

12 *Kennedy v Campbell* [1899] 1 IR 59; and see PARA 1142.

13 *Rouse v Bradford Banking Co* [1894] AC 586, HL; *Oakeley v Pasheller* (1836) 4 Cl & Fin 207, HL; *Nisbet v Smith* (1789) 2 Bro CC 579; *Wilson v Lloyd* (1873) LR 16 Eq 60. See PARA 1130.

14 An account stated by the original principal debtor and his guarantor to the creditor is some evidence of the conversion of the guarantor into a principal debtor (*Buck v Hurst and Bailey* (1866) LR 1 CP 297), especially as the right of action, after an account stated, rests in general on the new promise to pay (*Laycock v Pickles* (1863) 4 B & S 497: see CONTRACT vol 9(1) (Reissue) PARA 1049).

15 *Reade v Lowndes* (1857) 23 Beav 361; affd 30 LTOS 110, CA in Ch; see PARAS 1232, 1244 et seq.

1020. Instances where suretyship does not arise. Suretyship will not arise in every instance where there is a primary and secondary liability for the same obligation. So, even though there is a primary and secondary liability between the transferee and transferor of shares[1], the relation between them is not that of principal debtor and guarantor[2]. An assignor of a lease granted before 1 January 1996[3] was not a guarantor, in the true sense of the term, for the assignee[4]. Nor is a mortgagor, who remains liable to the mortgagee after selling the mortgaged property, a guarantor for the purchaser[5].

1 See the Insolvency Act 1986 s 74(2)(c); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 705.

2 *Roberts v Crowe* (1872) LR 7 CP 629 (compromise with transferee by liquidator does not affect transferee's liability to indemnify transferor); *Re Contract Corpn, Hudson's Case* (1871) LR 12 Eq 1; *Helbert v Banner, Re Barned's Bank* (1871) LR 5 HL 28 (compromise by liquidator of claim against transferee does not release transferor from liability as contributory).

3 Ie a lease which is not a 'new tenancy' for the purposes of the Landlord and Tenant (Covenants) Act 1995: see PARA 1081; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 578 et seq.

4 *Baynton v Morgan* (1888) 22 QBD 74, CA. As between the landlord and the original tenant, the liability of the original tenant was primary: *Warnford Investments Ltd v Duckworth* [1979] Ch 127, [1978] 2 All ER 517. However, as between the original tenant and his assignee, the liability of the assignee (and of any guarantor for the assignee) to pay the rent and to perform the tenant's covenants was primary or ultimate: see *Re Downer Enterprises Ltd* [1974] 2 All ER 1074 at 1083–1084, [1974] 1 WLR 1460 at 1470; *Selous Street Properties Ltd v Oronel Fabrics Ltd* [1984] 1 EGLR 50, 270 Estates Gazette 643; *Kumar v Dunning* [1989] QB 193 at 201, [1987] 2 All ER 801 at 807, CA. If the assignor paid rent for which the assignee was liable, he was subrogated to the landlord's rights and was entitled to be indemnified by the assignee or

by any guarantor for the assignee: *Becton Dickinson UK Ltd v Zwebner* [1989] QB 208, [1988] 3 WLR 1376. See also *Johns v Pink* [1900] 1 Ch 296; PARA 1259; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 573.

5 However, the purchaser is impliedly liable to indemnify the vendor against his continuing personal liability to the mortgagee: see *Waring v Ward* (1802) 7 Ves 332 at 337; *Tweddell v Tweddell* (1787) 2 Bro CC 152 at 154 per Lord Thurlow LC; *Re Errington, ex p Mason* [1894] 1 QB 11 at 14, DC; *Re Windle (a bankrupt), ex p trustee of the bankrupt v Windle* [1975] 3 All ER 987 at 994–995, [1975] 1 WLR 1628 at 1637–1638.

B. GUARANTEE DISTINGUISHED FROM OTHER CONTRACTS

1021. Guarantee and indemnity. Contracts of guarantee and contracts of indemnity may perform similar commercial functions, in providing compensation to the creditor for the failure of a third party to perform his obligation. However, there is a conceptual distinction between a contract of guarantee and a contract of indemnity, in that under a contract of indemnity, the indemnifier undertakes an independent obligation which does not depend upon the existence of any other obligation of any other obligor[1]. A contract of indemnity is a contract by one party to keep the other harmless against loss[2]. It has no necessary reference in law to the obligation of any third persons[3].

By contrast[4], there can be no contract of guarantee unless there exists or is contemplated some other, principal, obligation of some other, principal, obligor, to which the guarantee is ancillary and subsidiary[5]. Under a contract of guarantee, the guarantor assumes a secondary liability to the creditor for the default of another who remains primarily liable to the creditor[6].

Whether a contract is one of guarantee or of indemnity is a question of construction in each case[7]. In doubtful cases, the fact that the parties have described their agreement as an 'indemnity' or as a 'guarantee' may provide some guide, especially if the expression is used in the heading[8], or is repeated a number of times in the body of the agreement[9]. Another guide is whether the creditor's rights against the principal debtor and against the indemnifier or guarantor are the same. If the person liable under the agreement is liable even though the principal debtor is not in default[10], or is liable for a greater amount than the principal debtor[11], the agreement will probably be construed as an indemnity. On the other hand, the inclusion of a clause preserving the creditor's rights against the person liable under the agreement in the event of the creditor's giving time to the principal debtor, or varying the principal obligation, suggests that the contract is a guarantee[12]. There is authority that an undertaking to meet a loss which is incidental to the overall transaction will generally be an indemnity but, where the payment obligation is the central feature of the contract, it is more likely to constitute a guarantee[13].

Agreements whose provisions are mainly those of a guarantee sometimes contain clauses which preserve the liability of the guarantor in circumstances where the principal debtor has either never been[14], or has ceased to be, liable to the creditor, and clauses entitling the creditor to treat the guarantor as a principal debtor, either generally or in specific circumstances[15]. The inclusion of such clauses probably does not convert what would otherwise be a guarantee into an indemnity[16]. However, it may be that contracts which include such clauses should properly be regarded as hybrid in nature[17].

1 *Western Credit Ltd v Alberry* [1964] 2 All ER 938, [1964] 1 WLR 945, CA; *Stadium Finance Co Ltd v Helm* (1965) 109 Sol Jo 471, CA. See PARA 1255.

2 *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294 at 296, [1961] 1 WLR 828 at 830–831, CA, per Holroyd Pearce LJ; *Davys v Buswell* [1913] 2 KB 47 at 53–55, CA, per Vaughan Williams LJ.
3 *Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone* [1987] 1 Lloyd's Rep 546 at 555; and see *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 at 784, CA, per Vaughan Williams LJ.
4 See the comparison made between the two types of contract in *General Surety and Guarantee Co Ltd v Francis Parker Ltd* (1977) 6 BLR 16 at 21 per Donaldson J.
5 See *Lakeman v Mountstephen* (1874) LR 7 HL 17; and PARA 1013.
6 *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294 at 296, [1961] 1 WLR 828 at 831, CA; *Goulston Discount Co Ltd v Clark* [1967] 2 QB 493, [1967] 1 All ER 61, CA; *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289 at 296, CA, per Orr LJ.
7 *Moschi v Lep Air Services Ltd* [1973] AC 331 at 349, [1972] 2 All ER 393 at 402, HL.
8 *Goulston Discount Co Ltd v Clark* [1967] 2 QB 493 at 498, [1967] 1 All ER 61 at 64, CA, per Dankwerts LJ; *Western Credit Ltd v Alberry* [1964] 2 All ER 938 at 940, [1964] 1 WLR 945 at 949–950, CA, per Davies LJ. Cf *Stadium Finance Co Ltd v Helm* (1965) 109 Sol Jo 471, CA, where an agreement headed 'Indemnity Form' was held to be a guarantee, and so void because the principal obligation was void on account of the minority of the principal debtor.
9 *Heald v O'Connor* [1971] 2 All ER 1105 at 1110, [1971] 1 WLR 497 at 503.
10 *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294 at 297–298, [1961] 1 WLR 828 at 832–833, CA. However, the fact that the agreement makes no provision for a demand to be made on the principal debtor does not convert what would otherwise be a guarantee into an indemnity: see *Chiswell Shipping Ltd v State Bank of India, The World Symphony* [1987] 1 Lloyd's Rep 165.
11 *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289 at 296, CA, per Orr LJ.
12 If the contract were an indemnity, such provisions would be unnecessary, because the creditor's conduct in giving time or varying the principal obligation would not discharge an indemnifier. See *Western Credit Ltd v Alberry* [1964] 2 All ER 938 at 940, [1964] 1 WLR 945 at 949–950, CA, per Davies LJ.
13 See *Pitts v Jones* [2007] EWCA Civ 1301, [2007] All ER (D) 93 (Dec). The case illustrates the importance of the distinction between a guarantee and an indemnity: there the arrangement was found to be a guarantee which was void for want of compliance with the Statute of Frauds (1677) s 4 (see PARA 1052), that provision not applying to contracts of indemnity.
14 Eg because the principal obligation is ultra vires the principal debtor, or the principal debtor is a minor.
15 *Heald v O'Connor* [1971] 2 All ER 1105, [1971] 1 WLR 497; *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255; *National Westminster Bank plc v Riley* [1986] BCLC 268, CA; *Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone* [1987] 1 Lloyd's Rep 546. See PARA 1217.
16 See the cases cited in note 15.
17 See *General Surety and Guarantee Co Ltd v Francis Parker Ltd* (1977) 6 BLR 16 at 21 per Donaldson J.

1022. Contracts of insurance. The insurer under a contract of insurance agrees, in consideration of the payment to him of a premium, to pay a specified sum to the insured upon the happening of a specified event[1]. Where that event is a default by a debtor or obligor, the contract bears a striking resemblance to a guarantee[2], both in substance and in economic function. However, there are distinctions between the nature of the two types of contract, and between the obligations which they create.

An insurer under a contract of insurance, like an indemnifier under a contract of indemnity, undertakes a principal rather than a secondary obligation to the creditor[3]. An insurer's liability is not dependent upon the existence of a third person's liability, whereas a contract cannot be a guarantee unless it is ancillary to the primary obligation of another person, to which the guarantor's liability is secondary[4].

As a result, events such as the termination or variation of the principal obligation, which might discharge a surety[5], will not generally discharge an insurer from his liability[6].

A contract of insurance is a contract of the utmost good faith[7]. Contracts of guarantee are not subject to this doctrine, although there is a limited duty of disclosure[8].

It has been said that there is no magic in the words 'insurance' or 'guarantee', and many contracts may with equal propriety be referred to by either name[9]. The substance and not the form of the transaction is decisive. The mere fact that a contract is in the form of an insurance policy[10] or that the party contracting as guarantor is an insurance company[11], will not prevent the contract from being a contract of guarantee. Equally, a contract described as an 'indemnity guarantee' may in fact be a contract of insurance[12].

1 See *Prudential Insurance Co v IRC* [1904] 2 KB 658 at 663 per Channell J.
2 See eg *Dane v Mortgage Insurance Corpn Ltd* [1894] 1 QB 54, CA.
3 'A policy on a ship, for instance, is not an undertaking to pay the amount insured, if somebody else, eg, the owner of another ship that has caused the loss, does not, but to pay such amount on the loss of the ship': *Dane v Mortgage Insurance Corpn Ltd* [1894] 1 QB 54 at 60, CA, per Lord Esher MR.
4 See *Lakeman v Mountstephen* (1874) LR 7 HL 17; and PARA 1013.
5 See PARA 1214 et seq.
6 See *Dane v Mortgage Insurance Corpn Ltd* [1894] 1 QB 54, CA; *Finlay v Mexican Investment Corpn* [1897] 1 QB 517.
7 Ie uberrimae fidei: see INSURANCE vol 25 (2003 Reissue) PARA 5.
8 See *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72, CA; and PARA 1036 et seq.
9 See *Seaton v Heath, Seaton v Burnand* [1899] 1 QB 782 at 792, CA, per Romer LJ; on appeal sub nom *Seaton v Burnand, Burnand v Seaton* [1900] AC 135, HL.
10 See *Re Denton's Estate, Licences Insurance Corpn and Guarantee Fund Ltd v Denton* [1904] 2 Ch 178, CA, where a 'mortgage insurance policy' by which an insurance company agreed to pay to a mortgagee the principal and interest due under the mortgage if the mortgagee became entitled to exercise his power of sale was held to be a contract of a suretyship. Cf *Woolwich Building Society v Brown* [1996] CLC 625 cited in note 12.
11 See *Trade Indemnity Co Ltd v Workington Harbour and Dock Board* [1937] AC 1 at 16–17, [1936] 1 All ER 454 at 458–459, HL, where a joint and several bond by the contractors and an insurance company, conditioned for the due performance of the contractors' work by them, was held to be a contract of guarantee and not a contract of insurance. A similar bond was considered by Phillips J in *City of London v New Hampshire Insurance Co* (18 January 1991, unreported), QBD, but summarised in (1991) 3 JIBFL 144 (revsd sub nom *Mercers Co v New Hampshire Insurance Co* [1992] 3 All ER 57n, sub nom *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 1 WLR 792n, [1992] 2 Lloyd's Rep 365, CA); reconsidered [1992] 1 Lloyd's Rep 431. Phillips J, applying the definition in PARA 1013, held that the bond was in the nature of a guarantee. The Court of Appeal decided that it was not, holding that the nature of the bond defied tidy categorisation. As Nolan LJ put it, 'It stands in a class of its own which, in the light of the deficiencies in its terms which Lord Justice Parker has listed, is just as well.'
12 See eg *Woolwich Building Society v Brown* [1996] CLC 625.

(ii) Essentials of a Guarantee

A. AGREEMENT

1023. Making the agreement. As in the case of any other contract, a valid guarantee requires a sufficient agreement[1]. This is usually reached by the process of offer and acceptance and, where this is so, the law requires that there be an offer on ascertainable terms which receives an unqualified acceptance from the person to whom it is made[2].

1 See CONTRACT vol 9(1) (Reissue) PARA 629 et seq.
2 See CONTRACT vol 9(1) (Reissue) PARA 631.

1024. Offer. Whether a statement amounts to an offer capable of being converted by acceptance into a binding contract of guarantee depends upon the words used and the context in which they are used. A statement that the offeror has no objection to guaranteeing has been held to be a mere invitation to treat[1]. By contrast, a statement of willingness to guarantee a particular shipment has been held to be a sufficient guarantee in the light of the dealings between the parties[2]. Words which are too vague cannot amount to a guarantee[3].

To amount to a guarantee, the offer must be addressed to the creditor[4]. An offer, not addressed to any individual creditor, to contribute to the assets of the principal debtor is not a guarantee[5].

1 *M'Iver v Richardson* (1813) 1 M & S 557.
2 *Sorby v Gordon* (1874) 30 LT 528.
3 *Westhead v Sproson* (1861) 6 H & N 728.
4 *Nash v Spencer* (1896) 13 TLR 78.
5 *Phillipps v Bateman* (1812) 16 East 356.

1025. Revocation of the offer. A guarantor's promise, unless made by deed, does not bind him until the promisee has accepted it[1]. A guarantee not made as a deed may therefore be revoked at any time before it has been accepted, provided that the revocation is communicated to the offeree[2]. This is so even though the offeror has indicated that he will keep his offer open for a specified time[3].

If the guarantor dies before his offer has been accepted, the offer is revoked[4].

1 Eg by fulfilling the prescribed conditions: *Westhead v Sproson* (1861) 6 H & N 728; *Glyn v Hertel* (1818) 8 Taunt 208; *Offord v Davies* (1862) 12 CBNS 748; *Hartland v Jukes* (1863) 1 H & C 667; and see *Mayhew v Crickett* (1818) 2 Swan 185 at 191, 193. It is not accurate to describe a guarantee as a unilateral contract, although it is sometimes so named: *Wynne v Hughes* (1873) 21 WR 628 at 629 per Bramwell B. It is in fact an instance of a contract with an executed consideration, taking the form of a request to perform the consideration followed by the performing of the consideration according to the request.
2 *Offord v Davies* (1862) 12 CBNS 748; *Re Crace, Balfour v Crace* [1902] 1 Ch 733 at 737.
3 *Offord v Davies* (1862) 12 CBNS 748, where a guarantee expressed to last 'for the space of 12 calendar months' was held to have been validly revoked within that period, because the creditor had not acted on the faith of it by the time he received notice of revocation. Where the offeror has contracted to keep his offer open, revocation of that offer will amount to a breach of the contract of option: see CONTRACT vol 9(1) (Reissue) PARAS 640, 644.
4 See *Dickinson v Dodds* (1876) 2 ChD 463 at 475 per Mellish LJ (where the contract in question was not a contract of guarantee); and CONTRACT vol 9(1) (Reissue) PARA 648.

1026. Acceptance. Unless the offer contemplates an express acceptance[1], acceptance of a guarantee may be inferred[2].

Generally speaking, therefore, where a guarantee is given to enable a third person to obtain a supply of goods on credit, or advances of money, or an appointment to some office or employment, no other acceptance of the guarantor's offer is necessary than the subsequent supply of the goods[3], the making of the advances[4] or the appointment to the office or employment[5].

Where no time limit is fixed, the acceptance must be given within a reasonable time[6], must be absolute and unqualified[7], and, in case of alternative offers, the acceptance should state which is accepted[8].

1 See *Mozley v Tinkler* (1835) 1 Cr M & R 692; *Morten v Marshall* (1863) 2 H & C 305; *Payne v Ives* (1823) 3 Dow & Ry KB 664 at 668 per Holroyd J.
2 *Pope v Andrews* (1840) 9 C & P 564 at 568.
3 *Morrell v Cowan* (1877) 7 ChD 151, CA; *Mockett v Ames* (1871) 23 LT 729; *Jays Ltd v Sala* (1898) 14 TLR 461; *White v Woodward* (1848) 5 CB 810; *Johnston v Nicholls* (1845) 1 CB 251.
4 See *Oldershaw v King* (1857) 2 H & N 517, Ex Ch; *Chapman v Sutton* (1846) 2 CB 634.

5 See *Kennaway v Treleavan* (1839) 5 M & W 498; *Lysaght v Walker* (1831) 5 Bli NS 1, HL; *Newbury v Armstrong* (1829) 6 Bing 201; *Norton v Powell* (1842) 4 Man & G 42.

6 *Payne v Ives* (1823) 3 Dow & Ry KB 664 at 668; and see *Dunlop v Higgins* (1848) 1 HL Cas 381; *Ramsgate Victoria Hotel Co v Montefiore; Ramsgate Victoria Hotel Co v Goldsmid* (1866) LR 1 Exch 109.

7 See generally CONTRACT vol 9(1) (Reissue) PARA 650 et seq; *Mozley v Tinkler* (1835) 1 Cr M & R 692; *Morten v Marshall* (1863) 2 H & C 305; *Montreal Gas Co v Vasey* [1900] AC 595, PC.

8 *Lever v Koffler* [1901] 1 Ch 543.

B. INTENTION TO CREATE LEGAL RELATIONS

1027. The principle. An agreement of guarantee, even if supported by consideration, is not binding as a contract if it is made without any intention of creating legal relations[1]. In the case of an ordinary commercial transaction there is a presumption that the parties intended to create legal relations[2]. Where the transaction is a commercial one, the onus of proving that there was no such intention is on the party who asserts that no legal effect was intended, and the onus is a heavy one[3]. Nevertheless, a guarantee contained solely in a 'subject to contract' proposal will not usually be legally binding[4].

1 *Kleinwort Benson Ltd v Malaysia Mining Corpn Bhd* [1989] 1 All ER 785 at 788, [1989] 1 WLR 379 at 383, CA, per Ralph Gibson LJ. A unilateral offer of a guarantee contained in a document marked 'subject to contract' is not an offer capable of acceptance so as to conclude an agreement: see *Carlton Communications plc v Football League* [2002] EWHC 1650 (Comm), [2002] All ER (D) 01 (Aug). A general, verbal assurance may be insufficient: see *Manches LLP v Freer* [2006] EWHC 991 (QB), [2006] All ER (D) 428 (Nov).

2 *Rose and Frank Co v JR Crompton & Bros Ltd* [1923] 2 KB 261 at 294, CA, per Atkin LJ (decision partly revsd [1925] AC 445, HL).

3 *Edwards v Skyways Ltd* [1964] 1 All ER 494 at 500, [1964] 1 WLR 349 at 355 per Megaw J. To decide whether legal effect was intended, the courts normally apply an objective test. They 'will attach weight (a) to the importance of the agreement to the parties, and (b) to the fact that one of them has acted in reliance upon it ... In the search for agreed terms of a commercial transaction, businessmen may adopt language of deliberate equivocation in the hope that all will go well. It may, therefore, be artificial to try to ascertain the common intention of the parties as to the legal effect of such a claim if in fact their common intention was that the claim should have such effect as a judge or arbitrator should decide': *Kleinwort Benson Ltd v Malaysia Mining Corpn Bhd* [1989] 1 All ER 785 at 788–789, [1989] 1 WLR 379 at 383, CA, per Ralph Gibson LJ.

4 See eg *Carlton Communications plc v The Football League* [2002] EWHC 1650 (Comm), [2002] All ER (D) 01 (Aug).

1028. Letters of comfort. The problem of deciding whether the parties intended to create legal relations frequently occurs in the context of letters of comfort[1]. A comfort letter is a letter written usually by a parent company or a government to the lender giving comfort to the lender about a loan made to a subsidiary or a public entity[2]. The concept extends to or includes a document under which comfort is given to the lender by the assumption not of a legal responsibility but of a moral responsibility only[3].

In order to ascertain whether the parties intended a comfort letter to have legal effect, the terms of the document in question must be considered in the light of the surrounding circumstances[4]. The use of the expression 'comfort letter' may be an indication that the parties did not intend the document to have contractual effect, as may be the absence from the document of any express words of warranty or of promise[5]. A prior refusal to provide a legally binding guarantee may also be taken into account as a relevant circumstance[6].

1 See eg *Chemco Leasing SpA v Rediffusion Ltd* (19 July 1985, unreported), QBD; affd [1987] 1 FTLR 201, CA; and *Kleinwort Benson Ltd v Malaysian Mining Corpn Bhd* [1988] 1 All ER 714, [1988] 1 WLR 799; revsd [1989] 1 All ER 785, [1989] 1 WLR 379, CA.

2 Wood *Law and Practice of International Finance* (1st Edn, 1980) PARA 13.5, quoted by Staughton J in *Chemco Leasing SpA v Rediffusion Ltd* (19 July 1985, unreported), QBD (affd [1987] 1 FTLR 201, CA) and by Hirst J in *Kleinwort Benson Ltd v Malaysian Mining Corpn Bhd* [1988] 1 All ER 714 at 719–720, [1988] 1 WLR 799 at 805–806 (revsd [1989] 1 All ER 785, [1989] 1 WLR 379, CA).

3 *Kleinwort Benson Ltd v Malaysia Mining Corpn Bhd* [1989] 1 All ER 785 at 795, [1989] 1 WLR 379 at 391, CA, per Ralph Gibson LJ.

4 *Kleinwort Benson Ltd v Malaysia Mining Corpn Bhd* [1989] 1 All ER 785 at 796, [1989] 1 WLR 379 at 392–393, CA, per Ralph Gibson LJ.

5 Neither circumstance, however, is in any way conclusive: *Kleinwort Benson Ltd v Malaysia Mining Corpn Bhd* [1989] 1 All ER 785, [1989] 1 WLR 379, CA. In *Chemco Leasing SpA v Rediffusion Ltd* (19 July 1985, unreported), QBD (affd [1987] 1 FTLR 201, CA), where the comfort letter was held to amount to a guarantee, the parent company's letter stated that ' ... if we dispose of our interest we undertake to take over the remaining liabilities ...' of the subsidiary company to Chemco.

6 Though not as evidence of the subjective intention of the author of the letter: *Kleinwort Benson Ltd v Malaysia Mining Corpn Bhd* [1989] 1 All ER 785, [1989] 1 WLR 379, CA.

C. CAPACITY TO CONTRACT

1029. Insanity and drunkenness. Capacity to contract is as essential to the validity of a guarantee as it is to that of any other contract[1].

Where, therefore, a guarantor lacks the mental capacity to contract, the guarantee is voidable at his option provided that the promisee was aware of the promisor's incapacity[2]. Even if the creditor was not aware of the guarantor's lack of mental capacity at the time that the guarantee was made, he can no longer rely upon it as a continuing guarantee in relation to further advances once he learns of the guarantor's incapacity[3].

A guarantee given by a guarantor who at the time of contracting was so extremely drunk as to be incapable of understanding what he was doing is similarly voidable at his option, for the drunkard's condition will usually be apparent to the creditor[4].

1 See generally CONTRACT vol 9(1) (Reissue) PARA 630.

2 *Imperial Loan Co v Stone* [1892] 1 QB 599, CA, approved and applied in *Hart v O'Connor* [1985] AC 1000, [1985] 2 All ER 880, PC. See also *Molton v Camroux* (1848) 2 Exch 487 (affd (1849) 4 Exch 17); *York Glass Co Ltd v Jubb* (1925) 42 TLR 1, CA.

3 *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA. Under ordinary circumstances a continuing guarantee is also revoked as to future advances by notice of the death of the guarantor: *Coulthart v Clementson* (1879) 5 QBD 42; but see the judgments of the Court of Appeal in *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA, where the principle is considered open to doubt. As to the rights of the representatives of a continuing guarantor to terminate their liability and obtain a release see *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401.

4 *Gore v Gibson* (1845) 13 M & W 623; *Molton v Camroux* (1849) 4 Exch 17 at 19 per Patteson J; *Matthews v Baxter* (1873) LR 8 Exch 132. In *Lombard Finance Ltd v Brookplain Trading Ltd* [1991] 2 All ER 762, [1991] 1 WLR 271, CA, the guarantors had advanced at first instance the defence that when they signed the guarantee they were so drunk that they did not know what they were doing, but it had been rejected on the facts. See also CONTRACT vol 9(1) (Reissue) PARA 717.

1030. Minors. A minor[1] does not have the legal capacity to enter into a contract of guarantee[2]. A contract of guarantee entered into by a minor is accordingly unenforceable[3] against him[4].

Where a guarantee is given in respect of an obligation of a party to a contract and the obligation is unenforceable against him, or he repudiates the contract, because he was a minor when the contract was made, the guarantee is not for that reason alone unenforceable against the guarantor[5].

1 The age of majority is 18; see generally, as to the attaining of full age and a child's capacity to contract, CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 1 et seq.

2 For the rights and liabilities of minors in respect of contracts to which they become a party see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 12 et seq. It is unlikely that such a contract could ever be regarded as being for the minor's benefit: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 12.

3 The Infants Relief Act 1874 (repealed: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 14) provided that contracts of loan, contracts for goods other than necessaries, and contracts for accounts stated entered into by a minor were 'absolutely void': and the expression 'void' was used in some old cases to describe the status of contracts by minors. However, in those old cases 'void' probably meant only 'incapable of being enforced' against the minor, and not 'devoid of all legal effect': see *Williams v Moor* (1843) 11 M & W 256 at 263–266 per Parke B.

4 *Re Davenport, ex p Bankrupt v Eric Street Properties Ltd* [1963] 2 All ER 850, [1963] 1 WLR 817, CA. In that case Lord Denning MR stated that the guarantee 'was void and could not be ratified' upon the guarantor's attaining the age of majority. See also *Beam v Beatty (No 2)* (1902) 4 OLR 554 at 559 per Garrow JA. Sed quaere, following the repeal of the Infants Relief Act 1874 s 2 by the Minors' Contracts Act 1987 s 1. At common law, the general principle was that a minor would become liable on a contract of this kind if he ratified it after reaching full age, even though there was no consideration for the new promise: *Southerton v Whitlock* (1726) 2 Stra 690; *Williams v Moor* (1843) 11 M & W 256. However, exceptionally, a penal bond was regarded as void and incapable of ratification: *Baylis v Dineley* (1815) 3 M & S 477; *Walter v Everard* [1891] 2 QB 369, CA.

5 Minors' Contracts Act 1987 s 2. Section 2 applies only where the principal obligation guaranteed is that of a party to a contract made after 9 June 1987: ss 2(a), 5(2). Prior to the coming into force of the 1987 Act, a loan to a minor was made void by statute: Infants Relief Act 1874 ss 1, 2 (repealed). The guarantors of such a loan, where the fact of the minority was known to all parties, could not be made liable on the guarantee: *Coutts & Co v Browne-Lecky* [1947] KB 104, [1946] 2 All ER 207, following *Swan v Bank of Scotland* (1836) 10 Bli NS 627, HL, where a bank was precluded by statute from recovering against the principal debtor because it had knowingly honoured unstamped drafts, and not following the decision of Pickford J in *Wauthier v Wilson* (1911) 27 TLR 582; affd on other grounds (1912) 28 TLR 239, CA. A contract to repay money lent to a minor was, however, always enforceable if on its true construction it was a contract of indemnity by which the contractor incurred an original and independent liability as a principal debtor, as distinct from a mere guarantee: see *Harris v Huntbach* (1757) 1 Burr 373; *Duncomb v Tickridge* (1648) Aleyn 94; *Wauthier v Wilson* (1912) 28 TLR 239, CA (explained in *Coutts & Co v Browne-Lecky* above). For an example of an indemnity collateral to a hire purchase agreement entered into by a minor see *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294, [1961] 1 WLR 828, CA.

1031. Corporations. The validity of an act done by a company[1], such as the giving of a guarantee, cannot be called into question on the ground of lack of capacity by reason of anything in the company's memorandum[2]. In favour of a person dealing with[3] a company in good faith[4], the power of the board of directors to bind the company, or to authorise others to do so, is deemed to be free of any limitation[5] under the company's constitution[6]. A party to a transaction with a company, such as a guarantee, is not bound to inquire as to whether it is permitted by the company's memorandum or as to any limitation on the powers of the board of directors to bind the company or authorise others to do so[7].

In other cases, if a guarantee is beyond the scope of the constitution of a corporation, it is ultra vires and void from its inception[8].

Except in limited circumstances, a company may not give a guarantee in connection with a purchase or proposed purchase of its own shares[9].

Although a promise that a corporation shall do something beyond its legal powers is void[10], a guarantee by an individual for the performance by a corporation of an ultra vires contract may be enforceable if the transaction was entered into in good faith and the contract is not illegal or contrary to public policy[11].

1 Ie a company formed and registered under the Companies Act 1985 or under any of the former Companies Acts (other than the Joint Stock Companies Act 1844), but excluding any company registered under the Companies (Consolidation) Act 1908 or earlier legislation in what was then Ireland: Companies Act 1985 s 735(1) (prospectively repealed) (as to replacement provisions see the Companies Act 2006 ss 1(1), 1171). This definition excludes companies incorporated abroad: cf *Re International Bulk Commodities* [1993] Ch 77 at 84–85, [1993] 1 All ER 361 at 365–366, [1992] BCLC 1074 at 1078–1079 per Mummery J. See generally COMPANIES.

2 See the Companies Act 1985 s 35(1) (s 35 substituted, and ss 35A, 35B added, by the Companies Act 1989 s 108(1)) (the Companies Act 1985 ss 35–35B prospectively repealed) (as to replacement provisions see the Companies Act 2006 ss 39, 40). As to the Companies Act 1985 ss 35–35B see COMPANIES vol 7(1) (2004 Reissue) PARAS 416, 430 et seq. The application of the Companies Act 1985 s 35 (prospectively repealed) to acts done by the company presupposes that either the agent doing the act has authority to bind the company, or the company ratifies his act. It remains the duty of the directors to observe any limitation on their powers flowing from the company's memorandum: see the Companies Act 1985 s 35(3) (as so substituted; prospectively repealed).

3 A person deals with a company if he is party to any transaction or other act to which the company is a party: Companies Act 1985 s 35A(2)(a) (as added (see note 2); prospectively repealed). See note 2.

4 A person is not to be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution; and a person is presumed to have acted in good faith unless the contrary is proved: Companies Act 1985 s 35A(2)(b), (c) (as added (see note 2); prospectively repealed). See note 2.

5 Ie including limitations deriving from a resolution of the company in general meeting or a meeting of any class of shareholders, or from any agreement between members of the company or of any class of shareholders: Companies Act 1985 s 35A(3) (as added (see note 2); prospectively repealed). See note 2. Prior to the enactment of these provisions, it was held that the directors of a company could not bind the company by a guarantee given by them in the absence of proof of authority to do so: *Re Era Life Assurance Society* [1866] WN 309; and see *Colman v Eastern Counties Rly Co* (1846) 10 Beav 1; *Ridley v Plymouth Grinding and Baking Co; Kingsbridge Flour Mill Co v Plymouth Grinding and Baking Co* (1848) 2 Exch 711; *Re Cunningham & Co Ltd, Simpson's Claim* (1887) 36 ChD 532. A general power of management was sufficient authority if the giving of the guarantee was fairly within the scope of the company's business (*Re West of England Bank, ex p Booker* (1880) 14 ChD 317), but not otherwise (*Small v Smith* (1884) 10 App Cas 119, HL). See also *Charterbridge Corpn Ltd v Lloyds Bank Ltd* [1970] Ch 62, [1969] 2 All ER 1185; *Rolled Steel Products (Holdings) Ltd v British Steel Corpn* [1986] Ch 246, [1985] 3 All ER 52, CA.

6 Companies Act 1985 s 35A(1) (as added (see note 2); prospectively repealed). See note 2.

7 See the Companies Act 1985 s 35B (as added (see note 2); prospectively repealed). See note 2. As to authority to give a guarantee on behalf of a company see eg *Gransden & Co Ltd v Ballard (Kent) Ltd* [2001] All ER (D) 136 (Apr).

8 *Rosemary Simmons Memorial Housing Association Ltd v United Dominions Trust Ltd (Bates & Partners (a firm), third party)* [1987] 1 All ER 281, [1986] 1 WLR 1440 (where a charitable corporation was held to have implied power to guarantee transactions to advance its own charitable purposes, but not to guarantee the liabilities of a non-charitable body with which it was not associated in any legal sense). See also *Charterbridge Corpn Ltd v Lloyds Bank Ltd* [1970] Ch 62, [1969] 2 All ER 1185; *Rolled Steel Products (Holdings) Ltd v British Steel Corpn* [1986] Ch 246, [1985] 3 All ER 52, CA; *Den Norske Creditbank v Sarawak Economic Development Corpn* [1988] 2 Lloyd's Rep 616; affd [1989] 2 Lloyd's Rep 35, CA; and cf *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1, [1991] 1 All ER 545, HL. See also CORPORATIONS vol 9(2) (2006 Reissue) PARA 1232. When mutual guarantees are given by companies in the same group, it is essential that each company fulfils all necessary formalities: *Ford and Carter Ltd v Midland Bank Ltd* (1979) 129 NLJ 543, HL.

9 See the Companies Act 1985 ss 151–158 (prospectively repealed); and COMPANIES vol 7(1) (2004 Reissue) PARA 663 et seq (as to replacement provisions see the Companies Act 2006 ss 677–683). At the date at which this volume states the law, the Companies Act 1985

ss 151–153, 156, 158 have been repealed (from 1 October 2008) for certain purposes only: see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, arts 5, 8, Sch 3 Pt 1.

10 *MacGregor v Dover and Deal Rly Co* (1852) 18 QB 618, Ex Ch.

11 See *Garrard v James* [1925] Ch 616; *Chambers v Manchester and Milford Rly Co* (1864) 5 B & S 588; *Yorkshire Railway Waggon Co v Maclure* (1881) 19 ChD 478; affd on other grounds (1882) 21 ChD 309, CA. See also *Coutts & Co v Browne-Lecky* [1947] KB 104 at 111, [1946] 2 All ER 207 at 210; cf *Heald v O'Connor* [1971] 2 All ER 1105 at 1113, [1971] 1 WLR 497 at 506 per Fisher J.

1032. Transactions involving directors. If the board of directors of a company[1] exceeds any limitation[2] on its powers under the company's constitution in connection with a transaction[3] to which a director[4] of the company or of its holding company[5] or any person connected with such a director or a company with whom such director is associated[6] is a party, the transaction is voidable at the instance of the company[7].

A company may not give a guarantee[8] or provide security in connection with a loan made by any person to a director (including a shadow director[9]) of the company or of its holding company unless the transaction has been approved by a resolution of the members of the holding company[10]. A relevant company[11] may not make a loan or quasi-loan[12] to a director (including a shadow director) of the company or its holding company or a person connected with such director or enter into a credit transaction[13] as creditor for the benefit of a director (including shadow director) of a director of the company or of its holding company or a person connected with such a director, or give a guarantee or provide security in connection with a loan or quasi-loan or credit transaction made by or entered into any person to such a director (or shadow director) or person connected with such a director, unless the transaction has been approved by a resolution of the members of the company[14].

1 See PARA 1031 note 1.

2 Ie including limitations deriving from a resolution of the company in general meeting or a meeting of any class of shareholders, or from any agreement between members of the company or of any class of shareholders: Companies Act 1985 s 322A(8) (s 322A added by the Companies Act 1989 s 109(1)) (the Companies Act 1985 s 322A prospectively repealed) (as to replacement provisions see the Companies Act 2006 s 41). As to the Companies Act 1985 s 322A (prospectively repealed) see COMPANIES vol 7(2) (2004 Reissue) PARA 1116.

3 'Transaction' includes any act: Companies Act 1985 s 322A(8) (as added (see note 2); prospectively repealed). This definition is sufficiently wide to include a guarantee. See note 2.

4 Including any person occupying the position of director, by whatever name called: see the Companies Act 2006 s 250 (formerly the Companies Act 1985 s 741(1)); and COMPANIES.

5 As to the meaning of 'holding company' see the Companies Act 1985 ss 736, 736A (prospectively repealed); and COMPANIES vol 7(2) (2004 Reissue) PARA 1200 (as to replacement provisions see the Companies Act 2006 s 1159, Sch 6).

6 As to the meaning of 'connected' and 'associated' see the Companies Act 2006 ss 252–255 (formerly the Companies Act 1985 s 346); and COMPANIES.

7 Companies Act 1985 s 322A(1), (2) (as added (see note 2); prospectively repealed). A person who is a party to the transaction but who is not a director of the company or of its holding company or a person connected with such a director or a company with whom such director is associated may still rely upon s 35A (prospectively repealed) (see PARA 1031): but where a transaction is voidable under s 322A (prospectively repealed) and valid by virtue of s 35A (prospectively repealed) in favour of such a person, the court may make such order affirming, severing or setting aside the transaction on such terms as appear to be just: s 322A(7) (as so added; prospectively repealed). See note 2.

8 For this purpose, 'guarantee' includes indemnity: see the Companies Act 1985 s 331(2) (repealed as from 1 October 2007 subject to transitional provisions); and COMPANIES vol 7(2) (2004 Reissue) PARA 1101.

9 A 'shadow director' is a person in accordance with whose instructions the directors of the company are accustomed to act: see the Companies Act 2006 s 251(1), (2) (formerly the

Companies Act 1985 s 741(2)); and COMPANIES. However, a person is not deemed a shadow director by reason only that the directors act on advice given by him in a professional capacity: Companies Act 2006 s 251(2).

10 See the Companies Act 2006 ss 197(1), 223(1) (formerly the Companies Act 1985 s 330(2), (5)); and COMPANIES.

11 Ie a company which (1) is a public company; or (2) a company associated with a public company: see the Companies Act 2006 s 198(1), 200(1) (formerly see the Companies Act 1985 s 331(6)); and COMPANIES.

12 A 'quasi-loan' is a transaction under which one party (the 'creditor') agrees to pay, or pays otherwise than in pursuance of an agreement, a sum for another (the 'borrower') or agrees to reimburse, or reimburses otherwise than in pursuance of an agreement expenditure incurred by another party for another (the 'borrower') on terms that the borrower (or a person on his behalf) will reimburse the creditor, or in circumstances giving rise to a liability on the borrower to reimburse the creditor: see the Companies Act 2006 s 199(1) (formerly the Companies Act 1985 s 331(3)); and COMPANIES.

13 A 'credit transaction' is a transaction under which one party (the 'creditor') supplies goods or sells any land under a hire-purchase agreement or a conditional sale agreement or leases or hires any land or goods in return for periodical payments, or otherwise disposes of land or supplies goods or services on the understanding that payment (whether in a lump sum or instalments or by way of periodical payments or otherwise) is to be deferred: see the Companies Act 2006 s 202(1) (formerly the Companies Act 1985 s 331(7)); and COMPANIES. See further CONSUMER CREDIT.

14 See the Companies Act 2006 ss 198(1), (2), 200(1), (2), 201(1), (2) (formerly the Companies 1985 s 330(3), (4)); and COMPANIES. A company may not enter into arrangements to achieve the same effect indirectly: see the Companies Act 2006 s 203(1) (formerly the Companies Act 1985 s 330(7)). The prohibition (ie without such approval) does not apply to certain other guarantees including relating to expenditure on company business, defending proceedings etc, regulatory action or investigation, minor and business transactions, intra group transactions, and money-lending companies: see the Companies Act 2006 ss 204–211; and COMPANIES.

D. VITIATING FACTORS

1033. Mistake. A common mistake, substantially shared by both parties, and relating to facts as they existed at the time the contract was made, which renders the subject matter of the contract essentially and radically different from the subject matter which the parties reasonably believed to exist, may render an apparent contract of guarantee void at common law[1]. There is, however, no jurisdiction in equity to grant rescission of a contract on the ground of common mistake where that contract is valid and enforceable on ordinary principles of contract law[2]. Thus a party will not be allowed to evade performance of a contract such as a guarantee by the simple statement that he has made a mistake[3]. Nor will the doctrine of mistake avail a guarantor if the guarantee itself expressly or impliedly provides that he bears the risk of the relevant mistake[4], or where the mistake consists of a belief entertained by him without reasonable grounds[5] or is otherwise the result of the guarantor's own fault[6]. A mutual mistake may, however, prevent there being a sufficient agreement between the parties to amount to a binding contract, particularly if the guarantor's mistake has been induced by the negligence of the creditor[7].

A contract of guarantee will be voidable if the guarantor was, to the knowledge of the creditor[8], under a fundamental mistake as to the nature or effect of the guarantee[9] or as to its subject matter[10] at the time when he entered into the guarantee[11]. In such circumstances, the guarantee may be set aside in whole or part, or may be rectified so as to accord with the guarantor's belief as to its terms[12].

1 See *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902 at 912–913, [1989] 1 WLR 255 at 268–269 per Steyn J, applying *Bell v Lever Bros Ltd* [1932] AC

161, HL. In *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* above the defendants had guaranteed to the plaintiffs the obligations of a principal debtor under agreements for the sale and leaseback of industrial machines. Unknown to the plaintiffs and the defendants, the machines which were the subject of the transaction did not exist. Steyn J held that the non-existence of the machines, which were the defendants' principal security, rendered the subject matter of the guarantee essentially different from that which both parties reasonably believed it to be. He therefore held that the agreements of guarantee were void at common law for common mistake. He also held that it was an express condition precedent to the agreement of guarantee that the machines existed: cf *De Brettes v Goodman* (1855) 9 Moo PCC 466. As to mistake generally see CONTRACT vol 9(1) (Reissue) PARA 703 et seq; DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 68, 71; and MISTAKE.

2 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd, The Great Peace* [2002] EWCA Civ 1407, [2003] QB 679, [2002] 4 All ER 689, disapproving *Solle v Butcher* [1950] 1 KB 671, [1949] 2 All ER 1107, CA and *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507, [1969] 2 All ER 891, CA. See further EQUITY vol 16(2) (Reissue) PARA 441.

3 *Tamplin v James* (1880) 15 ChD 215 at 217–218, CA, per Baggallay LJ; and see *Small v Currie* (1854) 2 Drew 102 at 114 per Kindersley V-C. Thus a guarantor who signs a guarantee which gives full effect to the intentions of a creditor who, on the faith of the guarantee, supplies goods to the principal debtor cannot repudiate his liability by asserting that he (the guarantor) meant something which he has not stated: *Haymen v Gover* (1872) 25 LT 903 at 905. Where a written agreement is in clear and unambiguous terms, a party cannot be heard to say that he misunderstood it: *Falck v Williams* [1900] AC 176, PC; *Small v Currie* above at 114–115 per Kindersley V-C; on appeal (1854) 5 De GM & G 141. See also *Stewart and McDonald v Young* (1894) 38 Sol Jo 385 where Wills J said that a surety will not be relieved from liability because the language of the guarantee carries more than the parties may have contemplated, even though the court may be of opinion that, had the surety understood this, he would not have entered into the guarantee.

4 *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, Aust HC; *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902 at 913, [1989] 1 WLR 255 at 268 per Steyn J.

5 *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902 at 913, [1989] 1 WLR 255 at 268–269 per Steyn J.

6 *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902 at 913, [1989] 1 WLR 255 at 269 per Steyn J; cf *Solle v Butcher* [1950] 1 KB 671 at 693, [1949] 2 All ER 1107 at 1120, CA, per Denning LJ.

7 See *Lloyds Bank plc v Waterhouse* [1991] Fam Law 23 at 24, CA, per Sir Edward Eveleigh, applying *Scriven Bros & Co v Hindley & Co* [1913] 3 KB 564. As to the effect of mutual mistake on contracts in general see CONTRACT vol 9(1) (Reissue) PARA 703 et seq; and see generally MISTAKE.

8 The creditor must have actual knowledge of the surety's mistake. It is not enough that the creditor may have suspected that a mistake may have been made: *Agip SpA v Navigazione Alta Italia SpA, The Nai Genoa and the Nai Superba* [1984] 1 Lloyd's Rep 353, CA.

9 *Small v Currie* (1854) 2 Drew 102 at 114 per Kindersley V-C.

10 See *Royal Bank of Canada v Hale* (1961) 30 DLR (2d) 138; *Royal Bank of Canada v Oram* [1978] 1 WWR 564, BC SC.

11 As to the effect of unilateral mistake on contracts generally see *Riverlate Properties Ltd v Paul* [1975] Ch 133, [1974] 2 All ER 656, CA; *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, [1981] 1 WLR 505, CA; *Agip SpA v Navigazione Alta Italia SpA, The Nai Genoa and the Nai Superba* [1984] 1 Lloyd's Rep 353, CA; *Taylor Barnard Ltd v Tozer* [1984] 1 EGLR 21, 269 Estates Gazette 225; *Olympia Sauna Shipping Co SA v Shinwa Kaiun Kaisha Ltd, The Ypatia Halcoussi* [1985] 2 Lloyd's Rep 364; and MISTAKE.

12 Cf *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555, [1961] 2 All ER 545; *Riverlate Properties Ltd v Paul* [1975] Ch 133, [1974] 2 All ER 656, CA.

1034. Non est factum. A person under a disability[1] who signs a document such as a guarantee, which is fundamentally different from the document which he thinks that he is signing, and who can prove that he did not fail to take the precautions which he ought to have taken to ascertain the contents or significance of the document, may be able to escape liability under the guarantee by relying upon the doctrine of non est factum[2].

However, the strict application of these requirements, in particular the requirement that the guarantor must prove that he was not careless, means that the doctrine is of very limited application[3]. In modern times, cases in which persons who are adult and literate may successfully plead non est factum will be rare[4].

1 The plea of non est factum is available in a proper case for the relief of a person who for permanent or temporary reasons (not limited to blindness or illiteracy) is not capable of both reading and sufficiently understanding the document to be signed: *Saunders (Executrix of the Will of Gallie) v Anglia Building Society* [1971] AC 1004 at 1034, [1970] 3 All ER 961 at 979, HL, per Lord Pearson.

2 *Lloyds Bank plc v Waterhouse* [1991] Fam Law 23, CA, per Purchas LJ (illiterate farmer who had signed an 'all moneys' guarantee in the mistaken belief that it was limited to the money required for a particular purpose was held not bound by his guarantee). For the general requirements of the doctrine of non est factum see *Saunders (Executrix of the Will of Gallie) v Anglia Building Society* [1971] AC 1004, [1970] 3 All ER 961, HL; *Norwich and Peterborough Building Society v Steed* [1993] Ch 116, sub nom *Norwich and Peterborough Building Society v Steed (No 2)* [1993] 1 All ER 330, CA. See also *Hunter v Walters* (1871) 7 Ch App 75; *National Provincial Bank of England v Jackson* (1886) 33 ChD 1; *King v Smith* [1900] 2 Ch 425.

3 *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281 at 285, CA, per Lord Denning MR. The doctrine of undue influence must be kept within narrow limits if it is not to shake the confidence of those who habitually and rightly rely on signatures when there is no obvious reason to doubt their validity: *Saunders (Executrix of the Will of Gallie) v Anglia Building Society* [1971] AC 1004 at 1015, [1970] 3 All ER 961 at 963, HL, per Lord Reid. See also *Norwich and Peterborough Building Society v Steed* [1993] Ch 116 at 125–127, sub nom *Norwich and Peterborough Building Society v Steed (No 2)* [1993] 1 All ER 330 at 336–339, CA, per Scott LJ. As to undue influence see PARA 1045.

4 *Saunders (Executrix of the Will of Gallie) v Anglia Building Society* [1971] AC 1004 at 1027, [1970] 3 All ER 961 at 973, HL, per Lord Wilberforce.

1035. Misrepresentation. A contract of guarantee, like any other contract[1], is liable to be avoided if induced by a material[2] misrepresentation of an existing fact[3], even if made innocently[4].

Misrepresentation may be either written[5] or oral[6]. It usually consists of the direct assertion by the creditor[7] of a fact which is not a fact and which is calculated to influence a person becoming a guarantor[8]. However, it may also consist of statements by the creditor which tell only a misleading part of the truth[9], or arise from the creditor's failure to correct a statement which he believed to be true when he made it but which he subsequently discovers to be untrue, or a statement which was true when made but which has subsequently become, to his knowledge, untrue[10]. Whether the non-disclosure of a fact amounts to a representation of its non-existence is, in every case, a question of fact dependent upon all the circumstances[11].

The primary remedy for misrepresentation is rescission[12]. However, rescission may be refused and damages awarded in lieu if it is equitable to do so[13], having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss which rescission would cause to the other party[14]. The right to rescind may be lost by affirmation of the guarantee[15], by the fact that the parties cannot be restored to their pre-contract positions[16], and by the intervention of third party rights[17]. Damages may be awarded for loss caused by misrepresentation[18]. There are restrictions on the right to exclude or restrict liability for misrepresentation[19].

1 See CONTRACT vol 9(1) (Reissue) PARA 767.

2 It may be that the requirement of materiality is to be applied less strictly in cases of gratuitous guarantee: see *Davies v London and Provincial Marine Insurance Co* (1878) 8 ChD 469 at 475 per Fry J, who said ' ... there is no consideration in this case, as in many cases of suretyship, for

the contract entered into; and therefore I think ... it is a contract in respect of which a very little is sufficient. Very little said which ought not to have been said ... would be sufficient to prevent the contract being valid'. See also *Bank of New South Wales v Rogers* (1941) 65 CLR 42.

3 See *National Bank of New Zealand v Macintosh* (1881) 3 NZLR 217, where it was held that a statement that the principal debtor was 'all right and would be able to meet the liabilities' was a statement of opinion and not a statement of fact so to amount to a misrepresentation.

4 *MacKenzie v Royal Bank of Canada* [1934] AC 468 at 475, PC. For the applicable principles see generally the Misrepresentation Act 1967; and MISREPRESENTATION AND FRAUD.

5 *Lee v Jones* (1864) 17 CBNS 482.

6 *Blest v Brown* (1862) 4 De GF & J 367.

7 As to the circumstances in which the creditor will be affected by misrepresentation or other wrongdoing by the principal debtor or other third party see PARA 1046.

8 *Foster v Mackinnon* (1869) LR 4 CP 704; *Lewis v Clay* (1897) 67 LJQB 224. Thus, if to a question asked by the proposed surety as to the existence of trade debts owing by the principal debtor the creditor's agent replies in the negative, when in point of fact there is one such debt owing, this amounts to misrepresentation (*Blest v Brown* (1862) 4 De GF & J 367), as does also a gratuitous assertion that an estate is free from incumbrances, other than those specifically mentioned, when in fact there is another and undisclosed incumbrance (*Willis v Willis* (1850) 17 Sim 218). See also *Stone v Compton* (1838) 5 Bing NC 142 (misleading statement that a sum owing by the principal debtor to the creditor had already been paid); *M'Kewan v Thornton* (1861) 2 F & F 594 (alleged misrepresentation as to the state of the principal debtor's account with the creditor bank).

9 See *Lee v Jones* (1864) 17 CBNS 482 at 498 per Shee J; *Willis v Willis* (1850) 17 Sim 218.

10 See *Davies v London and Provincial Marine Insurance Co* (1878) 8 ChD 469 at 475 per Fry J.

11 *Lee v Jones* (1864) 17 CBNS 482; *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72 at 77, CA, per Vaughan Williams LJ. Apart from these cases, mere silence is not in general misrepresentation: see *Fox v Mackreth* (1788) 2 Bro CC 400; on appeal (1791) 2 Cox Eq Cas 320 at 320–321 per Lord Thurlow; *Bell v Lever Bros Ltd* [1932] AC 161 at 227, HL, per Lord Atkin. It may be that the Misrepresentation Act 1967 applies only to representations that have in fact been made, not to those which the law deems to have been made: see *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665 at 760, sub nom *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952 at 1004, CA (affd on different grounds [1991] 2 AC 249, [1990] 2 All ER 947, HL). See also *Sabah Shipyard (Pakistan) Ltd v The Islamic Republic of Pakistan* [2007] EWHC 2602 (Comm), [2007] All ER (D) 193 (Nov). For the special rules relating to concealment and non-disclosure which are applicable to contracts of guarantee see PARA 1036.

12 See eg *MacKenzie v Royal Bank of Canada* [1934] AC 468, PC; the Misrepresentation Act 1967 s 1; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 801 et seq.

13 Except in cases of fraudulent misrepresentation: see the Misrepresentation Act 1967 s 2(2).

14 See the Misrepresentation Act 1967 s 2(2). In *Ward v National Bank of New Zealand* (1886) 4 NZLR 35, NZ CA, a guarantor was induced by misrepresentation to give a second guarantee in substitution for the first. The court refused to set the second guarantee aside except on terms that the guarantor restored the creditor bank to the position that it was in before the second guarantee was given.

15 See MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 829–830.

16 See MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 831.

17 See MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 832.

18 See the Misrepresentation Act 1967 s 2; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 801, 811. In appropriate circumstances, a misrepresentation may also give rise to a cause of action in the tort of deceit or the tort of negligence: see eg *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, [1976] 2 All ER 5, CA.

19 See the Misrepresentation Act 1967 s 3; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 803.

1036. Non-disclosure and concealment. An ordinary contract of guarantee, unlike a contract of insurance[1], is not a contract of utmost good faith[2], requiring full disclosure of all material facts by the contracting parties[3]. Where, however, a company which was the beneficiary of a guarantee for payment of its trading debts did not disclose to the guarantor its participation in a dishonest scheme to circumvent Russian exchange controls, the Privy Council held that the court's discretion to enforce the guarantee should not have been exercised[4].

1 For the principle that insurance is a contract of utmost good faith see *London Assurance v Mansel* (1879) 11 ChD 363; *Container Transport International Inc and Reliance Group Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476, CA; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1993] 1 Lloyd's Rep 496, CA; and INSURANCE vol 25 (2003 Reissue) PARAS 5, 36 et seq.

2 Ie uberrimae fidei. It was formerly held that a creditor's duty of disclosure when communicating with a surety was similar to that of a person seeking insurance: *Owen v Homan* (1851) 3 Mac & G 378 at 397.

3 *Williams v Rawlinson* (1825) 3 Bing 71 at 77 per Best CJ; *Hamilton v Watson* (1845) 12 Cl & Fin 109 at 118–119, HL, per Lord Campbell; *North British Insurance Co v Lloyd* (1854) 10 Exch 523; *Wythes v Labouchere* (1859) 3 De G & J 593; *Lee v Jones* (1864) 17 CBNS 482; *Davies v London and Provincial Marine Insurance Co* (1878) 8 ChD 469 at 475 per Fry J; *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72 at 81, CA, per Farwell LJ, and at 85–86 per Kennedy LJ. There is no magic in the use of the word 'insurance' or 'guarantee'; many contracts may with equal propriety be called by either term; whether the contract is one requiring uberrima fides depends upon its substantial character: see *Seaton v Heath, Seaton v Burnand* [1899] 1 QB 782 at 792, CA, per Romer LJ; revsd, without affecting this point, sub nom *Seaton v Burnand, Burnand v Seaton* [1900] AC 135, HL. See also *Geest plc v Fyffes plc* [1999] 1 All ER (Comm) 672 (in a contract of indemnity or guarantee, the potential beneficiary's duty is confined to a duty not to make express or implied misrepresentations and there is no general duty to disclose to the party about to give the guarantee or indemnity all facts material to that party's decision whether to enter into that contract).

4 See *Far Eastern Shipping Co Public Ltd v Scales Trading Ltd* [2001] 1 All ER (Comm) 319, [2000] All ER (D) 2034, PC. This case was applied (in a different context) in *Lloyds TSB Bank plc v Shorney* [2001] EWCA Civ 1161, [2001] All ER (D) 277 (Jul).

1037. Matters which need not be disclosed. On the basis that an ordinary contract of guarantee is not one of utmost good faith[1], it has been held that a creditor, who has not been specifically asked,[2] is under no duty to disclose to an intending surety the fact that the principal debtor is already overdrawn[3], or the extent of that overdraft or other indebtedness to the creditor[4], whether the principal debtor is in the habit of overdrawing[5], how the principal debtor's account has been kept[6], the fact that the principal debtor's account has been conducted in an irregular way[7], whether the principal debtor has been punctual in his dealings[8], the fact that the creditor bank has dishonoured cheques drawn by the principal debtor[9], the fact that the principal debtor has previously defaulted[10], the fact that the creditor is suspicious that the principal debtor has been defrauding him[11], the fact that the husband of the principal debtor, who has authority to draw on the account to be guaranteed, is an undischarged bankrupt[12], the fact that the manager of the creditor bank has 'taken partial control' of the principal debtor's business[13], whether the principal debtor has performed his promises in an honourable manner[14], the fact that the creditor intends to lend a further substantial sum on the faith of the guarantee[15], or the fact that the guarantee is required because another guarantor wishes to retire[16].

1 Ie uberrimae fidei. For the exceptional circumstances in which the creditor is obliged to make disclosure see PARA 1038 et seq.

2 If the intending guarantor is unacquainted with the risk he is undertaking he should inquire about it: *Seaton v Heath, Seaton v Burnand* [1899] 1 QB 782 at 793, CA, per Romer LJ; revsd without affecting this point, sub nom *Seaton v Burnand, Burnand v Seaton* [1900] AC 135, HL. As to the creditor's obligation to give proper answers to the guarantor's questions see PARA 1039.

3 As it is not a matter of presumption that a customer's account stands clear at the time the guarantee is given, the surety should inquire about it: *Kirby v Duke of Marlborough* (1813) 2 M & S 18 at 22 per Lord Ellenborough CJ. Where a bond is given for the continuance of an old bank account the guarantor will not be discharged by the non-disclosure of the fact of the principal debtor's having a balance against him duly secured at the date of the bond, as it is well known that such accounts are not carried on until the old balance has been secured: *Williams v Rawlinson* (1825) 3 Bing 71 at 77 per Best CJ. See also *Westminster Bank Ltd v Cond* (1940) 46

Com Cas 60; *Lloyds Bank Ltd v Harrison* (1925) 4 Legal Decisions Affecting Bankers 12, CA; *Cooper v National Provincial Bank Ltd* [1946] KB 1, [1945] 2 All ER 641; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 455, 463, Aust HC. But cf *Lee v Jones* (1864) 17 CBNS 482, where the guarantee was of payments to be made by an agent to his merchant principals, and it was held that non-disclosure of existing arrears was in the circumstances evidence of fraud. 'It depends whether in such a transaction as that described in the agreement it might or might not naturally be expected that the matters might have allowed a balance of this extent to accumulate and might have allowed the amount to stand unsettled over so long a time': *Lee v Jones* at 505 per Blackburn J.

4 *Hamilton v Watson* (1845) 12 Cl & Fin 109, HL; *Royal Bank of Scotland v Greenshields* 1914 SC 259, Ct of Sess; *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72, CA; *National Provincial Bank of England Ltd v Glanusk* [1913] 3 KB 335.

5 *Hamilton v Watson* (1845) 12 Cl & Fin 109, HL. 'No surety asked to guarantee a banking account is entitled to assume that the customer of the bank has not been in the habit of overdrawing; the proper presumption in most instances is that he has been doing so, and wishes to do so again': *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72 at 83, CA, per Farwell J.

6 *Hamilton v Watson* (1845) 12 Cl & Fin 109, HL; *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72, CA.

7 *Cooper v National Provincial Bank Ltd* [1946] KB 1, [1945] 2 All ER 641 (cheques drawn then countermanded).

8 *Hamilton v Watson* (1845) 12 Cl & Fin 109, HL.

9 *National Provincial Bank of England Ltd v Glanusk* [1913] 3 KB 335.

10 *Roper v Cox* (1882) 10 LR Ir 200 (principal debtor guilty of gross irregularity and delay in paying rent, and substantially in arrears at date of guarantee); and see *Home Insurance Co v Holway* (1881) 39 American Reports 179.

11 *National Provincial Bank of England Ltd v Glanusk* [1913] 3 KB 335 at 339 per Horridge J; *Bank of Scotland v Morrison* 1911 SC 593 at 602, 605, Ct of Sess; *Royal Bank of Scotland v Greenshields* 1914 SC 259.

12 *Cooper v National Provincial Bank Ltd* [1946] KB 1, [1945] 2 All ER 641.

13 *Lloyds Bank Ltd v Harrison* (1925) 4 Legal Decisions Affecting Bankers 12, CA. The bank manager had agreed to give an extended credit to the principal debtor only on terms that he should not buy further stock, but should confine his business to selling his existing stock, and should lay off certain of his employees.

14 *Hamilton v Watson* (1845) 12 Cl & Fin 109, HL.

15 *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60.

16 *North British Insurance Co v Lloyd* (1854) 10 Exch 523.

1038. Where disclosure is required. There are four circumstances in which the creditor must make disclosure to an intending guarantor: (1) where the creditor is asked a specific question[1]; (2) where the bank would otherwise mislead the guarantor by volunteering only part of the truth[2]; (3) where the guarantor makes a statement in the creditor's presence that demonstrates that he entirely misunderstands the principal debtor's position[3]; and (4) where there is anything that might not naturally be expected to take place between the principal debtor and the creditor[4].

Where a fiduciary advises his principal to enter into a guarantee he must prove affirmatively that the transaction in question is fair and that in the course of the negotiations he has made full disclosure of all facts material to the transaction[5].

1 *Hamilton v Watson* (1845) 12 Cl & Fin 109, HL; *Royal Bank of Scotland v Greenshields* 1914 SC 259; *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60. See PARA 1039.

2 *Royal Bank of Scotland v Greenshields* 1914 SC 259.

3 See note 2.

4 *Hamilton v Watson* (1845) 12 Cl and Fin 109 at 119, HL, per Lord Campbell; *National Provincial Bank of England Ltd v Glanusk* [1913] 3 KB 335 at 338 per Horridge J; *Lloyds Bank Ltd v Harrison* (1925) 4 Legal Decisions Affecting Bankers 12 at 13, CA, per Sir Ernest Pollock MR, and at 15–16 per Bankes LJ; *Cooper v National Provincial Bank Ltd* [1946] KB 1 at 6–7, [1945] 2 All ER 641 at 644 per Lawrence LJ. See PARA 1040.

5 See eg *Meara v Fox* [2001] All ER (D) 68 (Apr). As to the duties of fiduciaries see generally EQUITY vol 16(2) (Reissue) PARA 851 et seq.

1039. The duty to answer questions. It is the duty of a creditor to give a true, honest and accurate answer to any specific question directed to him by an intending guarantor which is in any way material to the giving of the guarantee[1]. If the creditor's answer is misleading, it may amount to a misrepresentation and so entitle the guarantor to avoid the guarantee[2].

1 *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60 at 69. The creditor is not obliged to make inquiries in order to answer, merely to answer truthfully from the information which he has: *Parsons v Barclay & Co Ltd and Goddard* (1910) 103 LT 196, CA.
2 See PARA 1035.

1040. Disclosure of special circumstances. The creditor must disclose to an intending guarantor anything which might not naturally be expected to take place between the parties who are concerned in the transaction, namely whether there is a contract between the debtor and the creditor to the effect that the debtor's position is to be different from that which the guarantor might naturally expect[1].

The omission to mention any such special fact is an implied representation to the intending guarantor that it does not exist[2], entitling the guarantor upon discovering the true position to avoid the guarantee[3].

1 *Hamilton v Watson* (1845) 12 Cl & Fin 109 at 119, HL, per Lord Campbell. See also *Smith v Bank of Scotland* (1813) 1 Dow 272, HL; *Railton v Matthews* (1844) 10 Cl & Fin 934, HL; *North British Insurance Co v Lloyd* (1854) 10 Exch 523; *Lee v Jones* (1864) 17 CBNS 482 at 503–504 per Blackburn J; *Phillips v Foxall* (1872) LR 7 QB 666; *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72, CA; *National Provincial Bank of England Ltd v Glanusk* [1913] 3 KB 335 at 338 per Horridge J; *Royal Bank of Scotland v Greenshields* 1914 SC 259; *Lloyds Bank Ltd v Harrison* (1925) 4 Legal Decisions Affecting Bankers 12 at 13, CA, per Sir Ernest Pollock MR, and at 15–16 per Bankes LJ; *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60 at 69 per Tucker J; *Cooper v National Provincial Bank Ltd* [1946] KB 1 at 6, [1945] 2 All ER 641 at 644 per Lawrence LJ; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 447 per Gibbs CJ, Aust HC; *Levett v Barclays Bank plc* [1995] 2 All ER 615, [1995] 1 WLR 1260; *Lloyds TSB Bank plc v Shorney* [2001] EWCA Civ 1161, [2002] 1 FCR 673, [2002] 1 FLR 81.
2 See the cases cited in note 1.
3 See PARA 1035.

1041. Matters which ought to be disclosed. It depends on the circumstances of each case whether a fact not disclosed is such that it is impliedly represented not to exist[1]. In general, the guarantor should be informed of every private bargain between the creditor and the principal debtor varying the degree of the guarantor's responsibility[2], and it may sometimes become necessary even to disclose the existence and nature of an agreement between the creditor and some person other than the principal debtor[3].

It has, for example, been held that a creditor was obliged to disclose to an intending guarantor the existence of an agreement that part of the advance to be secured by the guarantee was to be applied to repay a pre-existing debt[4]. The guarantor was held to be discharged by the creditor's failure to disclose a further incumbrance, where an estate was conveyed to a person 'free from incumbrances' except those set out in a particular schedule, in consideration of that person and his guarantor doing certain things[5]. Where the creditor failed to disclose his understanding with the principal debtor that the promissory note, in which the guarantor had joined the principal debtor, should not be payable for five years but should bear interest at five per cent per annum, secured by a

separate promissory note given by the principal debtor, the guarantor was also held to be discharged[6]. Similarly, the guarantor was held to be discharged where the creditor made a secret arrangement to take payment of his debt in full, the guarantee having been given to secure an advance to enable the debtor to pay a composition agreed by the general body of creditors[7].

1 *Lee v Jones* (1864) 17 CBNS 482 at 506 per Blackburn J; *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72, CA, especially at 85–88 per Kennedy LJ, who distinguished between intrinsic and extrinsic circumstances: intrinsic circumstances forming the very ingredients of the contract and extrinsic circumstances forming no part of it, but only bearing upon it so as to enhance or diminish the price of the subject matter, or to operate as a motive to make or decline the contract. Extrinsic circumstances need only be disclosed in a contract uberrimae fidei, but intrinsic circumstances must be disclosed in a contract of guarantee.

2 *Pidcock v Bishop* (1825) 3 B & C 605; *Re Mason, ex p Sharp* (1844) 3 Mont D & De G 490; *Stone v Compton* (1838) 5 Bing NC 142 at 157; *Pendlebury v Walker* (1841) 4 Y & C Ex 424; *Smith v Bank of Scotland* (1813) 1 Dow 272 at 292 et seq, HL, per Lord Eldon LC; *Burke v Rogerson* (1866) 14 LT 780; *Hamilton v Watson* (1845) 12 Cl & Fin 109, HL; *Railton v Mathews* (1844) 10 Cl & Fin 934, HL; *Mackreth v Walmesley* (1884) 51 LT 19.

3 See *Stiff v Eastbourne Local Board* (1868) 19 LT 408; on appeal (1869) 20 LT 339, CA. In the case of a surety for payment of part of the purchase money of ships, it has been held that the fact that one of the ships is laden with munitions of war destined for a belligerent port should be disclosed to the surety: *Burke v Rogerson* (1866) 14 LT 780.

4 *Stone v Compton* (1838) 5 Bing NC 142 (mortgage for the same sum as the guarantee, which was read over to the guarantor, recited that the full sum was being advanced. In fact, it had been agreed that part of it should be kept back to pay a pre-existing debt, which the mortgage recited as paid). See also *Lee v Jones* (1864) 17 CBNS 482; and *Blest v Brown* (1862) 3 Giff 450; on appeal 4 De GF & J 367. Cf *Mackreth v Walmsley* (1844) 51 LT 19 (where the creditor was held not to have been obliged to disclose an arrangement made by the principal debtor to pay a debt to another surety with the advance to be guaranteed), and the cases cited in PARA 1040 note 1.

5 *Willis v Willis* (1850) 17 Sim 218; and see *Blest v Brown* (1862) 4 De GF & J 367.

6 See *Espey v Lake* (1852) 10 Hare 260.

7 *Pendlebury v Walker* (1841) 4 Y & C Ex 424.

1042. Fidelity guarantees. The nature of a fidelity guarantee gives rise to a more extensive disclosure than is required in the case of a guarantee for a bank or other cash account[1]. Where the guarantee is of the good behaviour of an employee, the omission of the employer to disclose to the intending guarantor any previous dishonesty or misconduct[2] of the employee in his employment of which the employer is aware will entitle the guarantor to avoid the guarantee[3].

The guarantor will not be entitled to avoid the guarantee if he knows of the dishonesty or misconduct from another source, since in those circumstances there is no effective misrepresentation[4].

Where the guarantee is a continuing guarantee, the duty of disclosure continues throughout the guaranteed employment. If the employer discovers that the employee has been dishonest, but continues to employ him without telling the guarantor, the guarantor will not be liable for any subsequent dishonesty by the employee[5].

1 *Railton v Mathews* (1844) 10 Cl & Fin 934, HL, as explained in *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72 at 79–80, CA, per Vaughan Williams LJ. 'There is a wide distinction between a case like the present and the cases ... of guarantees for overdrafts given to bankers ... The surety may well complain 'I did not know that your servant was a thief'; but he cannot be heard to complain 'I did not know your customer had been overdrawing his account or what the nature of his business was": *London General Omnibus Co Ltd v Holloway* at 82 per Farwell LJ. Fidelity guarantees are now rarely encountered. See further PARA 1133.

2 For examples of mere irregularities not amounting to misconduct see *Durham Corpn v Fowler* (1889) 22 QBD 394; *Caxton and Arrington Union v Dew* (1899) 68 LJQB 380.

3 *Phillips v Foxall* (1872) LR 7 QB 666 at 672 per Quain J; and see *Smith v Bank of Scotland* (1813) 1 Dow 272, HL; *Railton v Mathews* (1844) 10 Cl & Fin 934, HL; *Lawder v Lawder* (1873) 7 ICLR 57; *Sanderson v Aston* (1873) LR 8 Exch 73; *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72, CA, reviewing the authorities. As to the onus of proof of the employer's knowledge of the employee's misconduct cf *Federal Supply and Cold Storage Co of South Africa v Angehrn and Piel* (1910) 80 LJPC 1 at 8. In a case where fraudulent concealment or misrepresentation was not sufficiently pleaded, a provision in a guarantee for the disclosure of misconduct was held not to apply to misconduct before the guarantee was entered into: *Byrne v Muzio* (1881) 8 LR Ir 396.

4 *Peel v Tatlock* (1799) 1 Bos & P 419; *Goring v Edmonds* (1829) 3 Moo & P 259; *Caxton and Arrington Union v Dew* (1899) 68 LJQB 380.

5 *Phillips v Foxall* (1872) LR 7 QB 666; *Sanderson v Aston* (1873) LR 8 Exch 73; *Enright v Falvey* (1879) 4 LR Ir 397. See also *Smith v Bank of Scotland* (1813) 1 Dow 272. Mere delay in informing the guarantor of the employee's misconduct will not discharge the guarantee in respect of that misconduct: see *Peel v Tatlock* (1799) 1 Bos & P 419.

1043. Whether there is a duty to explain. It has been stated that there is no special obligation upon a person to whom another is about to give a guarantee to explain the meaning or effect of the guarantee, any more than a person who is taking from another any other species of deed or instrument which is to enure to the benefit of the person taking it is under such obligation[1]. If, however, the creditor does give the intending guarantor any explanation, it must be sufficiently accurate and complete so as not to be misleading[2]. Furthermore, where the creditor is a bank or other large institution and the relationship between the debtor and the guarantor is non-commercial, the guarantee may be unenforceable on the grounds of undue influence exerted by the debtor unless the creditor can establish that it has taken reasonable steps to bring home to the guarantor, in a meaningful way, the practical implications of the proposed transaction and the risks he or she is running by standing as surety[3]. The steps to be taken by the creditor in such situations are discussed below[4].

1 *Small v Currie* (1853) 2 Drew 102 at 114–115 per Kindersley V-C.

2 *Cornish v Midland Bank plc (Humes, third party)* [1985] 3 All ER 513, CA. In *Midland Bank plc v Hubbard* (16 February 1993, unreported), CA, the bank manager told the wife, about to mortgage her home to secure the indebtedness of her husband's company, that the mortgage was to secure borrowing in accordance with arrangements agreed with her husband. He also explained to her what he called the 'worst scenario', which was that the bank could take possession of the house and sell it, and said that her rights were removed by signing the charge. Gibson LJ described this explanation as 'entirely adequate'. See now the text and notes 3–4; and PARAS 1045–1046.

3 *Barclays Bank v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL; *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

4 See PARA 1045–1046.

1044. Duress. A guarantee procured by duress by the creditor[1] is liable to be set aside[2].

Duress may take the form of physical coercion[3], or of any other conduct or threat which the law regards as illegitimate[4] which coerces the will of the guarantor and so vitiates his consent to the guarantee[5].

1 For the circumstances in which the creditor may be affected by improper pressure exercised by a third party see PARA 1046.

2 See eg *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389, [1937] 2 All ER 657, where a guarantee obtained from a family company by a threat to prosecute a family member was held voidable. The case was argued and decided as a case of undue influence, on the basis that 'the common law doctrine of duress has been superseded by the equitable doctrine of undue influence' (see at 394): sed quaere. See also *Kaufman v Gerson* [1904] 1 KB 591, CA; and see *Scott v Scott* (1847) 11 I Eq R 74; *Williams v Bayley* (1866) LR 1 HL 200; *Société des Hôtels*

Réunis SA v Hawker (1913) 29 TLR 578; affd on a question of costs (1914) 30 TLR 423, CA. In *Barton v Armstrong* [1976] AC 104, [1975] 2 All ER 465, the Privy Council described certain deeds as being 'void' as a result of duress. However, such contracts are more commonly spoken of as being only voidable: see *DPP for Northern Ireland v Lynch* [1975] AC 653 at 695, sub nom *Lynch v DPP for Northern Ireland* [1975] 1 All ER 913 at 938, HL, per Lord Simon of Glaisdale (as a matter of criminal law, this case was overruled in *R v Howe* [1987] AC 417, [1987] 1 All ER 771, HL); *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705, [1978] 3 All ER 1170; *Pao On v Lau Yiu Long* [1980] AC 614 at 634, [1979] 3 All ER 65 at 77–78, PC; *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 at 383, [1982] 2 All ER 67 at 75, HL, per Lord Diplock, and at 400 and 89 per Lord Scarman.

3 See eg *Friedberg-Seeley v Klass* (1957) 101 Sol Jo 275; *Barton v Armstrong* [1976] AC 104, [1975] 2 All ER 465, PC.

4 Legitimate commercial pressure can never amount to duress: *Occidental Worldwide Investment Corpn v Skibs A/S Avanti, The Siboen and The Sibotre* [1976] 1 Lloyd's Rep 293 at 336. 'In the vast majority of cases a customer who signs a bank guarantee ... cannot get out of it. No bargain will be upset which is the result of the ordinary interplay of forces. There are many hard cases caught by this rule ... take the case of a borrower in urgent need of money. He borrows it from the bank at high interest and is guaranteed by a friend. The guarantor gives his bond and gets nothing in return. The common law will not interfere': *Lloyds Bank Ltd v Bundy* [1975] QB 326 at 336, [1974] 3 All ER 757 at 763, CA. See also *GMAC Commercial Credit Ltd v Dearden* [2002] All ER (D) 440 (May) (claimant requiring directors of company with which it had entered into invoice discounting agreement to sign personal guarantees; held that claimant had been acting to enforce its lawful rights under the agreement and defendants had no real prospect of establishing a defence of economic duress to a claim under the guarantees if the case proceeded to trial); *DSND Subsea Ltd v Petroleum Geo-services ASA* [2000] BLR 530; *Bulmer v Owlett* [2003] EWHC 2929 (Ch), [2003] All ER (D) 39 (Dec).

5 See *Occidental Worldwide Investment Corpn v Skibs A/S Avanti, The Siboen and The Sibotre* [1976] 1 Lloyd's Rep 293; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705, [1978] 3 All ER 1170; *Pao On v Lau Yiu Long* [1980] AC 614 at 635–636, [1979] 3 All ER 65 at 78–79, PC; *Syros Shipping Co SA v Elaghill Trading Co, The Proodos C* [1981] 3 All ER 189 at 192, [1980] 2 Lloyd's Rep 390 at 393; *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366, [1982] 2 All ER 67, HL; *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419, CA; *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA; *Vantage Navigation Corpn v Suhail and Saud Bahwan Building Materials Inc, The Alev* [1989] 1 Lloyd's Rep 138; *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] QB 833, [1989] 1 All ER 641; *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152, [1991] 4 All ER 871, HL. For the effect of duress on contracts generally see CONTRACT vol 9(1) (Reissue) PARAS 710–711.

1045. Undue influence; in general. A guarantee procured by undue influence on the part of the creditor[1] is liable to be set aside[2]. Such undue influence is either actual or presumed[3].

In cases of actual undue influence, it is necessary for the claimant to prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into the transaction[4]. He must show that (1) the other party to the transaction (or someone who induced the transaction for his own benefit) had the capacity to influence the complainant; (2) the influence was exercised; (3) its exercise was undue; and (4) its exercise brought about the transaction[5]. The line between permissible forms of coercion and persuasion on the one hand and undue influence on the other is regulated by considerations of public policy[6]. Relief will not be granted where all that is shown is impecuniosity or inequality of bargaining power[7]. There must be something in the nature of the conduct complained of which is unfair and improper, whether it takes the form of coercion, overreaching or cheating, before equity will intervene[8].

Presumed undue influence arises out of a relationship between two persons where one person has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage[9].

Whether a transaction was brought about by the exercise of what is commonly called 'presumed undue influence' is a question of fact and the burden of proving it rests upon the person who claims to have been wronged[10]. A different form of presumption, however, arises in the case of certain types of relationship in which one party acquires influence over another who is vulnerable and dependent and where, moreover, substantial gifts by the influenced or vulnerable person are not normally to be expected. In these cases the law presumes, irrebuttably, that one party had influence over the other. The complainant need not prove he actually reposed trust and confidence in the other party; it is sufficient for him to prove the existence of the type of relationship[11]. That presumption does not arise from the normal relationship of banker and customer[12]; nor does the relationship of husband and wife as such give rise to the presumption[13].

Reluctance to enter into a contract of guarantee or collateral security is not necessarily indicative that any improper pressure was being brought to bear; indeed reluctance on the part of the surety may rather show that he knew what he was doing and did it because he thought it was the right thing to do[14].

The presumption of undue influence may be rebutted by proof that the guarantee was given as a result of full, free and informed thought by the guarantor about it[15]. Proof that the complainant received advice from an independent[16] third party before entering into the impugned transaction may be very helpful in rebutting the presumption of undue influence. However such advice, including legal advice, is on the one hand not always necessary nor on the other hand always sufficient[17]. A bank cannot avoid being fixed with constructive notice of the complainant's equity merely by relying on an honest belief that the complainant was represented in the transaction by a solicitor, since it cannot be assumed that the solicitor's retainer extended to explaining to his client the nature and effect of the transaction[18].

1 For the circumstances in which the creditor may be affected by undue influence exercised by a third party see PARA 1046.

2 See *Lloyds Bank Ltd v Bundy* [1975] QB 326, [1974] 3 All ER 757, CA; *National Westminster Bank plc v Morgan* [1985] AC 686, [1985] 1 All ER 821, HL; *Woodstead Finance Ltd v Petrou* [1986] BTLC 267; *Midland Bank plc v Phillips* (14 March 1986, unreported), CA. See also the cases cited in PARA 1046. As to the doctrine of undue influence generally see CONTRACT vol 9(1) (Reissue) PARA 712; and for a full treatment of this doctrine as an aspect of the equitable jurisdiction in cases of constructive fraud see EQUITY vol 16(2) (Reissue) PARA 416 et seq.

3 The wisdom of the practice of making a classification of cases of undue influence has been questioned (see *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449 esp at [92] per Lord Clyde, at [107] per Lord Hobhouse and at [158], [161] per Lord Scott); however a distinction may still be drawn between actual undue influence and presumed undue influence. Cf however *Royal Bank of Scotland v Etridge (No 2)* at [92] per Lord Clyde ('on the face of it a division into cases of 'actual' and 'presumed' undue influence appears illogical'). The previous classification, in *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA and adopted by Lord Browne-Wilkinson in *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL, was into: (1) Class 1, cases of actual undue influence: (2) Class 2A, cases of presumed undue influence where the law presumes the legal relationship between the parties to be one of trust and confidence; and (3) Class 2B where the claimant must establish by affirmative evidence that he or she was accustomed to repose trust and confidence in the alleged wrongdoer.

4 See *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [103], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Hobhouse; cf *Barclays Bank plc v O'Brien* [1994] 1 AC 180 at 189, [1993] 4 All ER 417 at 423, HL, per Lord Browne-Wilkinson. See also *Coldunell Ltd v Gallon* [1986] QB 1184, [1986] 1 All ER 429, CA; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA (overruled on other grounds by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL); *Wright v Cherrytree Finance Ltd (Scott and anor Pt 20 defendants)* [2001] EWCA Civ 449, [2001] 2 All ER (Comm) 877, 82 P & CR D20. *Royal Bank of Scotland v Etridge (No 2)* above has been applied on a

number of occasions: see eg *Yorkshire Bank plc v Tinsley* [2004] EWCA Civ 816, [2004] 3 All ER 463; *National Westminster Bank plc v Waite* [2006] EWHC 1287 (QB), [2006] All ER (D) 289 (Jun); *Abbey National plc v Stringer* [2006] EWCA Civ 338, [2006] All ER (D) 91 (Apr). See further EQUITY vol 16(2) (Reissue) PARA 418.

5 *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 967, [1992] 4 All ER 955 at 976, CA.

6 *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389 at 394–395, [1937] 2 All ER 657 at 661; *Kaufman v Gerson* [1904] 1 KB 591, CA. The courts have been careful not to define too clearly the circumstances in which the doctrine of undue influence may be invoked. 'There is no precisely defined law setting limits to the equitable jurisdiction of a court to relieve against undue influence ... A court in the exercise of this equitable jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable ... ': *National Westminster Bank plc v Morgan* [1985] AC 686 at 709, [1985] 1 All ER 821 at 831, HL, per Lord Scarman.

7 *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA; *National Westminster Bank plc v Morgan* [1985] AC 686 at 707–708, [1985] 1 All ER 821 at 830, HL, per Lord Scarman.

8 *Allcard v Skinner* (1887) 36 ChD 145 at 181, CA.

9 In *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [8], [2002] 2 AC 773, [2001] 4 All ER 449 Lord Nicholls of Birkenhead gave as an example from the nineteenth century *Bainbrigge v Browne* (1881) 18 ChD 188 where an impoverished father prevailed upon his inexperienced children to charge their reversionary interests under their parents' marriage settlement with payment of his mortgage debts. See also *Huguenin v Baseley* (1807) 14 Ves 273; *Allcard v Skinner* (1887) 36 ChD 145; *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127, PC; *Re Craig, Meneces v Middleton* [1971] Ch 95, [1970] 2 All ER 390; *National Westminster Bank plc v Morgan* [1985] AC 686, [1985] 1 All ER 821, HL; *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, [1985] 3 All ER 351, CA; *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281, CA; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA (overruled on other grounds by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL); *Simpson v Simpson* [1989] Fam Law 20. Cf *Re Brocklehurst, Hall v Roberts* [1978] Ch 14, [1978] 1 All ER 767, CA. Not every fiduciary relationship gives rise to a presumption of undue influence: *Re Coomber, Coomber v Coomber* [1911] 1 Ch 723, CA.

10 The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personalities of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship and all the circumstances of the case. Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. The court may then infer that the transaction was procured by undue influence. This situation is conventionally described as one in which a presumption of undue influence arises, the use of the word 'presumption' being descriptive of a shift in the evidential onus on a question of fact: *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449. See also *Roche v Sheerington* [1982] 2 All ER 426, [1982] 1 WLR 599; *Hammond v Osborn* [2002] EWCA Civ 885, [2002] 2 P & CR D41, [2002] All ER (D) 232 (Jun).

11 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449. Well-established categories of such a relationship are those between parent and child, guardian and ward, trustee and beneficiary, solicitor and client, doctor and patient and religious superior and inferior: see EQUITY vol 16(2) (Reissue) PARAS 419, 425–427.

12 *Lloyds Bank Ltd v Bundy* [1975] QB 326, [1974] 3 All ER 757, CA; *National Westminster Bank plc v Morgan* [1985] AC 686, [1985] 1 All ER 821, HL; *Cornish v Midland Bank plc (Humes, third party)* [1985] 3 All ER 513, CA; *Goldsworthy v Brickell* [1987] Ch 378, [1987] 1 All ER 853, CA; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA (overruled on other grounds by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL). Nor does it arise from the normal relationship of employer and employee or of landlord and tenant or from a combination of the two: *Matthew v Bobbins* (1980) 41 P & CR 1, CA.

13 *Howes v Bishop* [1909] 2 KB 390, CA; *Bank of Montreal v Stuart* [1911] AC 120, PC; *National Westminster Bank plc v Morgan* [1985] AC 686, [1985] 1 All ER 821, HL; *Kingsnorth Trust Ltd v Bell* [1986] 1 All ER 423, [1986] 1 WLR 119, CA; *Midland Bank plc v Perry* (1988) 56 P & CR 202, CA; *Midland Bank plc v Shephard* [1988] 3 All ER 17, CA; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA (overruled on

other grounds by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL). The presumption may be established where there are special circumstances of illness or dependency: *Simpson v Simpson* [1989] Fam Law 20. It seems, however, that the presumption may apply to engaged couples: *Page v Horne* (1848) 11 Beav 227; *Re Lloyds Bank Ltd, Bomze and Lederman v Bomze* [1931] 1 Ch 289; *Zamet v Hyman* [1961] 3 All ER 933, [1961] 1 WLR 1442, CA; cf *Re Craig, Meneces v Middleton* [1971] Ch 95, [1970] 2 All ER 390; *Halifax Building Society v Brown* [1995] 3 FCR 110, [1996] 1 FLR 103, CA.

14 *Royal Bank of Scotland v Etridge (No 2)* [1998] 4 All ER 705 at 715, CA, [1998] 3 FCR 675 at 686 (PARA 18), CA, per Stuart-Smith LJ, giving the judgment of the court; affd [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449 without the passage cited being affected by criticisms of part of the Court of Appeal reasoning. As to the burden of proof of undue influence see also *Barclays Bank plc v Boulter* [1999] 4 All ER 513, [1999] 1 WLR 1919, HL.

15 See *Zamet v Hyman* [1961] 3 All ER 933 at 938, [1961] 1 WLR 1442 at 1446, CA, per Lord Evershed MR; followed in *Re Craig, Meneces v Middleton* [1971] Ch 95 at 105, [1970] 2 All ER 390 at 396. See, for a longer formulation, *Allcard v Skinner* (1887) 36 ChD 145 at 171, CA, per Cotton LJ. For a case on the rebuttal of the presumption where the parties were close friends see *Banco Exterior Internacional SA v Thomas* [1997] 1 All ER 46, [1997] 1 WLR 221, CA.

16 If the third party is being retained by the bank, the bank cannot rely on inaccurate information supplied to it by the third party: *National Westminster Bank plc v Amin* [2002] UKHL 9, [2002] 1 FLR 735, [2002] All ER (D) 388 (Feb).

17 *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 74 P & CR 384, CA, but note the criticism of one point in this decision in *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [58]–[61], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead; *Claughton v Price* (1997) 30 HLR 396, [1997] EGCS 51, CA.

The weight, or importance, to be attached to such advice depends on all the circumstances. Generally advice from a solicitor or other outside adviser can be expected to bring home to a complainant a proper understanding of what he or she is about to do; but a person may fully understand the implications of a proposed transaction and yet still be acting under the undue influence of another. The question is not whether the complainant knew what he was doing and intended to do, but how the intention to act was created. Whether it will be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence, is a question of fact to be decided having regard to all the evidence in the case: *Steeples v Lea* (1997) 76 P & CR 157, [1998] 2 FCR 144, CA; *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 74 P & CR 384, CA; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [20], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead. See also *Massey v Midland Bank plc* [1995] 1 All ER 929, [1995] 1 FCR 380, CA.

18 *UCB Corporate Services Ltd v Williams* [2002] EWCA Civ 555, [2003] 1 P & CR 168, [2002] 3 FCR 448.

1046. Misrepresentation or influence by third parties. Where the guarantor seeks to avoid the guarantee on the grounds of misrepresentation, duress or undue influence, it is not of itself sufficient for him to show that that misrepresentation, duress or undue influence was committed by the principal debtor or some other third party. He must show that the creditor is affected in law by the third party's wrongdoing[1].

There are two distinct grounds on which the creditor may be affected by the actions of the principal debtor or a third party: they are (1) agency; and (2) notice[2]. On general principles, the creditor will be vicariously liable for the acts of his agents acting within the scope of their authority[3]. So if the wrongdoing principal debtor or other third party is acting as agent for the creditor in obtaining the guarantee, the guarantee so obtained may be set aside as against the creditor[4]. However, in the majority of cases where the creditor has required of the principal debtor that there must be a surety, the principal debtor will be acting on his own account and not for the creditor in seeking to procure the support of a guarantor[5].

If the creditor has actual or constructive notice[6] at the time of execution of a guarantee that the guarantee has been procured by the exercise of undue

influence, he cannot enforce the transaction[7]. What notice will be requisite will depend on the nature of the undue influence alleged. In a case of actual undue influence, the creditor must have notice of the circumstances alleged to constitute the actual exercise of the undue influence; in a presumption case he must have notice of the circumstances from which the presumption of undue influence is alleged to arise[8].

Questions have typically arisen where a husband has borrowed money for his business from a bank secured by a mortgage on the jointly owned matrimonial home, and where, on the bank seeking to realise its security, the wife has claimed that she is not bound by her guarantee, having entered into the mortgage because of the undue influence of her husband. The principle[9] that has recently emerged is that in such circumstances the bank is 'put on inquiry'[10] and will be subject to the wife's claim unless it can establish that it has taken reasonable steps to bring home to her, as guarantor, in a meaningful way the practical implications of the proposed transaction and the risks she is running by standing as surety[11]. The duty to take these steps, it has been held, is not restricted to the husband/wife relationship but applies in all cases where the relationship between the surety and the debtor is non-commercial[12]. In these cases a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts[13]. Where, however, the money is being advanced to husband and wife jointly, a bank is not put on inquiry unless it is aware that the loan is being made for the husband's purposes as distinct from the couple's joint purposes[14].

A bank may satisfy the requirements set out above if it insists that the wife or other guarantor attend a private meeting with a representative of the bank at which she is told of the extent of her liabilities as surety, warned of the risks she is running and urged to take independent advice. Alternatively the bank may seek protection by seeing to it that the wife is advised independently by a solicitor. To this end the bank should communicate directly with the wife, informing her that for its own protection it will require written confirmation from a solicitor, acting for her, to the effect that the solicitor has fully explained to her the nature of the documents and the practical implications they will have for her. She should be told that the purpose of this requirement is that thereafter she should not be able to dispute she is legally bound by the documents once she has signed them. She should be asked to nominate a solicitor[15] whom she is willing to instruct to advise her separately from her husband and to act for her in giving the necessary confirmation to the bank. The bank should not proceed with the transaction until it has received an appropriate response directly from the wife[16]. The bank must supply the solicitor with all the necessary financial information after obtaining the husband's consent to the passing on of confidential information. Of course if consent is not forthcoming the transaction will not be able to proceed. If the solicitor cannot obtain from the bank all the information he needs, he should refuse to provide the confirmation sought by the bank. Having explained the position to the wife, setting out the risks involved, the solicitor should make it clear to the wife that she has a choice. The decision whether or not to proceed is hers and hers alone[17]. Exceptionally there may be a case where the bank believes or suspects that the wife has been misled by her husband or is not entering into the transaction of her own free will. In such a case the bank must inform the wife's solicitors of the facts giving rise to its belief or suspicion[18].

In every case the bank should obtain from the wife's solicitor an appropriate written confirmation of the matters referred to above[19].

There is no special equity that entitles a wife or other cohabitee to set aside a guarantee merely on the grounds that she did not fully understand the transaction[20].

1 *Bainbrigge v Browne* (1881) 18 ChD 188; *Coldunell Ltd v Gallon* [1986] QB 1184, [1986] 1 All ER 429, CA; *Midland Bank plc v Perry and Perry* [1988] 1 FLR 161, CA; *Midland Bank plc v Shephard* [1988] 3 All ER 17, CA; *Bank of Baroda v Shah* [1988] 3 All ER 24, CA. Cf *Spencer v Handley* (1842) 4 Man & G 414; *Matthews v Bloxsome* (1864) 4 New Rep 139; and see *Greenfield v Edwards* (1865) 2 De GJ & Sm 582; *M'Taggart v Watson* (1836) 3 Cl & Fin 525 at 542–543, HL; *Jackman v Mitchell* (1807) 13 Ves 581.

2 *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL; *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL. See also *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 971–972, [1992] 4 All ER 955 at 979, CA.

3 See AGENCY vol 1 (2008) PARAS 121 et seq; 150 et seq.

4 *Barclays Bank plc v O'Brien* [1994] 1 AC 180 at 193, [1993] 4 All ER 417 at 427, HL, per Lord Browne-Wilkinson.

5 *Barclays Bank plc v O'Brien* [1994] 1 AC 180 at 193, [1993] 4 All ER 417 at 427, HL, per Lord Browne-Wilkinson. The many earlier cases dating from *Turnbull & Co v Duval* [1902] AC 429, PC, in which it had been held or suggested that the creditor constitutes the principal debtor his agent merely by leaving the obtaining of the guarantee to the principal debtor (see *Chaplin & Co Ltd v Brammall* [1908] 1 KB 233, CA; *Bunbury v Hibernian Bank* [1908] 1 IR 261; *Howes v Bishop* [1909] 2 KB 390, CA; *Talbot v Von Boris* [1911] 1 KB 854, CA; *Bank of Montreal v Stuart* [1911] AC 120, PC; *Shears & Sons Ltd v Jones* [1922] 2 Ch 802; *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281, CA; *Coldunell Ltd v Gallon* [1986] QB 1184, [1986] 1 All ER 429, CA; *Kingsnorth Trust Ltd v Bell* [1986] 1 All ER 423 at 427, sub nom *Kings North Trust Ltd v Bell* [1986] 1 WLR 119 at 123, CA, per Dillon LJ; *Midland Bank plc v Perry and Perry* [1988] 1 FLR 161, CA; *Bank of Baroda v Shah* [1988] 3 All ER 24, CA; *Barclays Bank plc v Kennedy* [1989] 1 FLR 356, CA; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 972, [1992] 4 All ER 955 at 980, CA) are expressly or impliedly overruled on this point.

6 If the circumstances are such as fairly to lead a reasonable person to believe that fraud must have been used in order to obtain the guarantor's agreement to the transaction, the creditor is bound to make inquiry and cannot shelter himself under the plea that he was not called on to ask and did not ask any questions on the subject: *Owen and Gutch v Homan* (1853) 4 HL Cas 997 at 1034–1035 per Lord Cranworth LC.

7 *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL; *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL. See also *Kempson v Ashbee* (1874) 10 Ch App 15 at 21 per James LJ; *Bainbrigge v Browne* (1881) 18 ChD 188; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 973, [1992] 4 All ER 955 at 980, CA (overruled on other grounds by *CIBC Mortgages plc v Pitt* above).

8 *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 973, [1992] 4 All ER 955 at 980–981, CA (overruled on other grounds by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL). See also *Halifax Building Society v Brown* [1995] 3 FCR 110, [1996] 1 FLR 103, CA.

9 At one time the rules were often thought to be based on agency, but this theory has been discredited: *Barclays Bank v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL. Agency was established in *Turnbull & Co v Duval* [1902] AC 429, PC; *Chaplin & Co Ltd v Brammall* [1908] 1 KB 233, CA; *Kingsnorth Trust Ltd v Bell* [1986] 1 All ER 423, [1986] 1 WLR 119, CA; *Barclays Bank plc v Kennedy* (1988) 58 P & CR 221, [1989] 1 FLR 356, CA; but not in *Coldunell Ltd v Gallon* [1986] QB 1184, [1986] 1 All ER 429, CA; *Midland Bank plc v Shephard* [1988] 3 All ER 17, [1987] 2 FLR 175, CA; *Bank of Baroda v Shah* [1988] 3 All ER 24, [1988] NLJR 98, CA; *Lloyds Bank plc v Egremont* [1990] FCR 770, [1990] 2 FLR 351, CA.

10 Ie put on inquiry as to whether the wife understood the nature and effect of the transaction she was entering into: see *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [147], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Scott; cf at [44] where Lord Nicholls of Birkenhead observed that the phrase 'put on inquiry' is strictly a misnomer, for the bank is not required to make any inquiries.

11 *Barclays Bank v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL; *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

12 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [87], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead. See *Avon Finance Co Ltd v Bridger* [1985]

2 All ER 281, 123 Sol Jo 705, CA (son and elderly parents); *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 74 P & CR 384, CA (employer and employee); *Greene King plc v Stanley* [2001] EWCA Civ 1966, [2002] BPIR 491, [2002] All ER (D) 56 (Jan); *National Westminster Bank plc v Amin* [2002] UKHL 9, [2002] 1 FLR 735, [2002] All ER (D) 388 (Feb) (English-speaking son and non-English speaking parents). See also *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127, PC.

13 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [44], [48], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead. Likewise where a husband stands surety for his wife's debts; and similarly in the case of unmarried couples, whether heterosexual or homosexual, where the bank is aware of the relationship. Cohabitation is not essential: *Royal Bank of Scotland v Etridge (No 2)* at [47].

14 *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [48], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead. The position is less clear cut where the wife becomes surety for the debts of a company whose shares are held by her and her husband: *Royal Bank of Scotland v Etridge (No 2)* at [49].

15 The solicitor may be the same solicitor who is acting for the husband in the transaction, provided the solicitor is satisfied that this is in the wife's best interests and satisfied also that this will not give rise to any conflicts of duty or interest: *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [69]–[74], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead.

16 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

17 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449. Dicta in the court below (see [1998] 4 All ER 705 at 715, [1998] 3 FCR 675 at 686, CA, per Stuart-Smith LJ; and PARA 19) and in *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 74 P & CR 384, CA, in effect giving the solicitor a power of veto were disapproved in *Royal Bank of Scotland v Etridge (No 2)* above at [59]–[61] per Lord Nicholls of Birkenhead. Any deficiencies in the advice given by the solicitor to the wife are a matter between the wife and the solicitor and do not affect the bank: *Royal Bank of Scotland v Etridge (No 2)* above at [78] per Lord Nicholls of Birkenhead.

18 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449, esp at [79] per Lord Nicholls of Birkenhead.

19 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [79], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead.

20 *Barclays Bank plc v O'Brien* [1994] 1 AC 180 at 193–194, 196, [1993] 4 All ER 417 at 427–428, 431, HL, per Lord Browne-Wilkinson (reversing on this point the Court of Appeal [1993] QB 109, [1992] 4 All ER 983, and disapproving *Yerkey v Jones* (1939) 63 CLR 649, HC of A). Nor is a creditor put on inquiry where the transaction concerned is an advance made jointly to the husband and wife together rather than a loan to the husband which the wife has guaranteed: *CIBC Mortgages plc v Pitt* [1994] 1 AC 200 at 211, [1993] 4 All ER 433 at 441, HL, per Lord Browne-Wilkinson. See also *Midland Bank plc v Massey* [1995] 1 All ER 929, [1995] 1 FCR 380, CA; *Allied Irish Bank v Byrne* [1995] 1 FCR 430, [1995] 2 FLR 325; *Banco Exterior Internacional v Mann* [1995] 1 All ER 936, [1995] 2 FCR 282, CA; *TSB Bank plc v Camfield* [1995] 1 All ER 951, [1951] 1 WLR 430, CA; *Halifax Building Society v Brown* [1995] 3 FCR 110, [1996] 1 FLR 103, CA; *National Bank of Abu Dhabi v Mohamed* (1998) 30 HLR 383, [1997] NPC 62, CA; *Bank of Cyprus (London) Ltd v Markou* [1999] 2 All ER 707, 78 P & CR 208.

E. CONSIDERATION

1047. Necessity for consideration. Every guarantee not made by deed must, like other simple contracts, be supported by a valuable consideration[1], that is to say, the mere existence of the debt, default or miscarriage of another person is not sufficient to support the guarantor's promise to the creditor[2], which must in all cases be founded upon a new consideration[3], the total failure of which entitles the guarantor to have his guarantee delivered up to be cancelled[4].

1 *Barrell v Trussell* (1811) 4 Taunt 117; *Sheffield v Lord Castleton* (1700) 2 Vern 393; *Saunders v Wakefield* (1821) 4 B & Ald 595 at 600–601; *Pillans and Rose v Van Mierop and Hopkins* (1765) 3 Burr 1664 at 1666; *Jones v Ashburnham* (1804) 4 East 455 at 463–464; *Ex p Gardom*

(1808) 15 Ves 286; *Boyd v Moyle* (1846) 2 CB 644 at 650; *French v French* (1841) 2 Man & G 644; *Barber v Fox* (1671) 2 Saund 136, and notes thereto; *Glover v Halkett* (1857) 2 H & N 487. These cases make it clear that when Lord Westbury in *Williams v Bayley* (1866) LR 1 HL 200 at 219 described a contract to give security for the debt of another as 'a contract without consideration', he meant that the consideration for such a contract is not necessarily a direct benefit or advantage to the guarantor. As to the necessity for consideration so far as it affects contracts in general see CONTRACT vol 9(1) (Reissue) PARA 727 et seq. See also *Herman v Jeuchner* (1885) 15 QBD 561 at 563, CA, per Sir Baliol Brett MR.

2 See *Forth v Stanton* (1669) 1 Saund 210 at 211a, 211b, note (f); and see *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291 at 297, where it was held that the mere existence of an antecedent debt is not valuable consideration for a security given by a debtor: see PARA 1051 note 11.

3 *Forth v Stanton* (1669) 1 Saund 210 at 211a, 211b, note (f); *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291; and see *French v French* (1841) 2 Man & G 644; *Bell v Welch* (1850) 9 CB 154; *Crofts v Beale* (1851) 11 CB 172.

4 *Cooper v Joel* (1859) 1 De GF & J 240; and see *Re Barber & Co, ex p Agra Bank* (1870) LR 9 Eq 725; *Rolt v Cozens* (1856) 18 CB 673; and PARA 1211.

1048. Requisites of consideration. The consideration for the guarantor's promise does not move from the principal debtor, but from the creditor[1]. It need not directly benefit the guarantor[2], although it may do so[3], and it may consist wholly of some advantage given to or conferred on the principal debtor by the creditor at the guarantor's request[4]. Thus, the guarantor's promise often stipulates for a supply of goods[5] or an advance of money[6] to the principal debtor, or that the principal debtor should be taken into the creditor's service or employment[7].

1 See *White v Cuyler* (1795) 6 Term Rep 176 at 177; *Dutchman v Tooth* (1839) 5 Bing NC 577. The authorities for the doctrine that the consideration for a promise must move from the promisee do not cover a case in which the consideration is supplied by an agent who, nevertheless, obtains the promise for and on behalf of his principal: see *Fleming v Bank of New Zealand* [1900] AC 577, PC.

2 *Ex p Minet* (1807) 14 Ves 189 at 190 per Lord Eldon LC; *Seaton v Heath, Seaton v Burnand* [1899] 1 QB 782 at 793, CA, per Romer LJ (revsd without reference to this point sub nom *Seaton v Burnand, Burnand v Seaton* [1900] AC 135, HL); *Morley v Boothby* (1825) 10 Moore CP 395 at 406 per Best CJ; *Nerot v Wallace* (1789) 3 Term Rep 17 at 24 per Buller J; *Bailey v Croft* (1812) 4 Taunt 611; *Ex p Gardom* (1808) 15 Ves 286; *Wright v Sandars* (1857) 3 Jur NS 504 at 507 per Stuart V-C.

3 *Re Willis, ex p Brook* (1850) 6 De GM & G 771.

4 *Coghlan v S H Lock (Australia) Ltd* (1987) 3 BCC 183, PC. See also *Morley v Boothby* (1825) 10 Moore CP 395; *Miles v New Zealand Alford Estate Co* (1886) 32 ChD 266 at 289, CA, per Bowen LJ.

5 *Morrell v Cowan* (1877) 7 ChD 151, CA; *Wood v Benson* (1831) 2 Cr & J 94; *Johnston v Nicholls* (1845) 1 CB 251; *Boyd v Moyle* (1846) 2 CB 644; *Mockett v Ames* (1871) 23 LT 729; *White v Woodward* (1848) 5 CB 810.

6 *Edwards v Jevons* (1849) 8 CB 436; *Broom v Batchelor* (1856) 1 H & N 255; *Grahame v Grahame* (1887) 19 LR Ir 249; *Offord v Davies* (1862) 12 CBNS 748; *Hartland v Jukes* (1863) 1 H & C 667.

7 See *Kennaway v Treleavan* (1839) 5 M & W 498; *Montefiore v Lloyd* (1863) 15 CBNS 203; *Newbury v Armstrong* (1829) 6 Bing 201; *Leathley v Spyer* (1870) LR 5 CP 595; *Lysaght v Walker* (1831) 5 Bli NS 1, HL.

1049. Forbearance as consideration. The consideration may take the form of forbearance by the creditor, at the guarantor's request, to sue the principal debtor[1], or of the actual suspension of pending legal proceedings against him[2]. The mere fact of forbearance is not, however, of itself a consideration for a person's becoming a guarantor for the payment of a debt[3]. There must be either an undertaking to forbear, or an actual forbearance at the guarantor's express or implied request[4].

An agreement to forbear for a reasonable time will provide sufficient consideration to support a guarantor's promise[5]. So will an agreement to forbear for an indefinite period, at least when a reasonable time can be inferred or where the guarantor has received the advantage contemplated[6]. Whilst the mere fact of forbearance, as opposed to an express promise to do so, will not supply the necessary consideration, an act of forbearance following a request, at the time the guarantee was entered into, so to act will do so, even if the request was not expressly agreed[7]. To be effectual the forbearance relied upon must be of a right capable of being enforced[8]. Therefore, where there is no person who could be sued for the debt the forbearance to sue cannot form any consideration[9].

1 See *Rolt v Cozens* (1856) 18 CB 673; *Crears v Hunter* (1887) 19 QBD 341 at 344, 346, CA; *Coles v Pack* (1869) LR 5 CP 65; *Coe v Duffield* (1822) 7 Moore CP 252; *Ockford v Barelli* (1871) 25 LT 504.

2 *Payne v Wilson* (1827) 7 B & C 423; *Oldershaw v King* (1857) 2 H & N 517, Ex Ch; *Wynne v Hughes* (1873) 21 WR 628; *Miles v New Zealand Alford Estate Co* (1886) 32 ChD 266, CA; *Pullin v Stokes* (1794) 2 Hy Bl 312, Ex Ch. The decision in *Ross v Moss* (1597) Cro Eliz 560, Ex Ch, that the mere discontinuance of an action is not a sufficient consideration to support a promise was disapproved in *Harris v Venables* (1872) LR 7 Exch 235, where it was held that the withdrawal of a petition presented for winding up a company was a sufficient consideration to support a promise to pay the costs incurred of and in relation to such petition.

3 *Crears v Hunter* (1887) 19 QBD 341 at 344, CA, per Lord Esher MR.

4 *Crears v Hunter* (1887) 19 QBD 341 at 346, CA, per Lopes LJ; *Jones v Ashburnham* (1804) 4 East 455; *Miles v New Zealand Alford Estate Co* (1886) 32 ChD 266 at 283, 285–286, CA, per Cotton LJ, and at 300 per Fry LJ. Where a surety who was liable on a promissory note jointly with the principal debtor, on being informed that proceedings were contemplated against himself and the principal debtor for the debt, stated, by letter, his intention to pay the debt, it was held (reversing the decision of Sir John Romilly MR in *Jones v Beach* (1851) 21 LJCh 543) that there was no consideration for this promise, and, consequently, on the surety's predeceasing the principal, the surety's estate was not liable as for a several debt: *Jones v Beach* (1852) 2 De GM & G 886. In proceedings founded on the collateral consideration of forbearance to sue another there never was any need to show, in the pleadings, the origin or cause of the debt guaranteed: see *Therne v Fuller* (1616) Cro Jac 396.

5 *Payne v Wilson* (1827) 7 B & C 423; *Oldershaw v King* (1857) 2 H & N 517, Ex Ch.

6 *Oldershaw v King* (1857) 2 H & N 517, Ex Ch. Earlier authorities for the view that forbearance for an unspecified but short period did not constitute good consideration (eg *Semple v Pink* (1847) 1 Exch 74) should be read in the light of this decision.

7 *Crears v Hunter* (1887) 19 QBD 341 at 344, CA, per Lord Esher MR.

8 *Jones v Ashburnham* (1804) 4 East 455 at 463, per Lord Ellenborough CJ.

9 *Jones v Ashburnham* (1804) 4 East 455.

1050. Non-essentials. The consideration for the guarantor's promise need not be commensurate with the promise, for its mere inadequacy will not invalidate the guarantee[1]. Neither need it be contemporaneous with it[2], as it may consist of a compliance with some stipulated condition which the creditor, without being bound to observe, must fulfil before the guarantee will attach[3]. It may be entire (that is, given once and for all), or fragmentary (that is, supplied from time to time) and therefore divisible[4].

The consideration for a promise of guarantee need not appear in writing[5].

1 *Johnston v Nicholls* (1845) 1 CB 251 at 271; see also *Pullin v Stokes* (1794) 2 Hy Bl 312, Ex Ch. Thus, the delivery up of an unenforceable guarantee may be a good consideration for the guarantor's promise: *Brooks v Haigh* (1840) 10 Ad & El 323, Ex Ch; and see *Westlake v Adams* (1858) 5 CBNS 248; *Meredith v Chute* (1702) 2 Ld Raym 759.

2 See *Goldshede v Swan* (1847) 1 Exch 154; *Butcher v Steuart* (1843) 11 M & W 857.

3 See *Kennaway v Treleavan* (1839) 5 M & W 498 at 501; *Westhead v Sproson* (1861) 6 H & N 728; *Offord v Davies* (1862) 12 CBNS 748; and the cases cited in PARA 1025 note 1.

4 *Lloyd's v Harper* (1880) 16 ChD 290 at 319, CA, per Lush LJ; and see *Cannon v Rands* (1870) 23 LT 817.
5 See the Mercantile Law Amendment Act 1856 s 3: and PARAS 1055, 1072.

1051. Insufficient consideration. An illegal consideration will not support a guarantee[1].

A transaction of guarantee may be invalid where the consideration is the enabling of a preference to be given to one creditor over the general body of creditors of a bankrupt or insolvent[2].

Neither a mere moral[3] nor a past consideration[4] will support a guarantee. Where, however, the language of the guarantee is equally expressive of a past or concurrent or future consideration[5] for the guarantor's promise, the maxim *ut res magis valeat quam pereat*[6] applies[7], and oral evidence will, if necessary, be admitted to clear up the ambiguity[8].

A mere promise to entertain a request by the guarantor or principal debtor to enter into transactions with the principal debtor does not amount to sufficient consideration to support a guarantee[9]. However, the actual advance of money following such a request does provide sufficient consideration to make the guarantor liable[10].

The mere existence of an antecedent debt is not of itself valuable consideration for a security given by the debtor[11], although such a debt is a sufficient consideration for a cheque or other negotiable security given on account of the debt. In such a case the negotiable security is equivalent to payment of the debt[12]. In the case of a promissory note given by a principal and a guarantor for a definite sum, payable on a fixed day, it is presumed to be given in consideration of an advance at the date of the note, and, if the creditor insists, as against the guarantor, that the object of the note was to secure the payment of the balance of an account current between the principal and the creditor, the burden of proof lies on the creditor[13].

1 See *Wood v Barker* (1865) LR 1 Eq 139; *Coles v Strick* (1850) 15 QB 2. If the guaranteed debt is itself illegal, it cannot be recovered from the guarantor under his guarantee: see *Lougher v Molyneux* [1916] 1 KB 718; see also *Swan v Bank of Scotland* (1836) 10 Bli NS 627, HL, where, however, the basis of the decision was that the loan was not only illegal, but void by statute; and cf *Coutts & Co v Browne-Lecky* [1947] KB 104 at 109, [1946] 2 All ER 207 at 209; *Heald v O'Connor* [1971] 2 All ER 1105, [1971] 1 WLR 497. The stifling of a prosecution for a crime is an illegal consideration: *Jones v Merionethshire Permanent Benefit Building Society* [1891] 2 Ch 587; affd [1892] 1 Ch 173, CA; and see *Cannon v Rands* (1870) 23 LT 817; *Seear v Cohen* (1881) 45 LT 589, DC. It has, however, been held in Ireland that an agreement to abstain from instituting such a threatened prosecution is not an illegal consideration unless there are reasonable grounds for believing that the illegal offence was actually committed, or unless each party entered into the agreement on that assumption: *Rourke v Mealy* (1878) 4 LR Ir 166. A guarantee of an overdraft to enable the principal debtor to pay bets which he had lost is not illegal, and is therefore enforceable: *Re O'Shea, ex p Lancaster* [1911] 2 KB 981, CA. The mere fact that a guarantee is signed on a Sunday does not make it illegal: *Norton v Powell* (1842) 4 Man & G 42. Where loans were made as part of a conspiracy to defraud the creditors of a company, and the company was a victim of that conspiracy and not a party to it, the company's liquidators were not debarred from recovering those loans or enforcing the guarantees given in respect of them: *BCCI (Overseas) Ltd v Gokal* [1999] All ER (D) 1494. As to the effect of illegality on contracts see generally CONTRACT vol 9(1) (Reissue) PARA 869 et seq. As to the effect of international sanctions on the right to payment under a counter-guarantee see *Shanning International Ltd (in liquidation) v Lloyds TSB Bank plc* [1999] All ER (D) 1457.
2 It has been held that a guarantee which amounted to a fraudulent preference could not be enforced, and would be ordered to be delivered up to be cancelled, even to a party to the fraud: see *Jackman v Mitchell* (1807) 13 Ves 581. Similarly, a guarantee given to one of several creditors, without the knowledge of the rest, to induce him to sign a composition deed has been held to be a fraud on the rest of the creditors and void: *Coleman v Waller* (1829) 3 Y & J 212; *McKewan v Sanderson* (1875) LR 20 Eq 65. The concept of fraudulent preference in insolvency

has been replaced by the wider statutory concept of voidable preference: see the Insolvency Act 1986 ss 239, 340; BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 653 et seq; and COMPANIES.

3 *Eastwood v Kenyon* (1840) 11 Ad & El 438.

4 *Astley Industrial Trust Ltd v Grimston Electric Tools Ltd* (1965) 109 Sol Jo 149, where the guarantee, although expressed to be 'in consideration of your hiring to the hirer ...', was actually executed four days after the hiring agreement. See also *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291; *Allnutt v Ashenden* (1843) 5 Man & G 392.

5 See *Bell v Welch* (1850) 9 CB 154; *Eastwood v Kenyon* (1840) 11 Ad & El 438; *Goldshede v Swan* (1847) 1 Exch 154; *Mockett v Ames* (1871) 23 LT 729; *Chalmers v Victors* (1868) 18 LT 481; *Wood v Priestner* (1866) LR 2 Exch 66; affd (1867) LR 2 Exch 282; and see *Raikes v Todd* (1838) 8 Ad & El 846.

6 Ie that the thing may be valid rather than a nullity.

7 *Steele v Hoe* (1849) 14 QB 431; *Broom v Batchelor* (1856) 1 H & N 255; *Goldshede v Swan* (1847) 1 Exch 154; *Edwards v Jevons* (1849) 8 CB 436; *Colbourn v Dawson* (1851) 10 CB 765; *Brooks v Haigh* (1840) 10 Ad & El 323, Ex Ch; *Mockett v Ames* (1871) 23 LT 729; *Grahame v Grahame* (1887) 19 LR Ir 249; *Johnston v Nicholls* (1845) 1 CB 251; *Wood v Priestner* (1866) LR 2 Exch 66; *Chapman v Sutton* (1846) 2 CB 634; *Re Duncan, ex p Littlejohn* (1843) 3 Mont D & De G 182.

8 See *Hoad v Grace* (1861) 7 H & N 494; *Wood v Priestner* (1866) LR 2 Exch 66; affd (1867) LR 2 Exch 282; *Edwards v Jevons* (1849) 8 CB 436; *Goldshede v Swan* (1847) 1 Exch 154; see also *Brunning v Odhams Bros Ltd* (1896) 75 LT 602, HL; *Bainbridge v Wade* (1850) 16 QB 89; *Shortrede v Cheek* (1834) 1 Ad & El 57; *Johnston v Nicholls* (1845) 1 CB 251. See also PARA 1084.

9 *Coghlan v SH Lock (Australia) Ltd* (1985) 4 NSWLR 158, NSWCA; affd (1987) 3 BCC 183, PC.

10 See note 9.

11 *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291 (see PARA 1047 note 2), where, however, the security given was not a negotiable security; cf *Currie v Misa* (1875) LR 10 Exch 153 (cited in note 12); affd on another ground sub nom *Misa v Currie* (1876) 1 App Cas 554, HL. Where, however, a creditor asks for and obtains a security for an existing debt the inference is that, but for obtaining the security, he would have taken action which he forbears to take on the strength of the security: *Glegg v Bromley* [1912] 3 KB 474 at 491, CA. See also *Leask v Scott Bros* (1877) 2 QBD 376, CA (transfer of a bill of lading to a transferee in good faith defeats the right of stoppage in transit even though the consideration for the transfer is an antecedent debt); *Fullerton v Provincial Bank of Ireland* [1903] AC 309 at 313–316, HL.

12 *Currie v Misa* (1875) LR 10 Exch 153; affd on another ground sub nom *Misa v Currie* (1876) 1 App Cas 554, HL, where it was laid down that all money paid into a bank is subject to a lien, and that all documents as well as money deposited with a bank are subject on the bank's part to a lien in respect of any balance that may be due to it from its customer: *Misa v Currie* at 569 per Lord Hatherley. In this case, which was not cited in *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291, it was not really necessary to decide whether an existing debt constitutes a sufficient consideration for the giving of the security, as there was ample consideration between the holders of the security (a cheque) sued upon and its drawer. An antecedent debt or liability of the drawer (but not of a third party) is of itself sufficient consideration to support a bill of exchange: see the Bills of Exchange Act 1882 s 27(1)(b); and PARA 1479.

13 *Re Boys, Eedes v Boys, ex p Hop Planters Co* (1870) LR 10 Eq 467.

(iii) Form of Contract of Guarantee

A. NECESSITY FOR WRITING

1052. The Statute of Frauds. The Statute of Frauds (1677)[1] provides that no claim[2] is to be brought by which to charge the defendant upon any special promise[3] to answer for[4] the debt, default or miscarriages[5] of another person[6] unless the agreement upon which the claim is brought, or some memorandum or note of it, is in writing, signed by the party to be charged with it[7] or by some other person thereunto lawfully authorised by him[8].

This enactment is merely an enactment as to evidence[9]. Where the original written evidence of a guarantee is lost, oral evidence of its having existed is admissible[10]. Moreover, a payment of money into court by a defendant to a claim on a guarantee dispenses with the production of written evidence of the contract[11] and admits the existence of an enforceable contract[12], unless the Statute of Frauds is at the same time pleaded[13]. A plea of tender also dispenses with written proof of a guarantee[14].

1 The common law of England did not require any written evidence of a guarantee, which could, accordingly, originally be proved in the same manner as any other contract: *Steele v M'Kinlay* (1880) 5 App Cas 754 at 768, HL, per Lord Blackburn. To prevent, however, the danger of a guarantee being established by false evidence, or by evidence of loose talk, when it never was really meant to make such a contract, the English legislature intervened: *Steele v M'Kinlay*. Much of the Statute of Frauds (1677) s 4 was repealed by the Law of Property Act 1925 s 207, Sch 7 and by the Statute Law Revision Acts 1883 and 1948 and the Law Reform (Enforcement of Contracts) Act 1954 s 1, and the section is now in force only in respect of the matters mentioned in this paragraph.

2 In fact the statutory wording is 'action': but see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 15.

3 'Special promise' excludes implied promises arising by operation of law (*Gray v Hill* (1826) Ry & M 420), contracts made by deed or of record (*Holmes v Mitchell* (1859) 7 CBNS 361 at 368–369 per Willes J), and also liabilities for deceitful representation by which credit has been obtained for a third party (to remedy this the Statute of Frauds Amendment Act 1828 s 6 was passed (see PARA 1054); *Pasley v Freeman* (1789) 3 Term Rep 51; notes to *Chandelor v Lopus* (1603) Cro Jac 4 in 2 Smith LC (13th Edn) 57). Whether a 'special promise' is or is not within the enactment depends not on the consideration for the promise but on other matters (*Fitzgerald v Dressler* (1859) 7 CBNS 374 at 392 per Cockburn CJ; *Sutton & Co v Grey* [1894] 1 QB 285 at 289, CA, per Lord Esher MR; *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 at 788, CA; *Davys v Buswell* [1913] 2 KB 47, CA; *Huggard v Representative Church Body* [1916] 1 IR 1; notes to *Forth v Stanton* (1669) 1 Saund 210 at 211e, note (1)), although a different view on this subject has been expressed: see *Saunders v Wakefield* (1821) 4 B & Ald 595 at 600–601. A special promise is sometimes partly within the enactment and partly outside it. When this occurs, and the promise is not reduced to writing, if the parts are separable, the part outside the enactment may give rise to a claim (see *Wood v Benson* (1831) 2 Cr & J 94; and *Bromley v Smith* [1909] 2 KB 235); while if the parts are inseparable no action will lie in respect of either part (see *Chater v Beckett* (1797) 7 Term Rep 201; *Lord Lexington v Clarke* (1689) 2 Vent 223; *Thomas v Williams* (1830) 10 B & C 664; *Earl of Falmouth v Thomas* (1832) 1 Cr & M 89; *Wood v Benson*; *Head v Baldrey* (1837) 6 Ad & El 459; and *Savage v Canning* (1867) 16 WR 133).

4 'Translated into modern legal terminology 'to answer for' is 'to accept liability for'': *Moschi v Lep Air Services Ltd* [1973] AC 331 at 347, [1972] 2 All ER 393 at 400–401, HL, per Lord Diplock.

5 'Translated into modern legal terminology ....'debt, default or miscarriage' is descriptive of failure to perform legal obligations, existing or future, arising from any source, not only from contractual promises, but in any other factual situations capable of giving rise to legal obligations such as those resulting from bailment, tort or unsatisfied judgments': *Moschi v Lep Air Services Ltd* [1973] AC 331 at 347–348, [1972] 2 All ER 393 at 401, HL, per Lord Diplock.

The plural of 'miscarriage' is used in the Statute of Frauds (1677) s 4 (see note 1). Each word in the phrase 'debt, default or miscarriages' has a different signification: *Kirkham v Marter* (1819) 2 B & Ald 613 at 616 per Abbott CJ. Thus:

(1) 'debt' refers to a contractual liability already incurred (*Castling v Aubert* (1802) 2 East 325 at 330–331 per Lord Ellenborough CJ);

(2) 'default' refers to a future contractual liability (*Re Young and Harston's Contract* (1885) 31 ChD 168, CA; and see *Mountstephen v Lakeman* (1871) LR 7 QB 196 at 202, Ex Ch, per Willes J), and possibly to any future liability, whether or not founded in contract (*Kirkham v Marter* above at 617 per Holroyd J). Apart from its statutory significance, 'default' is a purely relative term, just like 'negligence', meaning nothing more and nothing less than not doing what is reasonable under the circumstances; not doing something which one ought to do, having regard to the relations which the person defaulting occupies towards other persons interested in a particular transaction (*Re Young and Harston's Contract* above at 174 per Bowen LJ);

(3) 'miscarriages' comprehends that species of wrongful act for the consequences of which the law would make a person civilly responsible (*Kirkham v Marter* at 616 per Abbot CJ), although probably it and 'default' equally apply to a promise to answer for another, with respect to the non-performance of a duty, even where the duty is not founded in contract (*Kirkham v Marter* above at 617 per Holroyd J).

6 'Of another person' means that, to make the enactment apply, there must always be a principal debtor in existence, or in contemplation, for whom the surety is, or is to become, answerable to the creditor: *Lakeman v Mountstephen* (1874) LR 7 HL 17 at 24–25, per Lord Selborne LC. As to this see PARA 1058 et seq.

7 See *Laythoarp v Bryant* (1836) 2 Bing NC 735.

8 Statute of Frauds (1677) s 4 (as amended: see note 1). For the principles determining what is a guarantee within this enactment see PARA 1058 et seq; and for what written evidence of guarantee will satisfy the enactment see PARA 1064 et seq. There is no reason in principle for distinguishing, in this context, between contracts for the sale of land and contracts of guarantee: see *GMAC Commercial Credit Development Ltd v Sandhu* [2004] EWHC 716 (Comm), [2004] All ER (D) 589 (Mar). It appears that an email guarantee may satisfy the requirements of the Statute of Frauds (1677) s 4 so long as it has been 'signed' by the guarantor. However, the standard reproduction of the intending guarantor's email address is not referable to the intention to provide a guarantee and is thus of itself not a sufficient signature for the purposes of s 4: see *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 2 All ER 891.

9 See *Fraser v Pape* (1904) 91 LT 340, CA; *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84 at 97, CA, per Lindley LJ; *Gibson v Holland* (1865) LR 1 CP 1; *Lucas v Dixon* (1889) 22 QBD 357, CA. See further PARA 1072.

10 *Barrass v Reed* (1898) Times, 28 March; *Crays Gas Co v Bromley Gas Consumers' Co* (1901) Times, 23 March, CA.

11 *Middleton v Brewer* (1790) Peake 15; *Spurrier v Fitzgerald* (1801) 6 Ves 548.

12 *Lucas v Dixon* (1889) 22 QBD 357, CA.

13 *Lucas v Dixon* (1889) 22 QBD 357, CA. Under the previous civil procedure, it was held that the Statute of Frauds (1677) had to be specifically pleaded whenever the defendant wished to rely on it: see *Clarke v Callow* (1876) 46 LJQB 53, CA; *Olley v Fisher* (1886) 34 ChD 367; *Morgan v Worthington* (1878) 38 LT 443. See also *Worthington & Co Ltd v Belton* (1902) 18 TLR 438, CA; *Brunning v Odhams Bros Ltd* (1896) 75 LT 602, HL. As to statements of case see now CPR Pt 16; and see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 651 et seq. A claimant may defeat a plea of the statute by waiving a stipulation in his favour omitted in the memorandum, or by submitting to perform an omitted term in favour of the guarantor: see PARA 1073.

14 See 1 Wms Saund (1871 Edn) 52; *Middleton v Brewer* (1790) Peake 15.

1053. Effect of oral guarantee. Although an oral guarantee cannot be enforced by bringing a claim, it is not, on that account, void[1]. Thus, money actually paid under it cannot, it seems, be recovered[2], and the existence of such a guarantee may be used as a defence[3]. When given by a solicitor an oral guarantee may be enforced against him by the court, by virtue of its summary jurisdiction over its officers[4]. On the other hand, an executor or administrator cannot retain a debt owing in respect of an oral guarantee[5], and, should he pay such a debt, would commit a devastavit[6]. An oral guarantee made abroad, and binding there, cannot be enforced in England and Wales by bringing a claim, since the mode of proof is governed by the lex fori[7].

Although the creditor may have relied on an oral or unsigned guarantee, the guarantee is not thereby estopped from pleading the absence of a signed memorandum for the purposes of the Statute of Frauds (1667)[8].

1 See *Maddison v Alderson* (1883) 8 App Cas 467, HL.

2 *Shaw v Woodcock* (1827) 7 B & C 73; and see *Cresswell v Wood* (1839) 10 Ad & El 460; *Sweet v Lee* (1841) 3 Man & G 452.

3 See *Lavery v Turley* (1860) 6 H & N 239.

4 *Re Greaves* (1827) 1 Cr & J 374n; and see *Evans v Duncombe* (1831) 1 Cr & J 372; *Re a Solicitor* (1900) 45 Sol Jo 104; and see generally SOLICITORS vol 44(1) (Reissue) PARA 354 et seq.

5 *Re Rownson, Field v White* (1885) 29 ChD 358, CA; and see *Re Midgley, Midgley v Midgley* [1893] 3 Ch 282, CA.
6 *Re Rownson, Field v White* (1885) 29 ChD 358, CA; see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 393, 792 et seq.
7 *Leroux v Brown* (1852) 12 CB 801: see CONFLICT OF LAWS vol 8(3) (2003 Reissue) PARAS 11, 17; EVIDENCE vol 17(1) Reissue) PARA 405.
8 Such pleading would be for the purposes of the Statute of Frauds Act (1677) s 4: see PARA 1052. The availability of an estoppel in such a case would render the provision nugatory: see *Actionstrength Ltd (t/a Vital Resources (formerly t/as Morson Alltrades)) v International Glass Engineering In.Gl.En SpA* [2003] UKHL 17, [2003] 2 AC 541, [2003] 2 All ER (Comm) 331.

1054. The Statute of Frauds Amendment Act 1828. By the Statute of Frauds Amendment Act 1828, commonly known as Lord Tenterden's Act[1], no claim[2] may be brought by which to charge any person upon or by reason of any representation[3] or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person[4] in order that that other person may obtain credit, money or goods, unless the representation or assurance is made in writing[5].

Only statements which relate in some way to the credit or creditworthiness of another person fall within the relevant provision of the Statute of Frauds Amendment Act 1828[6]. Moreover, that provision only applies to fraudulent misrepresentations[7]. It does not constitute a defence to claims based upon negligence[8]. The enactment only applies to claims upon representations as such, and not to claims in which the gist of the claim is a breach of duty[9].

The representation relied upon must be signed by the party to be charged with it[10]. Where the party to be charged is an individual or a partnership, an agent's signature has been held insufficient[11]. However, the signature on behalf of a company of its duly authorised agent acting within the scope of his authority is the signature of the company for these purposes[12]. A partner signing in the firm name binds himself[13]. Where there are both written and oral representations a claim lies if the written representation materially induced the person to whom it was given to give credit[14].

1 See *Lyde v Barnard* (1836) 1 M & W 101 at 114 per Parke B. The Statute of Frauds Amendment Act 1828 was passed owing to a successful evasion of the Statute of Frauds (1677) s 4 (see PARA 1052), which took the form of treating the guarantor's oral promise to be answerable for another as a false representation, for which he was made liable in tort although not in contract: see *Lyde v Barnard*; *Tatton v Wade* (1856) 18 CB 371 at 381, Ex Ch, per Pollock CB; *Pasley v Freeman* (1789) 3 Term Rep 51; *Ex p Carr* (1814) 3 Ves & B 108 at 110 per Lord Eldon LC; *Banbury v Bank of Montreal* [1918] AC 626 at 639–640, 693–694, 711–712, HL.
2 The statutory wording is in fact 'action': but see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 15.
3 See the cases cited in notes 4, 6.
4 'Person' includes a corporation: *Banbury v Bank of Montreal* [1918] AC 626 at 708, HL, per Lord Parker, and at 714 per Lord Wrenbury. Cf the Interpretation Act 1978, which by s 5, Sch 1 defines 'person' as including a body of persons corporate or unincorporate. This definition, however, only applies to Acts passed after 1889: s 22(1), Sch 2 para 4(1)(a). A fraudulent misrepresentation by one partner as to the credit of his firm is one as to the credit 'of another person' within the enactment: *Devaux v Steinkeller* (1839) 6 Bing NC 84.
5 Statute of Frauds Amendment Act 1828 s 6. An unsuccessful attempt to evade this enactment was made in *Haslock v Fergusson* (1837) 7 Ad & El 86. Evasions of the Statute of Frauds (1677) s 4 are to be discouraged by the courts: *Mallet v Bateman* (1865) LR 1 CP 163 at 170–171, Ex Ch, per Pollock CB. See also *Contex Drouzhba Ltd v Wiseman* [2006] EWHC 2708 (QB), [2007] 1 BCLC 758.
6 *Clydesdale Bank Ltd v Paton* [1896] AC 381, HL (decided under equivalent Scottish provisions); *Diamond v Bank of London and Montreal Ltd* [1979] QB 333 at 347, [1979] 1 All ER 561 at 565, CA, per Lord Denning MR, and at 351 and 568 per Shaw LJ; *UBAF Ltd*

v European American Banking Corpn [1984] QB 713 at 718, [1984] 2 All ER 226 at 229, CA. It has been held that a representation made in order that the party making the representation may obtain a benefit from the credit allowed to the third party (*Pearson v Seligman* (1883) 48 LT 842, CA), and a representation as to ability to pay (*Swann v Phillips* (1838) 8 Ad & El 457) are within the section. As to what representations are within the enactment see also the notes to *Chandelor v Lopus* (1603) Cro Jac 4 in 2 Smith LC (13th Edn) 57; *Swann v Phillips* above; *Turnley v MacGregor* (1843) 6 Man & G 46; *Lyde v Barnard* (1836) 1 M & W 101; *Swift v Winterbotham* (1873) LR 8 QB 244; varied on appeal sub nom *Swift v Jewsbury* (1874) LR 9 QB 301, Ex Ch; *Bishop v Balkis Consolidated Co* (1890) 25 QBD 512, CA.

7 *Banbury v Bank of Montreal* [1918] AC 626, HL. See also *Behn v Kemble* (1859) 7 CBNS 260; *Diamond v Bank of London and Montreal Ltd* [1979] QB 333 at 347, [1979] 1 All ER 561 at 565, CA, per Lord Denning MR; and *UBAF Ltd v European American Banking Corpn* [1984] QB 713 at 718, [1984] 2 All ER 226 at 229, CA.

8 *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850; *UBAF Ltd v European American Banking Corpn* [1984] QB 713 at 718–719, [1984] 2 All ER 226 at 229–230, CA. Where a bank is asked for a reference as to the standing and financial position of a customer, it need not make inquiries outside as to the solvency or otherwise of the person asked about, nor do anything more than answer the question put to it honestly from what it knows from the books and accounts before it: *Parsons v Barclay & Co Ltd and Goddard* (1910) 103 LT 196, CA.

9 *Banbury v Bank of Montreal* [1918] AC 626, HL.

10 Statute of Frauds Amendment Act 1828 s 6.

11 *Swift v Jewsbury* (1874) LR 9 QB 301, Ex Ch. See also *Hirst v West Riding Union Banking Co* [1901] 2 KB 560, CA; *Williams v Mason* (1873) 28 LT 232; *Hyde v Johnson* (1836) 2 Bing NC 776.

12 *UBAF Ltd v European American Banking Corpn* [1984] QB 713 at 724–725, [1984] 2 All ER 226 at 234, CA, distinguishing *Swift v Jewsbury* (1874) LR 9 QB 301, Ex Ch, and *Hirst v West Riding Union Banking Co Ltd* [1901] 2 KB 560, CA, and not following the dictum of Scrutton LJ in *Banbury v Bank of Montreal* [1917] 1 KB 409 at 413, CA (affd [1918] AC 626, HL).

13 *Fortune v Young* 1918 SC 1, Ct of Sess.

14 *Tatton v Wade* (1856) 18 CB 371 at 381, Ex Ch.

1055. The Mercantile Law Amendment Act 1856. By the Mercantile Law Amendment Act 1856, no special promise to be made by any person to answer for the debt, default or miscarriage of another person, if in writing and signed by the party to be charged with it or some other person duly authorised by him, is deemed invalid to support a claim[1], suit or other proceeding to charge the person making the promise, by reason only that the consideration for the promise does not appear in writing or by necessary inference from a written document[2].

1 The statutory wording is in fact 'action': but see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 15.

2 Mercantile Law Amendment Act 1856 s 3 (amended by the Statute Law Revision Act 1892). See further PARA 1072. This enactment, which does not dispense with the necessity for a consideration (see PARAS 1047, 1072), was rendered necessary by reason of its having been decided that, as the language of the Statute of Frauds (1677) s 4 (see PARA 1052) required 'the agreement' to be in writing, this must be taken to comprise both the promise and also the consideration for it (*Wain v Warlters* (1804) 5 East 10; 1 Smith LC (13th Edn) 358; *Saunders v Wakefield* (1821) 4 B & Ald 595), which together constitute an agreement not made by deed (see *Herman v Jeuchner* (1885) 15 QBD 561 at 563, CA, per Sir Baliol Brett MR). This construction, however, imposed a grievance on the mercantile community (see the notes to *Forth v Stanton* (1669) 1 Wms Saund (1871 Edn) 226 at 227; and the notes to *Birkmyr v Darnell* (1704) 1 Salk 27 in 1 Smith LC (13th Edn) 331 at 336), and was found, in practice, to lead to many unjust and merely technical defences to actions on guarantees.

1056. Guarantees made by deed. A guarantee, if it is to take effect as a deed rather than as a simple contract, must comply with the requirements for the execution of deeds contained in the Law of Property (Miscellaneous Provisions) Act 1989[1].

1 See the Law of Property (Miscellaneous Provisions) Act 1989 s 1, which inter alia abolishes the requirement of a seal for the valid execution of an instrument as a deed by an individual and applies to instruments delivered as deeds after 31 July 1990: ss 1(11), 5(1), (2); Law of Property (Miscellaneous Provisions) Act 1989 (Commencement) Order 1990, SI 1990/1175. For the requirements for the valid execution of instruments delivered prior to that date see *First National Securities Ltd v Jones* [1978] Ch 109, [1978] 2 All ER 221, CA; *TCB Ltd v Gray* [1986] Ch 621, [1986] 1 All ER 587; affd (without discussing this point) [1987] Ch 458n, [1988] 1 All ER 860, CA; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 27 et seq. As to the execution of deeds by companies see the Companies Act 1985 s 36A (repealed for certain purposes); and COMPANIES vol 7(1) (2004 Reissue) PARA 458 (as to replacement provisions see the Companies Act 2006 ss 44, 45). See also *OTV Birwelco Ltd v Technical and General Guarantee Co Ltd* [2002] EWHC 2240 (TCC), [2002] 4 All ER 668, [2002] 2 All ER (Comm) 1116.

1057. Guarantees of regulated agreements. Any security[1] provided in relation to a consumer credit or consumer hire agreement regulated[2] under the Consumer Credit Act 1974 must be expressed in writing[3]. The form and contents of such instruments are prescribed by regulations made pursuant to that Act[4].

1 'Security' includes inter alia an indemnity or guarantee: Consumer Credit Act 1974 s 189(1).
2 As to the meaning of 'regulated agreement' under the Consumer Credit Act 1974 see s 189(1); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 79. See also PARA 1104 note 13.
3 Consumer Credit Act 1974 s 105(1).
4 See the Consumer Credit (Guarantees and Indemnities) Regulations 1983, SI 1983/1556, regs 3, 4, Schedule; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 201.

B. CONTRACTS WITHIN OR OUTSIDE THE STATUTE OF FRAUDS

1058. Requisites for application of the Statute of Frauds. To bring a case within the Statute of Frauds (1677)[1], the primary liability of another person to the promisee for the debt, default or miscarriage to which the promise of guarantee relates must exist or be contemplated[2], otherwise the statute does not apply, and the promise is then valid and can be sued on, even if it is not evidenced in writing. Accordingly it has been suggested that a promise to pay the rent in arrear to a landlord who has levied a distress, in consideration of his abandoning the distress, is not within the statute[3] on the ground that so long as he holds the goods under distress his remedy for the recovery of the rent by bringing a claim is suspended[4].

The mere existence of a third person's liability is usually sufficient of itself to bring a guarantor's promise within the Statute of Frauds[5], except where the promise to be answerable for that liability is not the immediate object of the contract, but is a mere incident of it[6].

In order to bring a case within the statute it is not necessary that the principal debtor's liability should precede the surety's promise to be answerable[7]. Where it does not do so, however, it is generally more difficult to decide to whom credit is given, a question which then becomes one to be determined by evidence[8].

Even where the promise has reference to an existing liability of a third party, the statute does not apply if the consideration for the promise is the release or doing of something which has the effect of releasing the third party from liability[9], as where the transaction between the parties amounts to a novation of a debt[10], the release of the original debt being, as it usually is in such a case[11], the consideration for the contract; or where there is a novation of a contract[12].

1 See the Statute of Frauds (1677) s 4; and PARA 1052.
2 This is the primary and main principle for testing whether the statute applies to a particular case: see generally *Birkmyr v Darnell* (1704) 1 Salk 27; 1 Smith LC (13th Edn) 331; *Eastwood*

v Kenyon (1840) 11 Ad & El 438 at 446 per Denman CJ; *Hargreaves v Parsons* (1844) 13 M & W 561 at 570 per Parke B; *Lakeman v Mountstephen* (1874) LR 7 HL 17 at 24–25; *Tomlinson v Gill* (1756) Amb 330; *Kirkham v Marter* (1819) 2 B & Ald 613; *Lord Lexington v Clarke* (1689) 2 Vent 223; *Dixon v Hatfield* (1825) 2 Bing 439; *Bird v Gammon* (1837) 3 Bing NC 883; *Batson v King* (1859) 4 H & N 739; *Reader v Kingham* (1862) 13 CBNS 344; *Cripps v Hartnoll* (1863) 4 B & S 414, Ex Ch; *Mallet v Bateman* (1865) LR 1 CP 163, Ex Ch; *Wildes v Dudlow* (1874) LR 19 Eq 198; *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, CA; *Davys v Buswell* [1913] 2 KB 47, CA. For the four other principles for testing whether a promise is within the Statute of Frauds (1677) s 4, and not actionable unless evidenced in writing, see PARAS 1060–1063.

3 *Edwards v Kelly* (1817) 6 M & S 204. See also *Williams v Leper* (1766) 3 Burr 1886, where the landlord had entered to levy the distress, but had not actually distrained; but it appears to have been held that the landlord was nonetheless in possession of the goods, as if he had actually distrained. These cases, however, can be supported on the broader ground that the object of the promisor was to relieve the goods of an incumbrance so as to enable him to deal with them. See further *Bampton v Paulin* (1827) 4 Bing 264; and PARA 1062. This is probably the correct ground, for otherwise a promise made by a person who has no interest in the goods, merely for the purpose of causing them to be restored to the owner, would not be within the statute, a proposition contrary to decided cases: see *Rounce v Woodyard* (1846) 8 LTOS 186; *Bull v Collier* (1842) 4 ILR 107; *Fennell v Mulcahy* (1845) 8 ILR 434, which elaborately reviews the cases.

4 *Edwards v Kelly* (1817) 6 M & S 204 at 209 per Bailey and Holroyd JJ; *Lehain v Philpott* (1875) LR 10 Exch 242 at 246–247. The statute does, however, comprise a promise to pay rent to become due, in consideration of the distress being abandoned, and if the promise is to pay both rent in arrear and to become due, and is not severable (*Wood v Benson* (1831) 2 Cr & J 94), it cannot be enforced at all if not evidenced in writing (*Thomas v Williams* (1830) 10 B & C 664; and see *Lord Lexington v Clarke* (1689) 2 Vent 223).

5 See *Matson v Wharam* (1787) 2 Term Rep 80 at 81 per Buller J; *Anderson v Hayman* (1789) 1 Hy Bl 120; *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 at 784, CA, per Vaughan Williams LJ; *Davys v Buswell* [1913] 2 KB 47, CA; *Colman v Eyles* (1817) 2 Stark 62; *Tomlinson v Gell* (1837) 6 Ad & El 564; *Gull v Lindsay* (1849) 4 Exch 45; *Chater v Beckett* (1797) 7 Term Rep 201; *Barber v Fox* (1816) 1 Stark 270; *Beard v Hardy* (1901) 17 TLR 633, CA. Where, however, a person certifies that another person is able to pay for goods, to be supplied to that other person's order, he does not incur any liability for that other person's default: *Block v Cox* (1860) 2 LT 517, Ex Ch. Nor does a solicitor incur liability for his client by writing to the client's creditor that he (the solicitor) is making arrangements for a loan to his client, and that if the creditor will hold a bill for a few days, he (the solicitor) will be prepared on the client's behalf to take it up: *Allaway v Duncan* (1867) 16 LT 264; and see *Downman v Williams* (1845) 7 QB 103, Ex Ch; *Lewis v Nicholson* (1852) 18 QB 503; *Jones v Beach* (1852) 2 De GM & G 886; *Dixon v Broomfield* (1814) 2 Chit 205. It seems, however, that one who covenants for the act of another is personally bound by his covenant, even though he describes himself in the deed as covenanting for and on the part and behalf of that other person: *Appleton v Binks* (1804) 5 East 148; *Re Bentley, ex p Bentley* (1833) 2 Deac & Ch 578. See also *Pitts v Jones* [2007] EWCA Civ 1301, [2007] All ER (D) 93 (Dec).

6 See PARA 1061.

7 *Matson v Wharam* (1787) 2 Term Rep 80; and see *Jones v Cooper* (1774) 1 Cowp 227; *Peckham v Faria* (1781) 3 Doug KB 13; *Anderson v Hayman* (1789) 1 Hy Bl 120. It was formerly thought that, to bring a case within the Statute of Frauds (1677) s 4 (now as amended) it was essential that the principal debtor's liability should precede that of the guarantor: *Mawbrey v Cunningham* (1773) cited in 2 Term Rep at 81; *Jones v Cooper* (1774) 1 Cowp 227 at 228 per Lord Mansfield CJ.

8 See *Birkmyr v Darnell* (1704) 1 Salk 27; 1 Smith LC (13th Edn) 331; *Mountstephen v Lakeman* (1871) LR 7 QB 196 at 202, Ex Ch; affd sub nom *Lakeman v Mountstephen* (1874) LR 7 HL 17; *Gordon v Martin* (1731) Fitz-G 302; *Beard v Hardy* (1901) 17 TLR 633, CA; *Smith v Rudhall* (1862) 3 F & F 143; *Simpson v Penton* (1834) 2 Cr & M 430; *Keate v Temple* (1797) 1 Bos & P 158; *Rains v Storry* (1827) 3 C & P 130; *Croft v Smallwood* (1793) 1 Esp 121; *Anderson v Hayman* (1789) 1 Hy Bl 120; *Darnell v Tratt* (1825) 2 C & P 82; *Austen v Baker* (1698) 12 Mod Rep 250. Reference to book-keeping entries will sometimes indicate to whom credit was given: see *Austen v Baker*; *Storr v Scott* (1833) 6 C & P 241.

9 See *Goodman v Chase* (1818) 1 B & Ald 297; *Butcher v Steuart* (1843) 11 M & W 857; *Maggs v Ames* (1828) 4 Bing 470; *Tomlinson v Gell* (1837) 6 Ad & El 564; *Bird v Gammon* (1837) 3 Bing NC 883; *Lane v Burghart* (1841) 1 QB 933; *Re Lendon, ex p Lane* (1846) De G 300.

10 *Commercial Bank of Tasmania v Jones* [1893] AC 313, PC; *Anstey v Marden* (1804) 1 Bos & PNR 124; *Hodgson v Anderson* (1825) 5 Dow & Ry KB 735; *Re Lendon, ex p Lane* (1846) De G 300; and see *Wilson v Coupland* (1821) 5 B & Ald 228; *Lacy v M'Neile* (1824) 4 Dow & Ry KB 7; *Fairlie v Denton* (1828) 2 Man & Ry KB 353.

11 *Re Errington, ex p Mason* [1894] 1 QB 11 at 14, DC, per Vaughan Williams J; *Eastwood v Kenyon* (1840) 11 Ad & El 438.

12 *Browning v Stallard* (1814) 5 Taunt 450, where the buyer of goods, being unable to pay for them, transferred them to another who promised to pay for them; and see *Scarf v Jardine* (1882) 7 App Cas 345 at 351, HL, per Lord Selborne LC.

1059. Original promises outside the Statute of Frauds. Original, as distinguished from collateral, conditional or accessory, promises are outside the Statute of Frauds (1677)[1], because they bind the promisor to do something independently of and without regard to another's liability[2].

The following are examples of promises which have been held to be original promises: a promise to pay a certain sum in consideration of the withdrawal of a disputed claim against a third party[3], which must be distinguished from a promise to be answerable for the admitted liability of another in consideration of the creditor forbearing to sue, a promise which is within the statute[4]; a promise to pay another person's debt out of a fund or proceeds of sale of goods belonging to that other person[5], or out of the debtor's own money, when it has been received by the promisor[6]; a promise to pay such debt should the promisor have money in his hands due to the debtor, on a proper assignment and a proper discharge from the debtor[7]; a promise that if the promisee will accept certain bills for a firm the promisor will take care that they will be met at maturity, and will provide the promisee with funds for the purpose[8]; a promise to pay, in certain events, a sum of money to another if that other will procure a loan for the promisor, and guarantee the lender the repayment of it[9]; a promise to a county court enforcement officer about to arrest a debtor under a warrant for non-payment of a judgment debt, to pay the amount of the judgment debt if he will refrain from executing the warrant[10]; a promise that another person will not leave the kingdom without paying his debt[11]; and a promise to procure the signature of another to a guarantee[12].

A promise, however, to pay another's debt out of money due to the promisor himself when received by the promisor[13], or a promise to give a guarantee[14], or a promise to give bills for a debt due to a company[15] is collateral and accessory, and within the statute.

Although all guarantees are contracts of indemnity in the widest sense of the term 'indemnity'[16], an indemnity, in a stricter sense of the word, is a contract in the nature of an original obligation[17], and, therefore, outside the statute. Examples of promises outside the statute are a promise that, if another will, at the promisor's request, put his name to a bill of exchange, the promisor will see him harmless[18]; a promise to indemnify another from the consequences of entering into a surety bond[19]; a promise to hold a co-surety indemnified from all loss arising from the suretyship[20]; a promise to indemnify a third person against the cost of litigation undertaken at the promisor's request[21]; and a promise to be jointly liable with another[22]. In such cases there is really no principal debtor; there are only joint debtors, equally liable[23].

1 Thus if two come to a shop, and one buys, and the other to gain him credit promises the seller that, if the buyer does not pay him, the promisor will do so, this is a collateral undertaking, and not actionable without writing; but on the other hand, if the buyer's friend says to the seller, 'Let him have the goods, and I will see you paid', this is an original undertaking for the promisor himself and outside the statute: *Birkmyr v Darnell* (1704) 1 Salk 27.

2 *Gordon v Martin* (1731) Fitz-G 302 at 303 per Lee J; *Watkins v Perkins* (1697) 1 Ld Raym 224; *Jarmain v Algar* (1826) 2 C & P 249; *Barrell v Trussell* (1811) 4 Taunt 117; *Read v Nash* (1751) 1 Wils 305; *Bird v Gammon* (1837) 3 Bing NC 883; *Pearce v Blagrave* (1855) 3 CLR 338. In *Tomlinson v Gill* (1756) Amb 330, Lord Hardwicke LC distinguished between a promise to pay the original debt on the footing of the original contract and where the promise is founded on a new consideration. This distinction no longer prevails. Moreover, whether the statute applies or not depends not on the consideration for the promise, but on other matters: see PARA 1058.

3 *Read v Nash* (1751) 1 Wils 305.

4 *Fish v Hutchinson* (1759) 2 Wils 94; *Kirkham v Marter* (1819) 2 B & Ald 613; *Cole v Dyer* (1831) 1 Cr & J 461.

5 *Parkins v Moravia* (1824) 1 C & P 376; *Stephens v Pell* (1834) 2 Cr & M 710; *Edwards v Kelly* (1817) 6 M & S 204; and see *Bampton v Paulin* (1827) 4 Bing 264; *Masters v Marriot* (1693) 3 Lev 363.

6 *Andrews v Smith* (1835) 2 Cr M & R 627; *Dixon v Hatfield* (1825) 2 Bing 439.

7 *Sweeting v Asplin* (1840) 7 M & W 165 at 171 per Parke B.

8 *Guild & Co v Conrad* [1894] 2 QB 885, CA, where the promisor's son was a partner in the firm whose bills the promisee was asked to accept.

9 *Re Bolton* (1892) 8 TLR 668.

10 *Reader v Kingham* (1862) 13 CBNS 344; see also PARA 1060 note 5; and see *Bayne v Hare* (1859) 1 LT 40 (payment of rent by mortgagee of leaseholds to avoid sale under distress; IOU given to mortgagee by subsequent mortgagee's brother).

11 *Elkins v Heart* (1731) Fitz-G 202.

12 *Bushell v Beavan* (1834) 1 Bing NC 103.

13 *Morley v Boothby* (1825) 3 Bing 107.

14 *Mallet v Bateman* (1865) LR 1 CP 163, Ex Ch.

15 *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, CA.

16 *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 at 784, CA, per Vaughan Williams LJ; and see *Sampson v Burton* (1820) 4 Moore CP 515.

17 *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 at 785, CA; and see *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294 at 296, [1961] 1 WLR 828 at 830–831, CA, per Holroyd Pearce LJ; *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289 at 296, CA, per Orr LJ; *Guild & Co v Conrad* [1894] 2 QB 885 at 896, CA, per Davey LJ; *Re Bolton* (1892) 8 TLR 668; *Davys v Buswell* [1913] 2 KB 47 at 53–55, CA, per Vaughan Williams LJ. As to the contract of indemnity see PARA 1255 et seq.

18 *Batson v King* (1859) 4 H & N 739 at 740 per Pollock CB; *Guild & Co v Conrad* [1894] 2 QB 885, CA.

19 *Thomas v Cook* (1828) 8 B & C 728.

20 *Rae v Rae* (1857) 6 I Ch R 490.

21 *Howes v Martin* (1794) 1 Esp 162; *Adams v Dansey* (1830) 6 Bing 506; but see *Winckworth v Mills* (1796) 2 Esp 484, where it was ruled by Lord Kenyon CJ that a promise by the indorser of an unpaid note to indemnify the holder if he would proceed to enforce payment against the other parties to the note was within the statute. This must be viewed with some doubt. See also PARA 1255 et seq.

22 *Scholes v Hampson and Merriot* (1806) Fell on Mercantile Guarantees (2nd Edn) 27–28, where Chambre J held that an agreement whereby, in consideration of the supply by A to B of such cotton as he might want, C consented to credit being given by A to B and C jointly, is not within the statute. See also *Bain v Cooper* (1841) 1 Dowl NS 11 at 14 per Parke B.

23 See *Batson v King* (1859) 4 H & N 739; *Waugh v Carver* (1793) 2 Hy Bl 235. A person who was originally a guarantor may subsequently become jointly liable with the principal debtor: *Buck v Hurst and Bailey* (1866) LR 1 CP 297; and see PARA 1019.

1060. Promise must be made to creditor. The Statute of Frauds (1677)[1] does not apply to any promise to be answerable for another, unless the promise is made to the creditor, that is to say to the person to whom another is already or is thereafter to become liable, and who can enforce such liability by bringing a claim[2].

The statute does not, therefore, apply to a promise made to the principal debtor himself[3], by one co-debtor to another[4], nor to a promise that a contract will be performed by a third person, made to a stranger to that contract[5], nor to a promise to indemnify a person becoming bail for another's appearance to a

criminal charge[6], nor, it seems, to a promise to a firm, of which the promisor is himself a member, to be answerable for another to that firm[7].

1 See the Statute of Frauds (1677) s 4; and PARA 1052.
2 Ever since *Eastwood v Kenyon* (1840) 11 Ad & El 438 the rule of law has been as stated in the text; and see *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 at 784, CA, per Vaughan Williams LJ.
3 *Eastwood v Kenyon* (1840) 11 Ad & El 438; and see *Wildes v Dudlow* (1874) LR 19 Eq 198; *Castling v Aubert* (1802) 2 East 325; *Gregory v Williams* (1817) 3 Mer 582.
4 *Thomas v Cook* (1828) 8 B & C 728; and see *Rae v Rae* (1857) 6 I Ch R 490.
5 *Hargreaves v Parsons* (1844) 13 M & W 561 at 570. So, a promise to a county court bailiff for payment of a judgment debt due to the judgment creditor in consideration of the bailiff's forbearing to execute a warrant of commitment against the debtor is outside the statute: *Reader v Kingham* (1862) 13 CBNS 344. See also *Love's Case* (1706) 1 Salk 28, where, however, the decision was that a promise by a third party to the sheriff who had levied under a writ of fieri facias to pay the debt if the sheriff would restore the goods, was a promise made for a legal consideration.
6 *Cripps v Hartnoll* (1863) 4 B & S 414, Ex Ch. As to the illegality of such a promise see, however, PARA 1269.
7 *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84 at 99, CA. It would seem that the Law of Property Act 1925 s 82 (see PARA 1016 note 2; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 264) does not affect this decision.

1061. Liability must result from guarantor's promise only. The Statute of Frauds (1677)[1] does not apply to any case unless the guarantor's liability arises only from his express promise and not otherwise[2].

Where the guarantee does not stand alone but is part of a larger transaction, even an oral guarantee may be enforceable[3]. A promise need not be in writing, even though it involves an obligation to discharge the debt of another, if the assumption of that obligation is only incidental to the transaction[4]. Where the payment of a debt or the fulfilment of a duty by another is a mere indirect incident[5], or ulterior consequence[6], of the terms in which the contract is framed, the transaction is outside the statute.

1 See the Statute of Frauds (1677) s 4; and PARA 1052.
2 See the statement in the notes to *Forth v Stanton* (1669) 1 Saund 210 at 211e, note (l), adopted as correct by Cockburn CJ in *Fitzgerald v Dressler* (1859) 7 CBNS 374; and by the court in *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, CA, where the rule is stated in a different form at 786 per Vaughan Williams LJ; and in *Davys v Buswell* [1913] 2 KB 47 at 53–55, CA. See also *Bank of Scotland v Wright* [1991] BCLC 244 at 264, where the passage in the text, as contained in an earlier edition of this title, is discussed by Brooke J. As to the approach of the court when determining whether a guarantor's liability arises only from his express promise see *Actionstrength Ltd (t/a Vital Resources) v International Glass Engineering IN.GL.EN SpA* [2001] EWCA Civ 1477, [2002] 4 All ER 468, [2002] 1 WLR 566; affd [2003] UKHL 17, [2003] 2 AC 541, [2003] 2 All ER 615.
3 *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84 at 123, [1981] 3 All ER 577 at 585, CA, per Eveleigh LJ, applying *Sutton & Co v Grey* [1894] 1 QB 285, CA; and see *Actionstrength Ltd (t/a Vital Resources) v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17, [2003] 2 AC 541, [2003] 2 All ER 615 (the ordinary rules of estoppel are applicable to guarantees); and ESTOPPEL vol 16(2) (Reissue) PARA 960.
4 See *Orrell v Coppock* (1856) 2 Jur NS 1244, where the promise was to pay a sum to compromise a claim against third parties, to which claim the promisor also was alleged to be liable, although he could have successfully resisted it; *Macrory v Scott* (1850) 5 Exch 907, where judgment had been recovered against the promisor as guarantor and he subsequently agreed that the judgment should be held by the creditor as security for the debt of another, notwithstanding that at the time of the agreement facts had occurred which had put an end to the promisor's liability under the judgment, although the judgment itself was still technically subsisting; *Masters v Marriot* (1693) 3 Lev 363, where the promise to be answerable for payment of money by the promisor's own agent was treated as being merely expressive of an already existing

liability on the part of the promisor himself; *Ardern v Rowney* (1805) 5 Esp 254, where the promisor merely agreed to be answerable for a definite sum due from another, to the extent only of the promisor's actual indebtedness to any such person; *Hodgson v Anderson* (1825) 5 Dow & Ry KB 735, where the promisors orally agreed to apply money, for which they were already accountable to their principal, in discharge of the principal's liability to his own creditor, to whom the promise was made; and *Stephens v Squire* (1696) 5 Mod Rep 205, where the promise was made by one of several defendants to pay a certain sum and costs if the action were abandoned against all the defendants. Perhaps also *Houlditch v Milne* (1800) 3 Esp 86 is to be explained on the ground that there the promisor himself was already liable for repairs to a third person's goods, independently of his express promise to be answerable for the same, in consideration of which the promisee abandoned his lien on the goods.

5 *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 at 786, CA, per Vaughan Williams LJ; and see *Huggard v Representative Church Body* [1916] 1 IR 1.

6 *Walker v Hill* (1860) 5 H & N 419; *Sutton & Co v Grey* (1893) 69 LT 354 at 355 per Bowen LJ; affd [1894] 1 QB 285, CA.

1062. Promisor interested in incumbered property. Where the person making the promise has personally, or through an agent, an interest in property which is subject to some incumbrance, such as a lien or the right of a creditor to distrain, and obtains a discharge of that incumbrance by promising the creditor to be responsible for the payment of the debt in respect of which it exists, the promise is not within the Statute of Frauds (1677)[1].

The interest, however, must be a species of interest known to the law[2], the object of the promise must be to liberate the property for the benefit of the promisor, and not merely for the benefit of the debtor, and the property must be surrendered to the promisor[3], and if and in so far as the promise is to pay a debt in respect of which the property is not incumbered, the promise must be in writing[4].

The Statute of Frauds applies with all its rigour to cases where the guarantor executes a guarantee for the liabilities of a third party where there is no pre-existing liability binding his property which he is seeking to release, whether or not he also charges his property with the performance of those liabilities as part of the same or some later series of transactions[5].

1 See *Williams v Leper* (1766) 3 Burr 1886, where the promisor was an auctioneer employed by the holders of a bill of sale to sell the goods, and promised the landlord, who had entered for the purpose of distraining, that if he would refrain from exercising his right he would pay the rent in arrear. In the report of the case in 2 Wils 308 it is stated that the defendant was actually the holder of the bill of sale, but this does not affect the principle, for an auctioneer has a special property in the goods: see generally AUCTION. To the like effect are *Edwards v Kelly* (1817) 6 M & S 204; and *Bampton v Paulin* (1827) 4 Bing 264. See also *Walker v Taylor* (1834) 6 C & P 752, where the promise was made in consideration of the promisee's abandoning his lien on certain beer licences in which the promisor had a direct interest; *Castling v Aubert* (1802) 2 East 325, where it was agreed that if the promisee would surrender his lien on certain insurance policies in respect of acceptances which he had given for a third person, the promisor, who required possession of the policies in order to collect the amounts due under them on behalf of that third person, would provide for the acceptances at maturity; *Fitzgerald v Dressler* (1859) 7 CBNS 374, where the unpaid seller abandoned his lien and delivered the goods to a sub-purchaser on the sub-purchaser's undertaking to pay the purchase price due from the original purchaser. Contrast *Gull v Lindsay* (1849) 4 Exch 45, where a promise to satisfy a mere claim against a third person given in order to prevent the promisee asserting a lien based upon it was held to be within the statute.

2 *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, CA; and see *Davys v Buswell* [1913] 2 KB 47, CA.

3 *Clancy v Piggott* (1835) 2 Ad & El 473; *Rounce v Woodyard* (1846) 8 LTOS 186; *Bull v Collier* (1842) 4 ILR 107; *Fennell v Mulcahy* (1845) 8 ILR 434. If *Houlditch v Milne* (1800) 3 Esp 86 decides anything to the contrary, it cannot be regarded as law. See also *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, CA. The case of *Barrell v Trussell* (1811) 4 Taunt 117 seems to have been decided on the ground that it did not appear that there was any promise to

pay the debt of another at all. A distinction must be drawn between the cases where the promise was made to the creditor and those where it was made to somebody else, as in *Reader v Kingham* (1862) 13 CBNS 344, where the promise is not within the statute because it is not made to the creditor: see PARA 1060.

4 *Thomas v Williams* (1830) 10 B & C 664. The promise, however, may be severable, in which case, although unenforceable as regards the unsecured debt, it will be good as regards the secured debt: see *Wood v Benson* (1831) 2 Cr & J 94.

5 *Bank of Scotland v Wright* [1991] BCLC 244 at 264 per Brooke J.

1063. Essential object of agreement. For the case to fall within the Statute of Frauds (1677)[1], the main or immediate object of the agreement between the parties must be to secure the payment of a debt or the fulfilment of a duty by a third person[2].

Hence, the promise of a del credere agent who, for a higher commission, guarantees the solvency of those to whom he sells his principal's goods need not be in writing[3]. Such a contract is not really one of guarantee, but one settling the terms on which an agent is to be employed[4], its main object being not to obtain a guarantee in respect of a third person's debt or liability but to secure the exercise of greater care by the agent in selling only to solvent purchasers[5].

If, however, the payment of a third person's debt is the main object of a contract, the statute applies, whatever the motive may be for entering into the contract[6].

1 See the Statute of Frauds (1677) s 4; and PARA 1052.

2 *Macrory v Scott* (1850) 5 Exch 907 at 914. Thus, the statute does not apply to an agreement by which property already pledged for one debt is pledged for another, and where, although its ultimate object is the payment of a third person's debt, its immediate object is only to appropriate a fund in a particular way: *Macrory v Scott*. This rule also covers the property cases dealt with in PARA 1062: see *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, CA.

3 *Couturier v Hastie* (1852) 8 Exch 40; revsd on other grounds (1856) 5 HL Cas 673; *Wickham v Wickham* (1855) 2 K & J 478; *Wolff v Koppel* 5 Hill 458 (NY, 1846); *Fleet v Murton* (1871) LR 7 QB 126 at 132–133 per Blackburn J. An agreement in the nature of a del credere agreement may even be inferred from evidence of the course of conduct between the parties: *Shaw v Woodcock* (1827) 7 B & C 73. As to the meaning of 'del credere agent' see AGENCY vol 1 (2008) PARA 13.

4 *Sutton & Co v Grey* (1893) 69 LT 354 at 355 per Bowen LJ; affd [1894] 1 QB 285, CA.

5 See *Sutton & Co v Grey* (1893) 69 LT 354 at 355; affd [1894] 1 QB 285, CA; *Couturier v Hastie* (1852) 8 Exch 40; revsd on other grounds (1856) 5 HL Cas 673; *Wickham v Wickham* (1855) 2 K & J 478; *Wolff v Koppel* 5 Hill 458 (NY, 1846); *Fleet v Murton* (1871) LR 7 QB 126.

6 *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, CA; *Davys v Buswell* [1913] 2 KB 47, CA. These cases explained and qualified the somewhat wide propositions laid down in *Sutton & Co v Grey* (1893) 69 LT 354; affd [1894] 1 QB 285, CA.

C. NATURE OF WRITTEN EVIDENCE REQUIRED

1064. Satisfying the statutory requirements. The Statute of Frauds (1677)[1] prescribes two separate ways in which a contract of guarantee may be made enforceable. The first way is by having a written[2] agreement signed[3] by the party to be charged or his agent[4]. The second way is by having a note or memorandum[5] of the agreement similarly signed. In the latter case, the agreement itself may be oral[6].

1 See the Statute of Frauds (1677) s 4; and PARA 1052.

2 'Writing' includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form: Interpretation Act 1978 s 5, Sch 1. This definition applies to Acts whenever passed: s 22(1), Sch 2 para 4(1)(b).

3 As to what constitutes a sufficient signature see PARA 1076.

4 As to who must sign the agreement or memorandum see PARAS 1074–1075.
5 As to what constitutes a sufficient memorandum see PARA 1067 et seq.
6 *Elpis Maritime Co Ltd v Marti Chartering Co Inc* [1992] 1 AC 21 at 27, [1991] 3 All ER 758 at 762, HL, per Lord Brandon of Oakbrook. See also PARA 1066.

1065. A written agreement. The requirements of the Statute of Frauds (1677)[1] will be satisfied where the contract of guarantee is made in writing, signed by the guarantor or his agent[2]. The requirements as to writing are equally applicable to a contract to give a guarantee[3] as to a contract of guarantee itself[4].

1 See the Statute of Frauds (1677) s 4; and PARA 1052.
2 See the Statute of Frauds (1677) s 4; and *Elpis Maritime Co Ltd v Marti Chartering Co Inc* [1992] 1 AC 21 at 28, [1991] 3 All ER 758 at 762, HL, per Lord Brandon of Oakbrook. As to the meaning of 'writing' see PARA 1064 note 2. As to what constitutes a sufficient signature see PARA 1076.
3 It is a question of construction whether the words used amount to a guarantee or an offer to give one: see *Jones v Williams* (1841) 7 M & W 493; *Bank of Montreal v Munster Bank* (1876) IR 11 CL 47; *Jays Ltd v Sala* (1898) 14 TLR 461.
4 *Mallet v Bateman* (1865) LR 1 CP 163, Ex Ch.

1066. A written memorandum. As well as by a written agreement[1], the requirements of the Statute of Frauds (1677)[2] may be satisfied by any sufficient note or memorandum of the promise of guarantee signed by the guarantor or his agent[3]. The memorandum will usually come into existence as a record of an already completed contract[4]. However, in one exceptional case, the memorandum may antedate the contract. Where there is a written and signed offer of guarantee, there will be a sufficient memorandum to bind the offeror, whether the acceptance of that offer is oral[5] or written[6].

The existence of such a memorandum before a claim is brought is, however, essential[7]. This is anomalous, since the Statute of Frauds affects only the mode of proof, but the rule is founded on the wording of the relevant statutory provision[8].

The statute need only once be satisfied by a memorandum in writing[9]. Where the original written evidence of a guarantee is lost, oral evidence of its having existed is admissible[10].

1 See PARA 1065.
2 See the Statute of Frauds (1677) s 4; and PARA 1052.
3 See *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84 at 100, CA, per AL Smith LJ, cited with approval in *Elpis Maritime Co Ltd v Marti Chartering Co Inc* [1992] 1 AC 21 at 32–33, [1991] 3 All ER 758 at 766, HL, per Lord Brandon of Oakbrook. As to what constitutes a sufficient memorandum see PARA 1067 et seq.
4 See *Longfellow v Williams* (1804) Peake Add Cas 225; *Stewart v Eddowes; Hudson v Stewart* (1874) LR 9 CP 311; *Warner v Willington* (1856) 3 Drew 523.
5 *Powers v Fowler* (1855) 4 E & B 511; *Benecke v Chadwicke* (1856) 4 WR 687; *Warner v Willington* (1856) 3 Drew 523 at 532; *Smith v Neale* (1857) 2 CBNS 67; *Liverpool Borough Bank v Eccles* (1859) 4 H & N 139; *Reuss v Picksley* (1866) LR 1 Exch 342.
6 *Parker v Clark* [1960] 1 All ER 93 at 102, [1960] 1 WLR 286 at 295 per Devlin J, not following a contrary dictum of Fry J in *Munday v Asprey* (1880) 13 ChD 855 at 857.
7 *Lucas v Dixon* (1889) 22 QBD 357, CA; *Sievewright v Archibald* (1851) 17 QB 103 at 107; *Middleton v Brewer* (1790) Peake 15; *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84 at 97, CA, per Lindley LJ; *Farr, Smith & Co Ltd v Messers Ltd* [1928] 1 KB 397.
8 *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84 at 97, CA, per Lindley LJ.
9 Before the Statute of Frauds Amendment Act 1828 s 1 (repealed by the Limitation Act 1939 Schedule and re-enacted in s 24(1), now itself re-enacted by the Limitation Act 1980 s 30(1): see LIMITATION OF ACTIONS vol 28 (Reissue) PARA 1084), which required acknowledgments to be in writing, an oral promise was sufficient to revive a liability on a written guarantee which was barred by the Statute of Limitations: *Gibbons v McCasland* (1818) 1 B & Ald 690.

10 *Barrass v Reed* (1898) Times, 28 March; *Crays Gas Co v Bromley Gas Consumers' Co* (1901) Times, 23 March, CA.

1067. Form of agreement or memorandum. No special form of words is required to be used in framing a guarantee[1], and the word 'guarantee' need not be employed, since what is material is the substance of the contract, not the name or form given to it by the parties[2].

The rules governing the form of the memorandum of any other class of contract required by statute to be evidenced in writing apply in the case of a memorandum of a guarantee[3]. The document need not have been intended as a memorandum[4]. The following are examples[5] of documents which have been held to constitute a sufficient memorandum: a rough draft, the parties contemplating the execution of a more formal agreement[6]; a recital in a will[7]; an affidavit[8]; a letter to a third party[9], including an agent of the guarantor[10] or his solicitor[11], or the solicitor of the other party[12]; a reply to a requisition[13]; a receipt[14]; a resolution in the minute book of a company[15]; a pleading in previous proceedings[16]; a telegram[17]; a telex message[18]; a statement in a rent book[19]; a recital in a settlement[20]; and a signed entry in the guarantor's own diary[21].

The memorandum must contain an express or implied recognition that a contract of guarantee was entered into[22]. So a document acknowledging the existence of a contract but repudiating liability under it may be a sufficient memorandum[23], but not a document cancelling the contract[24] nor a document denying the existence of a contract[25]. The Statute of Frauds (1677)[26] does not preclude an application for rectification of a memorandum of guarantee to correct errors[27].

The indorsement by a guarantor of his undertaking to be answerable, made on the agreement between the principal debtor and the creditor, and referring to it, suffices[28].

If the limit on a guarantee is to be increased then the necessary amendment must itself constitute a sufficient memorandum for the purposes of the Statute of Frauds (1677)[29].

1 *Welford v Beazely* (1747) 1 Ves Sen 6.
2 See eg *Seaton v Heath, Seaton v Burnand* [1899] 1 QB 782 at 792, CA, per Romer LJ (revsd without affecting this point sub nom *Seaton v Burnand, Burnand v Seaton* [1900] AC 135, HL); *Re Denton's Estate, Licenses Insurance Corpn and Guarantee Fund Ltd v Denton* [1904] 2 Ch 178 at 188, CA; *Reynolds v Wheeler* (1861) 10 CBNS 561. The name given to a contract is, however, some evidence of the intention of the parties: see eg *Dane v Mortgage Insurance Corpn* [1894] 1 QB 54 at 60, CA.
3 See note 5.
4 *Welford v Beazely* (1747) 1 Ves Sen 6; and see the cases cited in PARA 1070. Cf *Daniels v Trefusis* [1914] 1 Ch 788 at 799.
5 Some of these examples are taken from cases concerning the Statute of Frauds (1677) s 17 (repealed) or the Law of Property Act 1925 s 40 (repealed).
6 *Gray v Smith* (1889) 43 ChD 208, CA; *Morgan v Worthington* (1878) 38 LT 443. It is, of course, essential to prove that the informal agreement amounts to a concluded contract.
7 *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84, CA.
8 *Barkworth v Young* (1856) 4 Drew 1.
9 *Gibson v Holland* (1865) LR 1 CP 1.
10 *Moore v Hart* (1683) 1 Vern 110, 201; *Longfellow v Williams* (1804) Peake Add Cas 225; *Gibson v Holland* (1865) LR 1 CP 1.
11 *Smith-Bird v Blower* [1939] 2 All ER 406 (disapproved on another point in *Davies v Sweet* [1962] 2 QB 300, [1962] 1 All ER 92, CA). See also *Waldron v Jacob and Millie* (1870) IR 5 Eq 131; *Smith v Mansi* [1962] 3 All ER 857, [1963] 1 WLR 26, CA.
12 *Bateman v Phillips* (1812) 15 East 272.
13 *Buxton v Bellin* (1877) 3 VLR 243.
14 *Evans v Prothero* (1852) 1 De GM & G 572; *North v Loomes* [1919] 1 Ch 378.

15 *Jones v Victoria Graving Dock Co* (1877) 2 QBD 314, CA; *Re Strathblaine Estates Ltd* [1948] Ch 228, [1948] 1 All ER 162. Cf *Eley v Positive Government Security Life Assurance Co Ltd* (1875) 1 ExD 20; affd (1876) 1 ExD 88, CA.
16 *Grindell v Bass* [1920] 2 Ch 487; *Farr, Smith & Co v Messers Ltd* [1928] 1 KB 397.
17 *Godwin v Francis* (1870) LR 5 CP 295; *McBlain v Cross* (1871) 25 LT 804.
18 *Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone* [1987] 1 Lloyd's Rep 546.
19 *Hill v Hill* [1947] Ch 231, [1947] 1 All ER 54, CA.
20 *Re Holland, Gregg v Holland* [1902] 2 Ch 360, CA.
21 *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84 at 100, CA, per AL Smith LJ.
22 *Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone* [1987] 1 Lloyd's Rep 546 at 556 per Staughton J, applying *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146, [1974] 1 All ER 209, CA.
23 *Jackson v Lowe* (1822) 1 Bing 9; *Wilkinson v Evans* (1866) LR 1 CP 407; *Buxton v Rust* (1872) LR 7 Exch 279; *Leather-Cloth Co v Hieronimus* (1875) LR 10 QB 140; *Dewar v Mintoft* [1912] 2 KB 373; *Thirkell v Cambi* [1919] 2 KB 590, CA.
24 *Elliott v Dean* (1884) Cab & El 283.
25 *Thirkell v Cambi* [1919] 2 KB 590, CA; *Société Capa Srl v Acatos & Co Ltd* [1953] 2 Lloyd's Rep 185.
26 Ie precluded by the Statute of Frauds (1677) s 4: see PARA 1052.
27 See *GMAC Commercial Credit Development Ltd v Sandhu* [2004] EWHC 716 (Comm), [2006] 1 All ER (Comm) 268, [2004] All ER (D) 589 (Mar).
28 *Stead v Liddard* (1823) 8 Moore CP 2; *Bluck v Gompertz* (1852) 7 Exch 862.
29 Ie a sufficient memorandum for the purposes of the Statute of Frauds (1677) s 4: see PARA 1052. For a case where the requirements of s 4 were found to be met see *Moat Financial Services v Wilkinson* [2005] EWCA Civ 1253.

1068. Surety's liability on bill or note. A promise to guarantee the due honouring of a bill or note is within the Statute of Frauds (1677)[1]. However, a person who signs a bill of exchange as guarantor for the acceptor will be liable to the drawer or payee upon proof that that is what the parties intended[2], even in the absence of a writing sufficient to satisfy the Statute of Frauds[3].

1 *G & H Montage GmbH v Irvani* [1990] 2 All ER 225 at 229–230, [1990] 1 WLR 667 at 672, CA, per Mustill LJ. See also *Steele v M'Kinlay* (1880) 5 App Cas 754, HL; *Jenkins & Sons v Coomber* [1898] 2 QB 168; *MT Shaw & Co Ltd v Holland* [1913] 2 KB 15, CA.
2 He may, of course, enter into an effective guarantee by a collateral writing: see *Morris v Stacey* (1816) Holt NP 153, where a letter returning bills of exchange that were sent to the writer of the letter to indorse, which he refused to do, at the same time adding that should the bills not be honoured when due the writer would see them paid, was held to satisfy the statute. See also *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corpn Ltd (liquidators)* (1874) LR 7 HL 348; *Singer v Elliott* (1888) 4 TLR 524, CA.
3 *G & H Montage GmbH v Irvani* [1990] 2 All ER 225 at 230, [1990] 1 WLR 667 at 672, CA, per Mustill LJ, affirming Saville J at [1988] 1 WLR 1285. See also *Wilkinson & Co v Unwin* (1881) 7 QBD 636, CA; *Gerald McDonald & Co v Nash & Co* [1924] AC 625, HL; *McCall Bros Ltd v Hargreaves* [1932] 2 KB 423. Cf *Singer v Elliott* (1888) 4 TLR 524, CA; *Stagg, Mantle and Co v Brodrick* (1895) 12 TLR 12, CA. See also the Bills of Exchange Act 1882 s 56; and PARA 1579. For the principle that oral evidence may not be adduced to vary the terms of the instrument see *Hitchings and Coulthurst Co v Northern Leather Co of America and Doushkess* [1914] 3 KB 907; and PARA 1447.

1069. Form of guarantee by company. A contract of guarantee may be made (1) by a company[1], by writing under its common seal[2]; or (2) on behalf of a company, by any person acting under its authority, express or implied[3]. The requirements of the Statute of Frauds (1677)[4] apply to a guarantee by a company as they apply to guarantees by an individual[5].

Directors may bind themselves personally by a guarantee which they sign or adopt[6]. When, therefore, they do not intend to bind themselves personally, but are acting solely on behalf of the company, they should be careful to word the contract accordingly[7].

1 As to the meaning of 'company' see PARA 1031 note 1.

2 A company is no longer obliged to have a company seal. The same effect is produced if the document is signed by two directors (or, in the case of a private company, by a director and secretary). On the execution of documents generally see the Companies Act 1985 s 36A (repealed for certain purposes); and COMPANIES vol 7(1) (2004 Reissue) PARA 458 (as to replacement provisions see the Companies Act 2006 s 44).

3 See the Companies Act 1985 s 36 (prospectively repealed); and COMPANIES vol 7(1) (2004 Reissue) PARA 457 (as to replacement provisions see the Companies Act 2006 s 43).

4 See the Statute of Frauds (1677) s 4; and PARA 1052.

5 See the Companies Act 1985 s 36 (prospectively repealed); and note 3. As to the execution by companies of guarantees as deeds see PARA 1056; and as to contracts by companies see generally COMPANIES vol 7(1) (2004 Reissue) PARA 457 et seq.

6 See *Re Dover and Deal Rly, Cinque Ports, Thanet and Coast Junction Co, Lord Londesborough's Case* (1854) 4 De GM & G 411; *Chapleo v Brunswick Permanent Building Society* (1881) 6 QBD 696, CA.

7 See *Chapman v Smethurst* [1909] 1 KB 927, CA, distinguishing *Dutton v Marsh* (1871) LR 6 QB 361; *W and T Avery Ltd v Charlesworth* (1914) 31 TLR 52, CA. Cf *VSH Ltd v BKS Air Transport Ltd and Stevens* [1964] 1 Lloyd's Rep 460; *Sun Alliance Pensions Life and Investments Services Ltd v Webster* [1991] 2 Lloyd's Rep 410; *Elpis Maritime Co Ltd v Marti Chartering Co Inc* [1992] 1 AC 21, [1991] 3 All ER 758, HL. In those cases, directors' signatures on behalf of the company as principal debtor were held to be sufficient to satisfy the statute and to make the guarantee recited in those contracts enforceable against the directors as guarantors. Contrast, however, the decision in *Manches LLP v Freer* [2006] EWHC 991 (QB), [2006] All ER (D) 428 (Nov): see PARAS 1027, 1074.

1070. Memorandum formed by more than one document. The memorandum need not be in one single document. There are two situations in which a memorandum may be constituted by two or more documents: (1) if all the documents are signed by the guarantor or his agent and can be seen to refer to the same transaction[1]; (2) if only one of the documents is so signed, but that document contains some express or implied reference to another document, then oral evidence is admissible to identify that other document and the two documents may be read together[2].

1 *Sheers v Thimbleby & Son* (1897) 76 LT 709, CA.

2 *Timmins v Moreland Street Property Co Ltd* [1958] Ch 110 at 130, [1957] 3 All ER 265 at 276, CA, per Jenkins LJ; approved in *Elias v George Sahely & Co (Barbados) Ltd* [1983] 1 AC 646 at 655, [1982] 3 All ER 801 at 807, PC; *Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone* [1987] 1 Lloyd's Rep 546 (memorandum of guarantee consisting of two telex messages and, possibly, the charterparty itself).

1071. Description of parties. In order to satisfy the Statute of Frauds (1677)[1], all the contracting parties must be named or sufficiently described as such in writing[2]. It is insufficient that their names are mentioned merely as descriptive of the subject matter of the contract[3]. The memorandum need not, however, be addressed to the other contracting party[4].

A mere misdescription, whether it be of one of the parties or of the principal debtor, will not render a guarantee unenforceable[5]. It is otherwise where the name of the principal debtor is omitted[6].

1 See the Statute of Frauds (1677) s 4; and PARA 1052.

2 *Williams v Lake* (1859) 2 E & E 349; *Sheers v Thimbleby & Son* (1897) 76 LT 709 at 711, CA; and see *Brettel v Williams* (1849) 4 Exch 623 at 628. The ruling in *Walton v Dodson* (1827) 3 C & P 162 that a memorandum, not addressed to or naming anybody, will enure for the benefit of those to whom or for whose use it was delivered, can scarcely be supported. Where agents are acting for principals, the agents' names suffice, even if the agency is not disclosed: *Filby v Hounsell* [1896] 2 Ch 737. Both the name and address of a company form part of its identity: *Dumford Trading AG v OAO Atlantrybflot* [2005] EWCA Civ 24, [2005] 1 Lloyd's Rep 289.

For a case in which an incorrect corporate name had been used but the circumstances clearly pointed to the defendant, see *Union Bank (UK) plc v Pathak* [2006] EWHC 2614 (Ch). [2006] All ER (D) 210 (May).

3 *Vandenbergh v Spooner* (1866) LR 1 Exch 316; *Newell v Radford* (1867) LR 3 CP 52.

4 *Gibson v Holland* (1865) LR 1 CP 1. Where a guarantee was addressed by the defendant to the plaintiff 's attorney, it was held that the plaintiff was entitled to the benefit of it: *Bateman v Phillips* (1812) 15 East 272; and see *Longfellow v Williams* (1804) Peake Add Cas 225.

5 *Lombard Finance Ltd v Brookplain Trading Ltd* [1991] 2 All ER 762, [1991] 1 WLR 271, CA, where oral evidence was admitted to prove the identity of the person referred to. See also *Dumford Trading AG v OAO Atlantrybflot* [2005] 1 Lloyd's Rep 289, [2004] All ER (D) 132 (May), considering dicta of Lord Phillips of Worth Matravers in *Shogun Finance Ltd v Hudson* [2003] UKHL 62 at [120]–[121], [2004] 1 AC 919, [2004] 1 All ER 215 (a case concerned with a hire-purchase agreement). See also *Dumford Trading AG v OAO Atlantrybflot* [2005] EWCA Civ 24, [2005] 1 Lloyd's Rep 289; and note 2.

6 See *UCB Corporate Services Ltd (formerly UCB Bank plc) v Harris* [2000] All ER (D) 2203; *UCB Corporate Services Ltd v Clyde & Co (a firm)* [2000] All ER (D) 141 (where the question of a solicitor's liability in negligence to the bank for failing to obtain an enforceable guarantee is discussed).

1072. Written evidence of consideration unnecessary. By virtue of the Mercantile Law Amendment Act 1856, provided that the requirements of the Statute of Frauds (1677)[1] are otherwise satisfied, a guarantee will not be unenforceable by reason only that the consideration for the guarantor's promise[2] does not appear in writing or by necessary inference from a written document[3].

The 1856 Act does not make a promise good which was not so before[4], but merely dispenses with any written statement of the consideration. It does not dispense with the necessity for a consideration[5]. If the written memorandum states a bad consideration, it will not be helped by the Act[6]. It seems that the parties are bound by any written statement of the consideration which they choose to make[7], although, in cases of ambiguity, oral evidence is admissible to show that the consideration alleged is sufficient in law[8]. Where the whole promise cannot be collected from the written memorandum of the contract, the Statute of Frauds is not satisfied, and oral evidence of the consideration may not be given in order to explain the promise[9]. It is not, however, necessary for a written memorandum of guarantee, even though it unnecessarily embodies the consideration, to state by whom the consideration is payable, if this can be inferred, and the meaning then is that it was paid by the party to whom the memorandum was given[10].

1 See the Statute of Frauds (1677) s 4; and PARA 1052.

2 It was formerly held that, because the Statute of Frauds (1677) s 4 required 'the agreement' to be in writing, there had to be written evidence, not only of the promise, but also of the consideration, in order to satisfy the requirements of the statute (see *Wain v Warlters* (1804) 5 East 10; 1 Smith LC (13th Edn) 358; *Saunders v Wakefield* (1821) 4 B & Ald 595; *Egerton v Mathews* (1805) 6 East 307), as the two together constitute the agreement, in the case of every contract not made by deed (*Herman v Jeuchner* (1885) 15 QBD 561 at 563, CA, per Sir Baliol Brett MR). The cases as to whether the consideration for the promise of guarantee duly appeared in writing, or by necessary inference from a written document, so as to satisfy the Statute of Frauds (1677) s 4 (now as amended) are very numerous. The Mercantile Law Amendment Act 1856 s 3 (as to which see note 3; and PARA 1055) has made these cases obsolete. However, as the principles established by them are still sometimes invoked when it has to be determined whether the surety's promise is sufficiently stated in writing, a brief reference will be made to them. From these cases it appears that it was not necessary that the consideration should be stated in express terms, it being sufficient if the written memorandum were so framed that a person of ordinary capacity must infer from it what the consideration really was (see *Hawes v Armstrong* (1835) 1 Scott 661; *Caballero v Slater* (1854) 14 CB 300; *Jarvis v Wilkins* (1841) 7 M & W 410; *Goldshede v Swan* (1847) 1 Exch 154), or if the nature of the consideration could be inferred from the written memorandum (see *James v Williams* (1834) 4 B & Ad 1109; *Raikes v Todd* (1838) 8 Ad & El 846; *Thackwell v Gardiner* (1851) 5

De G & Sm 58), with or without the aid of oral evidence as to extrinsic circumstances, or the meaning of the words used (see *Edwards v Jevons* (1849) 8 CB 436; *Goldshede v Swan* above; *Bainbridge v Wade* (1850) 16 QB 89; *Russell v Moseley* (1822) 3 Brod & Bing 211). On the other hand, the written memorandum was held to be insufficient to satisfy the Statute of Frauds if two distinct considerations could, with equal probability, be inferred from it as the inducement for the guarantor's promise: *Baring v Grieve* (1858) 6 WR 466; and see *Bentham v Cooper* (1839) 5 M & W 621; *Cole v Dyer* (1831) 1 Cr & J 461. When a defendant to an action on a guarantee pleaded that there was no memorandum in writing of the consideration, the plaintiff was at liberty to reply that the consideration was in writing without setting out the actual memorandum in his pleading: see *Wakeham v Sutton* (1834) 2 Ad & El 78. See also de Colyar's Law of Guarantees (3rd Edn) 166 et seq.

3 Mercantile Law Amendment Act 1856 s 3 (amended by the Statute Law Revision Act 1892).

4 *Holmes v Mitchell* (1859) 7 CBNS 361 at 367 per Byles J.

5 *Glover v Halkett* (1857) 2 H & N 487 at 489; and see *Baring v Grieve* (1858) 6 WR 466. As to the requirement for consideration in the case of a guarantee not made by deed see PARA 1047.

6 *Wood v Priestner* (1866) LR 2 Exch 66 at 70 per Bramwell B; affd (1867) LR 2 Exch 282, Ex Ch.

7 *Oldershaw v King* (1857) 2 H & N 517, Ex Ch.

8 *Hoad v Grace* (1861) 7 H & N 494.

9 *Holmes v Mitchell* (1859) 7 CBNS 361; *Sheers v Thimbleby & Son* (1897) 76 LT 709 at 711, CA; and see *Peek v North Staffordshire Rly Co* (1863) 10 HL Cas 473.

10 *Dutchman v Tooth* (1839) 5 Bing NC 577.

1073. Memorandum must include all material terms. Except for the consideration[1], the memorandum must evidence all the material terms of the contract of guarantee which have been expressly agreed[2]. However, it need not state any term which would be implied[3]. Nor need it state terms which form part of an independent collateral contract[4]. Objective extrinsic evidence is admissible to explain the meaning of the terms used in the memorandum[5].

Oral evidence is admissible to show that a written document is not itself a contract and therefore at the most a memorandum, and then to show that the document does not record all the terms of the contract[6].

Where a term omitted from the memorandum is solely for the creditor's benefit, he may waive it and enforce the guarantee as evidenced in the memorandum[7]. Equally, if the omitted term is exclusively for the benefit of the guarantor, the creditor may consent to be bound by the omitted term and the entire agreement may then be enforced[8].

The equitable remedy of rectification may be available where a term has been omitted from a written contract of guarantee owing to a mistake, provided that there is either a prior concluded agreement or a clear common intention of the parties which had some outward expression of accord[9]. Where the remedy is available the court may in one claim both rectify the contract and enforce it[10].

1 See the Mercantile Law Amendment Act 1856 s 3; and PARA 1055.

2 *Holmes v Mitchell* (1859) 7 CBNS 361 at 367, 370: 'the whole of the promise must ... appear in writing' (as to the authorship of the judgment in that case see the editor's note to *Perrylease Ltd v Imecar AG* [1987] 2 All ER 373 at 379, [1988] 1 WLR 463 at 471). See also *Cox v Middleton* (1854) 2 Drew 209; *Caddick v Skidmore* (1857) 2 De G & J 52; *Donnison v People's Café Co* (1881) 45 LT 187, CA; *Gray v Smith* (1889) 43 ChD 208, CA; *Van Praagh v Everidge* [1903] 1 Ch 434, CA; *Blackburn v Walker* [1920] WN 291; *Johnson v Humphrey* [1946] 1 All ER 460; *Hawkins v Price* [1947] Ch 645, [1947] 1 All ER 689; *Beckett v Nurse* [1948] 1 KB 535, [1948] 1 All ER 81, CA; *Burgess v Cox* [1951] Ch 383, [1950] 2 All ER 1212; *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146, [1974] 1 All ER 209, CA; *Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone* [1987] 1 Lloyd's Rep 546 at 556 per Staughton J. In *Barclays Bank Ltd v Caldwell* (25 July 1986, unreported), ChD, the guarantors signed an 'all moneys' guarantee in the bank's standard form, which did not refer to the oral agreement which they had reached with the manager limiting their liability to the additional money agreed to be lent. The guarantee was held to be unenforceable.

3 *Gray v Smith* (1889) 43 ChD 208, CA; *Ward v National Bank of New Zealand* (1886) 4 NZLR 35. Cf *Timmins v Moreland Street Property Co* [1958] Ch 110, [1957] 3 All ER 265, CA; *Farrell v Green* (1974) 232 Estates Gazette 587.

4 See *De Lassalle v Guildford* [1901] 2 KB 215, CA; *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, [1958] 2 All ER 733; *Record v Bell* [1991] 4 All ER 471, [1991] 1 WLR 853; *Tootal Clothing Ltd v Guinea Properties Management Ltd* (1992) 64 P & CR 452, [1992] 2 EGLR 80, CA.

5 *Perrylease Ltd v Imecar AG* [1987] 2 All ER 373 at 380, [1988] 1 WLR 463 at 472 per Scott J. See also *Heffield v Meadows* (1869) LR 4 CP 595 at 598 per Willes J; *Sheers v Thimbleby & Son* (1897) 76 LT 709 at 711–712, CA. For this purpose it does not matter whether the liability of the principal debtor is a present or a future liability: *Perrylease Ltd v Imecar AG* above.

6 *Beckett v Nurse* [1948] 1 KB 535, [1948] 1 All ER 81, CA.

7 *Martin v Pycroft* (1852) 2 De GM & G 785; *Smith v Wheatcroft* (1878) 9 ChD 223; *North v Loomes* [1919] 1 Ch 378 at 385 per Younger J; *Scott v Bradley* [1971] Ch 850, [1971] 1 All ER 583. For this purpose, it is irrelevant whether the term to be waived is important to the particular agreement: *Scott v Bradley* at 855 and at 587 per Plowman J, explaining the dictum of Younger J in *North v Loomes* above at 385 and disapproving the dictum of Evershed J in *Hawkins v Price* [1947] Ch 645 at 654, [1947] 1 All ER 689 at 692.

8 *Martin v Pycroft* (1852) 2 De GM & G 785; *Scott v Bradley* [1971] Ch 850, [1971] 1 All ER 583, not following *Burgess v Cox* [1951] Ch 383, [1950] 2 All ER 1212, and dictum of Evershed J in *Hawkins v Price* [1947] Ch 645 at 658, [1947] 1 All ER 689 at 693. Cf *National Westminster Bank plc v Morgan* [1985] AC 686, [1985] 1 All ER 821, HL, where the bank was permitted to enforce its third-party charge for the agreed, limited amount despite the fact that the only document signed by the chargor was the charge itself, which was in the bank's standard 'all-moneys' form, containing no mention of the limitation.

9 *Joscelyn v Nissen* [1970] 2 QB 86, [1970] 1 All ER 1213, CA. As to the equitable remedy of rectification generally see MISTAKE vol 32 (2005 Reissue) PARA 55 et seq.

10 *Craddock Bros v Hunt* [1923] 2 Ch 136, CA; *United States of America v Motor Trucks Ltd* [1924] AC 196, PC.

1074. Who must sign memorandum. The memorandum need only be signed by the party to be charged or his agent[1]. A guarantee drawn up in the plural number, and concluding 'as witness our hands', but signed by one guarantor only, is a sufficient memorandum to be binding on the guarantor who signed it[2]. A guarantee beginning 'we hereby guarantee', signed with the name of a firm, and also by each of the partners of the firm, operates as a separate guarantee by each partner as well as a joint guarantee by the firm[3]. A person who signs a guarantee as agent (for example, on behalf of a company of which he is a director) does not thereby assume personal liability even if he has given verbal assurances to the creditor[4].

1 Statute of Frauds (1677) s 4: see PARA 1052 et seq; and *Laythoarp v Bryant* (1836) 2 Bing NC 735 at 743; *Smith v Neale* (1857) 2 CBNS 67; *Liverpool Borough Bank v Eccles* (1859) 4 H & N 139; *Reuss v Picksley* (1866) LR 1 Exch 342. As to signature by agents see PARA 1075. As to email signatures see *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 2 All ER 891; and PARA 1052.

2 *Norton v Powell* (1842) 4 Man & G 42. Where, however, one guarantor expressly or impliedly stipulates that the other guarantor must also sign, this amounts to a condition precedent which must be fulfilled: see PARA 1106.

3 *Re Smith, Fleming & Co, ex p Harding* (1879) 12 ChD 557, CA; and see *Armstrong v Cahill* (1880) 6 LR Ir 440. See also *Bank of Scotland v Henry Butcher & Co* [2003] EWCA Civ 67, [2003] 2 All ER (Comm) 557, [2003] 1 BCLC 575 (claimant bank granted overdraft to customer who entered into negotiations with defendant firm with a view to a possible joint venture; consultancy agreement was drawn up by which, inter alia, it was agreed that firm would guarantee overdraft on customer's account up to a certain level. The partnership guarantee was signed by four of the firm's partners 'as partners [in the firm] and as individuals'. The firm's partnership deed provided that a partner might enter into a guarantee with the consent of the other partners; held that the firm was bound by the guarantee).

4 See *Manches LLP v Freer* [2006] EWHC 991 (QB), [2006] All ER (D) 428 (Nov).

1075. Memorandum signed by agent. An agent, authorised orally or in writing, may sign the memorandum[1]. He need not be of full age and capacity[2]. Nor, in order to render his principal liable, need he expressly sign as agent, oral evidence being admissible to show in what capacity he did sign[3]. Where reliance is placed on the signature of an agent as satisfying the Statute of Frauds (1677)[4], it must be shown that the agent signing was duly authorised, whether the document signed is a record of the terms or a document referring to and recognising the document actually containing the record of the terms[5]. An oral ratification of the agent's signature is sufficient where he was not previously authorised[6].

Certain agents possess implied authority to sign a guarantee[7]. Thus, a broker employed to buy or sell goods, it seems, possesses it[8], but not a solicitor[9]. Nor has a person who is also a party to a contract any implied authority to sign for another contracting party, either by himself[10] or his employee[11].

1 *Emmerson v Heelis* (1809) 2 Taunt 38; *Coles v Trecothick* (1804) 9 Ves 234.
2 *Watkins v Vince* (1818) 2 Stark 368.
3 *Young v Schuler* (1883) 11 QBD 651, CA. See the comments on the proper interpretation of the decision in this case in *Elpis Maritime Co Ltd v Marti Chartering Co Inc* [1992] 1 AC 21 at 28 et seq, [1991] 3 All ER 758 at 762 et seq, HL.
4 See the Statute of Frauds (1677) s 4; and PARA 1052.
5 *John Griffiths Cycle Corpn Ltd v Humber & Co Ltd* [1899] 2 QB 414, CA; revsd on another point sub nom *Humber & Co v John Griffiths Cycle Co* (1901) 85 LT 141, HL; and see *Hambro v Burnand* [1904] 2 KB 10, CA; *Watkins v Vince* (1818) 2 Stark 368; *Yonge v Toynbee* [1910] 1 KB 215, CA.
6 *Maclean v Dunn* (1828) 4 Bing 722; *Coles v Trecothick* (1804) 9 Ves 234. As to what constitutes ratification of an agent's acts see *Marsh v Joseph* [1897] 1 Ch 213, CA; *Bartram & Sons v Lloyd* (1904) 90 LT 357, CA; and AGENCY vol 1 (2008) PARA 57 et seq. A contract which purports to be made by or on behalf of a company at a time when the company has not been formed has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract: see the Companies Act 1985 s 36C(1) (s 36C as added; prospectively repealed); and COMPANIES vol 7(1) (2004 Reissue) PARA 261 (as to replacement provisions for the Companies Act 1985 s 36C see the Companies Act 2006 s 51). This provision also applies to the making of a deed: see the Companies Act 1985 s 36C(2) (as so added; prospectively repealed). A contract entered into by an agent on behalf of an unincorporated company cannot be ratified by the company after its incorporation: see *Natal Land etc Co v Pauline Colliery Syndicate* [1904] AC 120, PC.
7 See Fell's Law of Mercantile Guarantees (2nd Edn) 89, 94; de Colyar's Law of Guarantees (3rd Edn) 178 et seq.
8 Fell's Law of Mercantile Guarantees (2nd Edn) 89, 94. As to the meaning of 'broker' see AGENCY vol 1 (2008) PARA 12.
9 See *Earl of Glengal v Barnard* (1836) 1 Keen 769 at 787; on appeal sub nom *Lady Thynne v Earl of Glengall* (1848) 2 HL Cas 131; *Hasleham v Young* (1844) 5 QB 833 at 836; and see *Forster v Rowland* (1861) 7 H & N 103; *Smith v Webster* (1876) 3 ChD 49, CA; *Ridgway v Wharton* (1857) 6 HL Cas 238; *Bowen v Duc d'Orléans* (1900) 16 TLR 226, CA.
10 *Sharman v Brandt* (1871) LR 6 QB 720, Ex Ch; *Farebrother v Simmons* (1822) 5 B & Ald 333; *Wright v Dannah* (1809) 2 Camp 203; see AGENCY vol 1 (2008) PARA 10.
11 *Dixon v Broomfield* (1814) 2 Chit 205.

1076. What is a sufficient signature. The word 'signed' has been given an extended meaning by the courts; and the rules as to what is a sufficient signature are the same in the case of a guarantee as in the case of any other contract required to be evidenced in writing[1].

A signature in pencil is sufficient[2], as is a signature by initials[3], or by means of a stamp or mark[4]. It is not necessary to prove that the person making the mark could not write his name[5]. A printed heading of the name of the guarantor[6] is a sufficient signature if the remainder of the document is written by him or at his dictation[7], or is at the time or subsequently acknowledged by him[8]. The

signature of instructions for a telegram is sufficient[9], and a telegram itself may afford a sufficient signature, since the telegraph clerk may have the power delegated to him to sign[10]. The answerback of the sender of a telex probably constitutes a sufficient signature[11].

The signature must be so placed as to authenticate every material and operative part of the instrument[12].

Provided that there is a contract of guarantee[13], the intention with which the guarantor signs the memorandum evidencing that contract is irrelevant[14]. The signature of the guarantor as testator to a will reciting the guarantee[15], as signatory on behalf of the principal debtor to an agreement containing the guarantee[16], and as a witness[17], have all been held to be sufficient.

1 As to the power to modify legislation for the purpose of authorising or facilitating the use of electronic communications or electronic storage, instead of other forms of communication or storage, for the purposes of the doing of anything which under any such provisions is required to be or may be done or evidenced in writing see the Electronic Communications Act 2000 s 8(1)(a), (2)(a); and EVIDENCE vol 17(1) (Reissue) PARA 885; and as to electronic signatures see s 7; and EVIDENCE vol 17(1) (Reissue) PARA 886. The requirements of the Statute of Frauds (1677) s 4 (see PARA 1052) have not been modified under this power.

2 *Lucas v James* (1849) 7 Hare 410. See *Geary v Physic* (1826) 5 B & C 234.

3 *Chichester v Cobb* (1866) 14 LT 433; *Caton v Caton* (1867) LR 2 HL 127 at 143 per Lord Westbury. See also *Re Blewitt's Goods* (1880) 5 PD 116 (signature by initials sufficient for a will); *Jacob v Kirk* (1839) 2 Mood & R 221.

4 *Bennett v Brumfitt* (1867) 37 LJCP 25. See also *Jenkins v Gaisford and Thring* (1863) 3 Sw & Tr 93; *McDonald v John Twiname Ltd* [1953] 2 QB 304, [1953] 2 All ER 589, CA; *Goodman v J Eban Ltd* [1954] 1 QB 550, [1954] 1 All ER 763, CA.

5 *Baker v Dening* (1838) 8 Ad & El 94. Where an illiterate person held the top of the pen while another wrote his name, it was held to be a sufficient signature (*Helsham v Langley* (1841) 11 LJCh 17), but the mere tracing over a signature with a dry pen is not sufficient (see *Re Maddock's Goods* (1874) LR 3 P & D 169; *Re Cunningham's Goods* (1860) 4 Sw & Tr 194, both decisions on wills). See also *Brooks v Billingham* (1912) 56 Sol Jo 503.

6 The surname alone may be sufficient: *Lobb v Stanley* (1844) 5 QB 574. However, some indication of name is necessary: *Selby v Selby* (1817) 3 Mer 2; *Hubert v Treherne* (1842) 4 Scott NR 486.

7 *Schneider v Norris* (1814) 2 M & S 286; *Tourret v Cripps* (1879) 48 LJCh 567; *Hucklesby v Hook* (1900) 82 LT 117. See also *Evans v Hoare* [1892] 1 QB 593; *Leeman v Stocks* [1951] Ch 941, [1951] 1 All ER 1043. However, it is not possible to hold that the automatic insertion of an email address is intended for a signature: *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 2 All ER 891, [2006] 1 All ER (Comm) 885.

8 *Tourret v Cripps* (1879) 48 LJCh 567; *Leeman v Stocks* [1951] Ch 941, [1951] 1 All ER 1043.

9 *Godwin v Francis* (1870) LR 5 CP 295.

10 *McBlain v Cross* (1871) 25 LT 804. There is no longer an inland telegram service: see CONTRACT vol 9(1) (Reissue) PARA 682.

11 *Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone* [1987] 1 Lloyd's Rep 546 at 554 per Staughton J. The answerback of the receiver of the telex probably does not, for it only authenticates the document and does not convey approval of the contents: *The Anemone*. Similar principles probably apply to the names printed automatically on transmission and receipt of a message sent by fax or email. See also *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 2 All ER 891, [2006] 1 All ER (Comm) 885; and note 7. As to electronic signatures see note 1.

12 See *Durrell v Evans* (1862) 1 H & C 174, Ex Ch; *Bluck v Gompertz* (1852) 7 Exch 862; *Caton v Caton* (1867) LR 2 HL 127.

13 For the requirement of an intention to create legal relations for the formation of a contract of guarantee see PARA 1027.

14 'A letter to a third party has been held enough; an affidavit made in a different matter has been held to suffice; and I should say that an entry in a man's own diary, if it were signed by him and the contents were sufficient would do. The question is not what is the intention of the person signing the memorandum, but is one of fact, viz, is there a note or memorandum of the promise, signed by the party to be charged?': *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84 at 100, CA, per AL Smith LJ; cited with approval in *Elpis Maritime Co Ltd v Marti Chartering Co Inc* [1992]

1 AC 21 at 32–33, [1991] 3 All ER 758 at 766, HL, per Lord Brandon of Oakbrook. See also *Re Hoyle* above at 99 per Bowen LJ; and the cases cited in notes 15–17.

15 *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84, CA.

16 *Elpis Maritime Co Ltd v Marti Chartering Co Inc* [1992] 1 AC 21, [1991] 3 All ER 758, HL. See also *VSH Ltd v BKS Air Transport Ltd and Stevens* [1964] 1 Lloyd's Rep 460; *Sun Alliance Pensions Life and Investments Services Ltd v Webster* [1991] 2 Lloyd's Rep 410.

17 *Wallace v Roe* [1903] 1 IR 32; and see *Welford v Beazely* (1747) 1 Ves Sen 6. Contrast *Gosbell v Archer* (1835) 2 Ad & El 500.

1077. Alteration after signature. If the document is altered before the contract of guarantee is concluded, or is altered in order to correct a mistake in the written statement of an existing contract of guarantee, a signature already on the document will authenticate the alteration if the guarantor orally assents to the alteration[1]. Where, however, the alteration affects or evidences an amendment to an existing contract, oral consent is insufficient; there must be either a fresh signature (such as initialling the alteration), or some words or gestures sufficient to revive the existing signature[2].

An immaterial alteration, such as the correction of an innocent misdescription of the principal debtor, will not prevent the guarantee being enforceable, even if the guarantor does not assent to the alteration being made[3]. However, a material alteration, not approved by all the parties to the original document, will render the guarantee void[4]. For a deed or other instrument to be rendered invalid by an alteration, the party seeking to avoid the contract must demonstrate that the alteration is one which is potentially prejudicial to his legal rights or obligations. Without an element of potential prejudice, no inference of fraud or improper motive is appropriate. There is, however, no division of rights and obligations contained within a contract or other instrument into essential terms to which the rule applies and procedural terms to which it does not; the critical question is one of prejudice or potential prejudice as a result of the alteration[5].

1 *Bluck v Gompertz* (1852) 7 Exch 862 (correction of mistake). See also *Stewart v Eddowes* (1874) LR 9 CP 311; *Koenigsblatt v Sweet* [1923] 2 Ch 314, CA (alteration of draft agreement).

2 *New Hart Builders Ltd v Brindley* [1975] Ch 342, [1975] 1 All ER 1007. Goulding J at 352 and at 1012 recognised the distinction as illogical.

3 *Lombard Finance Ltd v Brookplain Trading Ltd* [1991] 2 All ER 762, [1991] 1 WLR 271, CA. See also *Raiffeisen Zentralbank Osterreich AG v Crossseas Shipping Ltd* [1999] 1 All ER (Comm) 626 (addition of the details of a guarantor's service agent after the conclusion of a guarantee and without the guarantor's knowledge not material alteration; guarantee enforceable); affd [2000] 3 All ER 274, [2000] 1 WLR 1135, CA.

4 *Lombard Finance Ltd v Brookplain Trading Ltd* [1991] 2 All ER 762, [1991] 1 WLR 271, CA. See also *Pigot's Case* (1614) 11 Co Rep 26b; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 82 et seq. As to the effect of the amendment in pencil of a guarantee see *Co-operative Bank plc v Tipper* [1996] 4 All ER 366, (1996) Times, 5 July (where a document consists of print, type and ink writing, the most natural inference to draw from an amendment in pencil is that it was not, and was not intended to be, an operative and final alteration but is in the nature of a note or drafting amendment).

5 *Raiffeisen Zentralbank Osterreich AG v Crossseas Shipping Ltd* [2000] 3 All ER 274, [2000] 1 WLR 1135, CA.

1078. Estoppel. A guarantor may, by representations or conduct, estop himself from denying that a particular liability is covered by his guarantee, even though that liability is not mentioned in any writing sufficient to satisfy the Statute of Frauds (1677)[1]. The House of Lords has confirmed that the ordinary rules of estoppel are applicable to guarantees[2].

1 *Humphries v Humphries* [1910] 2 KB 531, CA. See also *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 at 1015, [1964] 1 All ER 300, PC; *Bank of Scotland v Wright* [1991]

BCLC 244 at 266 per Brooke J. Cf also *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84, [1981] 3 All ER 577, CA. For the requirements of estoppel by representation see ESTOPPEL vol 16(2) (Reissue) PARA 1052 et seq; and for the requirements of estoppel by convention see ESTOPPEL vol 16(2) (Reissue) PARA 1065.

2 See *Actionstrength Ltd (t/a Vital Resources) v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17, [2003] 2 AC 541, [2003] 2 All ER 615; and ESTOPPEL vol 16(2) (Reissue) PARA 960. On the facts of that case, no estoppel was established.

(iv) Miscellaneous Legislation Applying to Guarantees

1079. Consumer credit legislation. Under the EC Consumer Credit Directive[1], certain credit agreements must be made in writing and the consumer must receive a copy of the written agreement which must include a statement of the annual percentage rate of charge and a statement of the conditions under which the annual percentage rate of charge may be amended[2]. The written agreement must further include the other essential terms of the contract[3]. Member states must afford other statutory protections for consumers with regard to advances on current accounts[4], repossession of goods bought on credit[5], early discharge of the obligations under a credit agreement[6], assignment of the agreement[7], making payment or giving security by means of bills of exchange including promissory notes[8], consumers' rights against a supplier of goods on credit[9] and official authorisation of persons offering credit[10]. Member states must ensure that the provisions which they adopt in implementation of these requirements are not circumvented as a result of the way in which agreements are formulated, in particular by the device of distributing the amount of credit over several agreements[11]. It has, however, been held that these requirements do not cover a contract of guarantee for the repayment of credit where neither the guarantor nor the borrower is acting in the course of his trade or profession[12].

Although some changes to secondary legislation were made in order to implement the Consumer Credit Directive into domestic law[13], the Consumer Credit Act 1974 already met and in some respects exceeded the requirements of the directive[14]. A contract of guarantee may be regulated by the 1974 Act, in which case it is subject to particular requirements which are discussed below[15] and in more detail elsewhere in this work[16].

1 See EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) for the approximation of the laws, regulations and administrative provisions of the member states concerning consumer credit; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 69.
2 See EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) art 4(1), (2) (art 4(2) amended by EC Council Directive 90/88 (OJ L61, 10.03.90, p 14).
3 See EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) art 4(3).
4 See EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) art 6.
5 See EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) art 7.
6 See EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) art 8.
7 See EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) art 9.
8 See EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) art 10.
9 See EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) art 11.
10 See EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) art 12.
11 EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) art 13.
12 See Case C-208/98 *Berliner Kindl Brauerei AG v Siepert* [2001] All ER (EC) 673, ECJ.
13 In particular, in relation to information which must be provided to consumers in respect of overdrafts: see CONSUMER CREDIT vol 9(1) (Reissue) PARA 69.
14 See CONSUMER CREDIT vol 9(1) (Reissue) PARA 69.
15 See PARA 1207 et seq.
16 See CONSUMER CREDIT vol 9(1) (Reissue) PARA 78 et seq.

1080. Other consumer protection legislation. Numerous measures have been made by the European Community to protect and promote the interests of consumers, including EC Council Directive of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises[1] and EC Council Directive of 20 May 1997 on the protection of consumers in respect of distance contracts[2]. The European Court of Justice has held that a contract which benefits a third party standing outside the contractual relationship, such as a guarantee securing the performance of a credit agreement, is not excluded from the scope of the first of these directives on the sole ground that the goods or services purchased are intended for the use of that third party. However, since the directive is only designed to protect consumers, a contract of guarantee only comes within its scope where the guarantor has entered into a commitment for a purpose which can be 'regarded as outside his trade or profession'. It follows that a contract of guarantee concluded by a natural person who was not acting in the course of his trade or profession does not come under the protection of the directive where it guarantees repayment of a debt contracted by another person who, for his part, was acting within the course of his trade or profession[3]. It appears that guarantees of loans made to the principal debtor for private, as opposed to business, purposes, will fall within the directives mentioned above and the regulations implementing them for the purposes of domestic law[4].

Contracts of guarantee may also fall within the provisions of the Unfair Contract Terms Act 1977[5] and of EC Council Directive of 5 April 1993 on unfair terms in consumer contracts[6] and the Unfair Terms in Consumer Contracts Regulations 1999[7] implementing that directive. Consumer protection legislation is discussed in detail elsewhere in this work[8].

1 Ie EC Council Directive 85/577 (OJ L372, 31.12.85, p 31), implemented by the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117: see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 663 et seq. It is apprehended that contracts of guarantee do not, without more, fall within the category of excepted contracts in reg 3.

2 Ie EC Council Directive 97/7 (OJ L144, 4.6.97, p 19), implemented by the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334: see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 673 et seq. Quaere, however, whether a guarantee of eg bank lending is an excepted contract: see reg 5.

3 Case C-45/96 *Bayerische Hypotheken- und Wechselbank AG v Dietzinger* [1998] All ER (EC) 332, [1998] ECR I-1199, ECJ.

4 As to implementation of the directives mentioned in the text see notes 1–2.

5 As to the Unfair Contract Terms Act 1977 see CONTRACT vol 9(1) (Reissue) PARA 820 et seq; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 450.

6 Ie EC Council Directive 93/13 (OJ L95, 21.4.93, p 29), implemented by the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083: see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 452 et seq.

7 Ie the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

8 See CONTRACT; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 383 et seq.

1081. The Landlord and Tenant (Covenants) Act 1995. Under the Landlord and Tenant (Covenants) Act 1995, a tenant who assigns premises demised to him is released from the tenant covenants of the tenancy[1] but may enter into an authorised guarantee agreement[2] with respect to the performance of those covenants by the assignee[3]. The rules of law relating to guarantees[4] are, subject to its terms, applicable in relation to any authorised guarantee agreement as in relation to any other guarantee agreement[5]. These provisions only apply in relation to tenancies which are 'new tenancies' for the purposes of the 1995 Act[6].

The 1995 Act also restricts the liability of a former tenant or his guarantor for rent and service charges[7]. These provisions, which apply to both 'old' and 'new' tenancies[8], are discussed elsewhere in this work[9].

1 See the Landlord and Tenant (Covenants) Act 1995 s 5; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 582.

2 For these purposes an agreement is an authorised guarantee agreement if: (1) under it the tenant guarantees the performance of the relevant covenant to any extent by the assignee; and (2) it is entered into in the circumstances set out in the Landlord and Tenant (Covenants) Act 1995 s 16(3); and (3) its provisions conform with s 16(4), (5): s 16(2). Those circumstances are as follows: (a) by virtue of a covenant against assignment (whether absolute or qualified) the assignment cannot be effected without the consent of the landlord under the tenancy or some other person; (b) any such consent is given subject to a condition (lawfully imposed) that the tenant is to enter into an agreement guaranteeing the performance of the covenant by the assignee; and (c) the agreement is entered into by the tenant in pursuance of that condition: s 16(3). An agreement is not an authorised guarantee agreement to the extent that it purports to impose on the tenant any requirement to guarantee in any way the performance of the relevant covenant by any person other than the assignee or to impose on the tenant any liability, restriction or other requirement (of whatever nature) in relation to any time after the assignee is released from that covenant by virtue of the Landlord and Tenant (Covenants) Act 1995: s 16(4). Subject to s 16(4), an authorised guarantee agreement may: (i) impose on the tenant any liability as sole or principal debtor in respect of any obligation owed by the assignee under the relevant covenant; (ii) impose on the tenant liabilities as guarantor in respect of the assignee's performance of that covenant which are no more onerous than those to which he would be subject in the event of his being liable as sole or principal debtor in respect of any obligation owed by the assignee under that covenant; (iii) require the tenant, in the event of the tenancy assigned by him being disclaimed, to enter into a new tenancy of the premises comprised in the assignment whose term expires not later than the term of the tenancy assigned by the tenant and whose tenant covenants are no more onerous than those of that tenancy; (iv) make provision incidental or supplementary to any provision made by virtue of any of heads (i)–(iii) above: s 16(5).

3 Landlord and Tenant (Covenants) Act 1995 s 16(1). For these purposes it is immaterial that (1) the tenant has already made an authorised guarantee agreement in respect of a previous assignment by him of the tenancy referred to in s 16(1), it having been subsequently revested in him following a disclaimer on behalf of the previous assignee; or (2) the tenancy referred to in s 16(1) is a new tenancy entered into by the tenant in pursuance of an authorised guarantee agreement; and in any such case s 16(2)–(5) apply accordingly: s 16(7).

4 In particular those relating to the release of sureties: Landlord and Tenant (Covenants) Act 1995 s 16(8).

5 Landlord and Tenant (Covenants) Act 1995 s 16(8).

6 Landlord and Tenant (Covenants) Act 1995 s 1(1). For these purposes, a tenancy is a new tenancy if it is granted on or after 1 January 1996 otherwise than in pursuance of an agreement entered into before that date or an order of a court made before that date: s 1(3). See further LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 578.

7 See the Landlord and Tenant (Covenants) Act 1995 ss 17, 18; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 289, 291.

8 Landlord and Tenant (Covenants) Act 1995 s 1(2).

9 See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 578 et seq.

1082. No stamp duty or stamp duty land tax on guarantees. The stamp duty formerly imposed upon the memorandum of a guarantee is no longer chargeable[1]. Nor is stamp duty land tax chargeable on such a memorandum[2].

1 The requirement that stamp duty should be paid on a guarantee neither under seal nor given for periodical payments was repealed by the Finance Act 1970 Sch 7 para 1(2)(a) (repealed with effect from 1 October 1999 by the Finance Act 1999 Sch 20 Pt V(2)). Ad valorem duty on guarantees was abolished by the Finance Act 1971 s 64 (likewise repealed); and the fixed duty of 50p on all documents (including guarantees) executed under seal was abolished by the Finance Act 1985 ss 85(1), 98, Schs 24, 27. Stamp duty is now chargeable only on instruments relating to stock or marketable securities (see the Finance Act 2003 s 125(1)) and is not chargeable on

any description of instrument in respect of which duty was abolished by the Finance Act 1971 s 64 (repealed) (see the Finance Act 1999 s 112(3), Sch 13 para 25). See further STAMP DUTY AND STAMP DUTY RESERVE TAX.

2 A security interest is an exempt interest (Finance Act 2003 s 48(2)(a)) and for these purposes 'security interest' means an interest or right (other than a rentcharge) held for the purpose of securing the payment of money or the performance of any other obligation (s 48(2), (3)).

(v) Construction of Guarantees

1083. Principles of construction. The principles of construction governing contracts in general[1] apply equally to contracts of guarantee[2]. Dealing with a guarantee as a mercantile contract, the court does not apply to it merely technical rules, but construes it so as to reflect what may fairly be inferred to have been the parties' real intention and understanding as expressed by them in writing[3], and so as to give effect to it rather than not[4].

1 The principles by which contractual documents are construed are summarised in *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 114 et seq, [1998] 1 WLR 896 at 912 et seq, HL, per Lord Hoffmann, applied in the context of guarantees in eg *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep 429, [2004] All ER (D) 04 (Apr); and see *UCB Corporate Services Ltd v Thomason* [2004] EWHC 1164 (Ch), [2004] 2 All ER (Comm) 774, [2004] All ER (D) 278 (May) (construction of agreement to waive liabilities pursuant to guarantees provided in respect of loan).

'The object sought to be achieved in construing any commercial contract is to ascertain what were the mutual intentions of the parties as to the legal obligations each assumed by the contractual words in which they ... chose to express them; or, perhaps more accurately, what each would have led the other reasonably to assume were the acts that he was promising to do or to refrain from doing by the words in which the promises on his part were expressed': *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 at 736, [1981] 2 All ER 1030 at 1035, HL, per Lord Diplock. See also *Marquis of Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1 at 91–92, HL per Sir Thomas Plumer MR; *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430 at 431, [1964] 1 WLR 125 at 128, HL, per Lord Reid; *Reardon Smith Line Ltd v Hansen-Tangen; Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570 at 574–575, [1976] 1 WLR 989 at 996, HL, per Lord Wilberforce. For the general rules for interpreting deeds and non-testamentary instruments see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 164 et seq; cf CONTRACT vol 9(1) (Reissue) PARA 772 et seq. There are incidental discussions of the interpretation of guarantees in other parts of this title, particularly in PARA 1090 et seq, where the extent of the guarantor's liability is dealt with.

2 See eg *Hargreave v Smee* (1829) 6 Bing 244; *Mayer v Isaac* (1840) 6 M & W 605; *Allnutt v Ashenden* (1843) 5 Man & G 392; *Edwards v Jevons* (1849) 8 CB 436 at 440; *Eastern Union Rly Co v Cochrane* (1853) 9 Exch 197 at 204, 206; *Morten v Marshall* (1863) 2 H & C 305; *Wood v Priestner* (1866) LR 2 Exch 66; affd (1867) LR 2 Exch 282, Ex Ch; *Chalmers v Victors* (1868) 16 WR 1046; *Heffield v Meadows* (1869) LR 4 CP 595; *Nottingham Hide, Skin and Fat Market Co v Bottrill* (1873) LR 8 CP 694; *Faber v Earl of Lathom* (1897) 77 LT 168 at 169; *Eshelby v Federated European Bank Ltd* [1932] 1 KB 254 at 266, DC, per Swift J; affd [1932] 1 KB 423, CA. Where a case concerns an ordinary commercial transaction, there is no good reason why a clause in question is not to be construed in accordance with the ordinary principles of construction for commercial contracts notwithstanding that one of the parties is a state: *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2002] EWCA Civ 1643, [2003] 2 Lloyd's Rep 571, [2002] All ER (D) 201 (Nov).

3 *Bank of Montreal v Munster Bank* (1876) IR 11 CL 47 at 55 per Fitzgerald J. See also *Barber v Mackrell* (1892) 68 LT 29, CA; *Other v Iveson* (1855) 3 Drew 177 at 182 per Kindersley V-C; *York City and County Banking Co v Bainbridge* (1880) 43 LT 732. In *Moschi v Lep Air Services Ltd* [1973] AC 331 at 345, [1972] 2 All ER 393 at 399, HL, Lord Reid said, when considering the extent of a guarantor's liability, 'I do not get much assistance from the authorities such as they are. I go by the terms of the ... contract. I find nothing in the authorities which in any way prevents me from reaching what appears to me to be the natural meaning and effect of this contract'.

4 The statement in the text, as contained in an earlier edition of this title, was cited with approval and applied by Scott J in *Perrylease Ltd v Imecar AG* [1987] 2 All ER 373 at 378, [1988] 1 WLR 463 at 469–470. See also *Stewart and McDonald v Young* (1894) 38 Sol Jo 385; and the cases cited in PARA 1084 et seq.

1084. Construing the guarantee in its context. The modern approach of the courts is to use all the available aids for the construction of written documents to seek out from the words used what they believe to have been the true intention of the parties[1] when the guarantee was executed and not to be over-constrained by an interpretation based purely on internal linguistic considerations[2].

Extrinsic evidence may assist in this process in two distinct ways. First, extrinsic evidence of the factual situation is admissible and necessary for the purpose of ascertaining whether particular words in the guarantee apply to that factual situation or whether that factual situation comes within particular words[3]. Second, extrinsic evidence of the context in which the contract was made is admissible in order to construe the terms of the contract[4]. A mercantile contract such as a guarantee is particularly susceptible of explanation by reference to the circumstances existing at the time it was made[5].

So, where the context showed that this was the clear intention of the parties, a guarantee expressed to cover the liabilities of a named company was held, on its true construction, to cover also the liabilities of that company's subsidiary through which the loan had in fact been made[6]. Similarly, a guarantee which did not state expressly that it covered the principal debtor's own liability as guarantor was held to do so, because the factual background showed that this was what the parties intended[7]. On the same basis, a guarantee of 'the proposed leasing' was construed with the aid of extrinsic evidence concerning the factual background known to the parties at or before the date of the guarantee[8] so as to cover the leasing arrangements which were in fact eventually entered into between the creditor and the principal debtor[9].

Extrinsic evidence has also been held admissible to show that one of the apparent parties to the guarantee in fact contracted as agent for the creditor[10]; to show that a guarantee was subject to a condition precedent[11]; to show whether the guarantee refers to a past or future credit[12]; to show whether the consideration for a guarantee was that the creditor should refrain from suing the principal debtor for a specified period or that he should refrain altogether from suing him[13]; to identify matters referred to in the memorandum of guarantee[14]; to show whether a person is really a guarantor entitled to contribution, or a guarantor for his co-sureties[15]; and generally to show the surrounding circumstances and the position of the contracting parties at the time that the guarantee was entered into[16].

However, neither evidence of negotiations nor direct evidence of the parties' intentions is admissible in construing a written contract such as a guarantee[17]. Nor is it permissible to take into account the actions of the parties after the contract was made, unless those actions evidence a new agreement or are the basis of an estoppel[18].

Where unambiguous words have been used in a contract of guarantee, the court has a duty to attempt to interpret the contract by giving the words their ordinary meaning[19].

1 On the meaning of the word 'intention' in this context see *Great Western Rly Co and Midland Rly Co v Bristol Corpn* (1918) 87 LJCh 414, HL; *IRC v Raphael* [1935] AC 96, HL. 'The question to be answered always is, 'What is the meaning of what the parties have said?' not 'What did the parties mean to say?'': *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 263, [1973] 2 All ER 39 at 55, HL, per Lord Simon of Glaisdale, citing Norton on Deeds (1906) p 43. See also eg *Re European Arab Finance Ltd* [2002] All ER (D) 153 (Oct) (where the principles to be applied in interpreting the contract were those contained in the Libyan Civil Code); *Vodafone Ltd v GNT Holdings (UK) Ltd* [2004] EWHC 1526 (QB), [2004] All ER (D) 194 (Mar).

2 *Bank of Scotland v Wright* [1991] BCLC 244 at 259 per Brooke J.

3 Eg to prove the identity of a principal debtor who had been misdescribed in the guarantee: see *Lombard Finance Ltd v Brookplain Trading Ltd* [1991] 2 All ER 762 at 764–765, [1991] 1 WLR 271 at 274, CA, per Dillon LJ.

4 See *Reardon Smith Line Ltd v Hansen-Tangen; Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570 at 573–574, [1976] 1 WLR 989 at 996, HL, per Lord Wilberforce. See also *Charrington & Co Ltd v Wooder* [1914] AC 71, HL; *Hvalfangerselskapet Polaris Aktieselskap v Unilever Ltd* (1933) 39 Com Cas 1, HL; *Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381, HL; *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39, HL.

5 *Johnston v Nicholls* (1845) 1 CB 251 at 269 per Maule J. See also *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep 502 at 506, CA, per Roskill LJ; *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1979] 1 Lloyd's Rep 130, CA; affd [1980] 2 All ER 29, [1980] 1 WLR 1129, [1980] 2 Lloyd's Rep 1, HL.

6 *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84, [1981] 3 All ER 577, CA. See also *Cambridge Credit Corpn v Lombard Australia Ltd* (1977) 14 ALR 420, HC of A; *National Bank of New Zealand Ltd v West* [1978] 2 NZLR 451, NZ CA.

7 *Coghlan v SH Lock (Australia) Ltd* (1987) 3 BCC 183, PC; *Bank of Scotland v Wright* [1991] BCLC 244. Contrast *National Bank of New Zealand Ltd v West* [1977] 1 NZLR 29 at 34 per Casey J, NZ SC; affd on different grounds [1978] 2 NZLR 451, NZ CA.

8 The guarantee must be construed at the time it is entered into: *National Bank of Nigeria Ltd v Awolesi* [1964] 1 WLR 1311 at 1315, [1965] 2 Lloyd's Rep 389 at 391–392, PC; *First National Finance Corpn Ltd v Goodman* [1983] BCLC 203 at 208–209, CA, per Stephenson LJ.

9 *Perrylease Ltd v Imecar AG* [1987] 2 All ER 373, [1988] 1 WLR 463. See also *Lombard Finance Ltd v Brookplain Trading Ltd* [1991] 2 All ER 762, [1991] 1 WLR 271, CA.

10 *Bruns v Colocotronis, The Vasso* [1979] 2 Lloyd's Rep 412 at 420 per Robert Goff J.

11 *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902 at 907–908, [1989] 1 WLR 255 at 262 per Steyn J.

12 *Goldshede v Swan* (1847) 1 Exch 154; *Colbourn v Dawson* (1851) 10 CB 765; *Butcher v Steuart* (1843) 11 M & W 857; *Edwards v Jevons* (1849) 8 CB 436; *Steele v Hoe* (1849) 14 QB 431; *Broom v Batchelor* (1856) 1 H & N 255; and see *King v Cole* (1848) 2 Exch 628; *Haigh v Brooks* (1839) 10 Ad & El 309; affd sub nom *Brooks v Haigh* (1840) 10 Ad & El 323, Ex Ch.

13 *Board v Hoey* (1948) 65 TLR 43 (guarantee of debt, or such part of it as might not be repaid within six months, in consideration of creditor undertaking not to sue principal debtor; construed in circumstances of case as involving agreement on creditor's part to forbear from suing principal debtor for the six months only, and not to release him entirely: guarantor not discharged by creditor beginning proceedings against principal debtor and guarantor at the end of the six months); cf *Rolt v Cozens* (1856) 18 CB 673 (guarantee of payment of debt on specified date in consideration of creditor forbearing to take proceedings: guarantor discharged on creditor beginning proceedings before the specified date).

14 *Shortrede v Cheek* (1834) 1 Ad & El 57; *Bateman v Phillips* (1812) 15 East 272; *Brown v Fletcher* (1876) 35 LT 165; *Holmes v Mitchell* (1859) 7 CBNS 361 at 368; *Macdonald v Longbottom* (1860) 1 E & E 977, Ex Ch.

15 *Craythorne v Swinburne* (1807) 14 Ves 160; *Re Denton's Estate, Licenses Insurance Corpn and Guarantee Fund Ltd v Denton* [1904] 2 Ch 178 at 189, CA, per Vaughan Williams LJ.

16 *Heffield v Meadows* (1869) LR 4 CP 595; *Wood v Priestner* (1866) LR 2 Exch 66; affd (1867) LR 2 Exch 282, Ex Ch; *Montefiore v Lloyd* (1863) 15 CBNS 203; *Coles v Pack* (1869) LR 5 CP 65 at 70–71; *Leathley v Spyer* (1870) LR 5 CP 595; *Brown v Fletcher* (1876) 35 LT 165; *Nottingham Hide, Skin and Fat Market Co v Bottrill* (1873) LR 8 CP 694; *Spark v Heslop* (1859) 1 E & E 563 at 570; *Laurie v Scholefield* (1869) LR 4 CP 622; *Plant v Bourne* [1897] 2 Ch 281, CA; *Morrell v Cowan* (1877) 7 ChD 151, CA; *Henton v Paddison* (1893) 68 LT 405 at 407; *Grahame v Grahame* (1887) 19 LR Ir 249; and cf *Hogarth v Miller, Brother & Co* [1891] AC 48, HL; *Spencer, Turner and Boldero v Lotz* (1916) 32 TLR 373; *Board v Hoey* (1948) 65 TLR 43 at 44; *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep 502; *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1979] 1 Lloyd's Rep 130, CA; affd [1980] 2 All ER 29, [1980] 1 WLR 1129, [1980] 2 Lloyd's Rep 1, HL. In many of these cases the court had to determine, by reference to the surrounding circumstances, whether a guarantee was a continuing guarantee or not. In *Chalmers v Victors* (1868) 16 WR 1046, a guarantee 'for liabilities incurred by A to B to the extent of £50' was, having regard to the extrinsic circumstances of the case, held to extend to £41 due from the principal debtor at the date of the guarantee and subsequent advances up to £9; and see *Morrell v Cowan* above.

17 *Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381, HL.

18 *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, [1970] 1 All ER 796, HL; *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39, HL. As to estoppel by convention see ESTOPPEL vol 16(2) (Reissue) PARA 1065.

19 See eg *Fliptex Ltd v Edney Enterprises Ltd* [2002] All ER (D) 439 (Nov).

1085. Construction contra proferentem. Where, applying the principles of construction discussed in the preceding paragraphs, the words of the guarantee remain ambiguous, the guarantee may be interpreted against the creditor who drafted it[1] and in favour of the guarantor[2].

1 As to the contra proferentem rule generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 178–179.

2 *Eastern Counties Building Society v Russell* [1947] 2 All ER 734, CA; *National House-Building Council v Fraser* [1983] 1 All ER 1090 at 1092 per Sir Douglas Frank QC. See also *First National Finance Corpn Ltd v Goodman* [1983] BCLC 203, CA; *Coghlan v SH Lock (Australia) Ltd* (1987) 3 BCC 183, PC. There are statements in some old authorities that guarantees should be construed strictly against the guarantor, on the basis that the guarantor is the maker of the instrument: see eg *Mason v Pritchard* (1810) 12 East 227; *Mayer v Isaac* (1840) 6 M & W 605; *Merle v Wells* (1810) 2 Camp 413. In other authorities, it is said that guarantees should be construed liberally in favour of the guarantor (see eg *Nicholson v Paget* (1832) 1 Cr & M 48 at 52 per Bayley B) or strictly against the creditor: see *Eastern Counties Building Society v Russell* [1947] 1 All ER 500 at 503 per Hilbery J (the Court of Appeal, in affirming his decision at [1947] 2 All ER 734, simply applied the contra proferentem rule); *General Surety and Guarantee Co Ltd v Francis Parker Ltd* (1977) 6 BLR 16 at 21, per Donaldson J; *First National Finance Corpn Ltd v Goodman* above at 208 per Stephenson LJ; *Coghlan v SH Lock (Australia) Ltd* above at 187. See also *Glyn v Hertel* (1818) 8 Taunt 208; *Bacon v Chesney* (1816) 1 Stark 192; *Stamford, Spalding and Boston Banking Co v Ball* (1862) 4 De GF & J 310; *Blest v Brown* (1862) 4 De GF & J 367 at 376 per Lord Westbury LC. The conflict between these two approaches does not appear to have been discussed or expressly resolved in any modern English authority. However, the reasoning and the actual decisions reached in the cases cited in PARA 1084 strongly suggest that the approach adopted by Swift J was correct when he said: 'I do not see that a guarantor stands in any better position than any other contractor, and I do not see that this contract is to be construed in any different way from any other contract': *Eshelby v Federated European Bank Ltd* [1932] 1 KB 254 at 266, DC; affd [1932] 1 KB 423, CA. See also *Moschi v Lep Air Services Ltd* [1973] AC 331 at 345, [1972] 2 All ER 393 at 399, HL, per Lord Reid, cited in PARA 1083 note 3. See also PARA 1084.

1086. Recitals, footnotes and sidenotes. Where the operative part of a guarantee is ambiguous[1], but not otherwise[2], its interpretation may be dependent upon its recitals[3], where those recitals are inconsistent with a meaning which the operative part might otherwise have been taken to bear[4].

The conditions of fidelity bonds are frequently explained by the recitals[5]. So in construing an agreement in the form of a bond in which a guarantor has become liable for the due fulfilment of an agent's duties therein particularly enumerated, a general clause in the obligatory part of the bond must be interpreted strictly and controlled by reference to the prior clauses specifying the extent of the agency[6]. Whether in a particular case the condition is capable of being restrained by the recital is not, however, always easy to determine[7], although in many cases it will be found that the recital is the proper key to the meaning of the condition in a suretyship bond[8]. Where a guarantee recites a debt already in existence, express words are required to make it extend to any other debts[9].

A guarantor is not estopped by a recital in a guarantee if it was intended as the statement of the creditor and not of the guarantor[10], although he may be estopped if it was intended as his statement or as a statement which both parties have mutually agreed to admit as true[11].

Where a standard printed form of guarantee supplied by the creditor contains footnotes or sidenotes for guidance, these may be used as an aid to construction of the contract only in cases of ambiguity[12].

1 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 217.

2 *Re Baker, Collins v Rhodes, Re Seaman, Rhodes v Wish* (1881) 51 LJCh 315 at 320, CA, per Sir George Jessel MR.

3 See generally *Lord Arlington v Merricke* (1672) 2 Saund 403, and notes thereto; *Luning v Milton* (1890) 7 TLR 12; see also the cases cited in note 5. As to the use of recitals in the construction of an instrument see generally DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 217 et seq.

4 *Australian Joint Stock Bank v Bailey* [1899] AC 396, PC; and see *Sansom v Bell* (1809) 2 Camp 39; *Saunders v Taylor* (1829) 9 B & C 35; *Oswald v Berwick-upon-Tweed Corpn* (1856) 5 HL Cas 856; *Bank of British North America v Cuvillier* (1861) 14 Moo PCC 187. The correct approach is probably to construe the guarantee as a whole: see *Bank of India v Trans Continental Commodity Merchants Ltd and Patel* [1982] 1 Lloyd's Rep 506 at 512 per Bingham J; affd [1983] 2 Lloyd's Rep 298, CA. See also *Evans v Earle* (1854) 10 Exch 1.

5 See *Lord Arlington v Merricke* (1672) 2 Saund 403; *Peppin v Cooper* (1819) 2 B & Ald 431; *Hassell v Long* (1814) 2 M & S 363; *Wardens of St Saviour's, Southwark v Bostock* (1806) 2 Bos & PNR 175; *Stoughton v Day* (1647) Aleyn 10; *Anderson v Thornton* (1842) 3 QB 271; *North Western Rly Co v Whinray* (1854) 10 Exch 77; and see also *R v O'Callaghan* (1838) 1 I Eq R 439; *Liverpool Waterworks Co v Atkinson* (1805) 6 East 507.

6 *Napier v Bruce* (1842) 8 Cl & Fin 470, HL.

7 *Evans v Earle* (1854) 10 Exch 1; *Curling v Chalklen* (1815) 3 M & S 502; *Parker v Wise* (1817) 6 M & S 239.

8 *London Assurance Co v Bold* (1844) 6 QB 514 at 526 per Wightman J; *Danby v Coutts & Co* (1885) 29 ChD 500.

9 See *Pearsall v Summersett* (1812) 4 Taunt 593; *Sansom v Bell* (1809) 2 Camp 39; *Plastic Decoration and Papier-Maché Co Ltd v Massey-Mainwaring* (1895) 11 TLR 205.

10 See *Greer v Kettle* [1938] AC 156, [1937] 4 All ER 396, HL.

11 See *Greer v Kettle* [1938] AC 156 at 170, [1937] 4 All ER 396 at 403, HL; and see eg *Anglo-Californian Bank Ltd v London and Provincial Marine and General Insurance Co Ltd* (1904) 20 TLR 665. See further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 115; ESTOPPEL vol 16(2) (Reissue) PARA 1015.

12 See eg *Bank of Baroda v ANY Enterprises Ltd* (4 December 1986, unreported), CA.

1087. Statement of consideration. If the guarantee is expressed to be given for a specified consideration, that statement forms part of the guarantee and will be taken into account in construing it[1]. A condition on which the guarantee is based may be found in the expressed consideration[2].

1 See eg *National Bank of Nigeria Ltd v Awolesi* [1964] 1 WLR 1311, [1965] 2 Lloyd's Rep 389, PC. Cf *Bank of India v Trans Continental Commodity Merchants Ltd and Patel* [1982] 1 Lloyd's Rep 506 at 512 per Bingham J; affd [1983] 2 Lloyd's Rep 298, CA. In that case, the operative part of the guarantee was clear, and was held not to be governed and restricted by the more limited statements in the recited consideration.

2 *National Bank of Nigeria Ltd v Awolesi* [1964] 1 WLR 1311, [1965] 2 Lloyd's Rep 389, PC.

1088. Whether surety is liable for the whole or part of the debt. When the guarantor's liability is limited to a fixed sum, it depends on the wording of the guarantee whether the guarantor guarantees the whole debt, subject to the specified limitation on his total liability, or whether his guarantee is applicable to a part only of the debt, co-extensive with the amount of the guarantee[1].

In the case of the bankruptcy of the principal debtor, the difference becomes material in determining whether the creditor may prove for the whole indebtedness, even though the guarantor has paid the sum for which he is liable, or whether the guarantor alone may prove for that sum[2].

The question is usually determined in favour of the creditor by the inclusion of special terms in the guarantee. However, where the matter is not expressly dealt with, the following principles of construction are applicable.

Where a guarantor gives a continuing guarantee, limited in amount, to secure a floating balance which may from time to time be due from the principal debtor to the creditor, the guarantee is as between the guarantor and the creditor to be construed, prima facie at least, as applicable to a part only of the debt co-extensive with the amount of the guarantee[3]. This principle can, however, admit exceptions[4]. On the other hand, a guarantee, limited in amount, for a debt already ascertained which exceeds that limit is not, prima facie, to be construed as a security for part of the debt only, it being for the court to determine in such cases whether the intention was to guarantee the whole debt, with a limitation on the guarantor's liability, or to guarantee a part of the debt only[5].

1 See *Ellis v Emmanuel* (1876) 1 Ex D 157, CA; and *Re Houlder* [1929] 1 Ch 205.
2 *Midland Banking Co v Chambers* (1869) 4 Ch App 398; *Re Rees, ex p National Provincial Bank of England* (1881) 17 ChD 98, CA; and see *Re Fernandes, ex p Hope* (1844) 3 Mont D & De G 720. See also *Re Sass, ex p National Provincial Bank of England* [1896] 2 QB 12. See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 504.
3 *Ellis v Emmanuel* (1876) 1 ExD 157, CA; *Huggard v Representative Church Body* [1916] 1 IR 1, approving the statement in the text, as contained in an earlier edition of this title.
4 See eg *Ulster Bank Ltd v Lambe* [1966] NI 161.
5 *Ellis v Emmanuel* (1876) 1 ExD 157, CA; *Forster Dry Cleaning Co Ltd v Davidson* (1963) 187 Estates Gazette 519; *Hobson v Bass* (1871) 6 Ch App 792; *Ex p Rushforth* (1805) 10 Ves 409; *Bardwell v Lydall* (1831) 7 Bing 489; *Paley v Field* (1806) 12 Ves 435; *Gee v Pack* (1863) 33 LJQB 49; *Re Garner, ex p Holmes* (1839) Mont & Ch 301; *Thornton v M'Kewan* (1862) 32 LJCh 69; *Gray v Seckham* (1872) 7 Ch App 680; *Veitch v National Bank of Scotland* 1907 SC 554, Ct of Sess. Sometimes the language of a limited guarantee given to secure a floating balance clearly indicates an intention that it is to apply to the whole debt: *Re Sass, ex p National Provincial Bank of England* [1896] 2 QB 12; *Re Rees, ex p National Provincial Bank of England* (1881) 17 ChD 98, CA; *Midland Banking Co v Chambers* (1869) 4 Ch App 398.

1089. Questions of law and fact. Where there are no words of doubtful trade meaning, and the extrinsic facts are not in controversy, the question whether the words used by the parties amount to a contract of guarantee is one of law[1]. Where, however, a guarantor has agreed to guarantee a specific sum, it has been treated as a question of fact[2] to say whether this sum comprised money advanced before the date of the guarantee as well as a subsequent advance[3].

1 *Bank of Montreal v Munster Bank* (1876) IR 11 CL 47 at 55; and see *Faber v Earl of Lathom* (1897) 77 LT 168 at 169; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 167.
2 Distinctions between questions of law and questions of fact have, however, become of less significance with the disappearance of juries from most classes of cases within the court's civil jurisdiction. As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 1075.
3 *Matthews v Bloxsome* (1864) 33 LJQB 209 at 211.

(2) LIABILITY OF GUARANTOR

(i) Special Characteristics

1090. Secondary liability of the guarantor. There are two different kinds of guarantee[1]. One is a promise by the guarantor which becomes effective if the principal debtor fails to perform his obligations[2]. The other is a promise that the principal debtor will perform his obligations[3]. In both cases, the guarantor's liability is secondary[4]. The guarantor is under no liability if the principal debtor's

obligation is discharged, by performance or otherwise, on or before the date of performance. In the one case, the conditional promise never becomes effective; in the other, there is no breach by the guarantor[5].

Consequently a creditor may not, before any default has been committed, apply for a quia timet injunction against a guarantor to force him to set apart money to provide for the possibility of a debt becoming due from the principal debtor and the principal debtor making default[6]. Nor can the creditor obtain a freezing injunction[7] against the guarantor, because he has no accrued cause of action to support it[8]. On the other hand, a guarantor is no more justified in placing the whole of his property out of the reach of liability to pay the guaranteed debt than if he were the principal debtor[9].

1 *Moschi v Lep Air Services Ltd* [1973] AC 331 at 344–345, [1972] 2 All ER 393 at 398, HL, per Lord Reid; *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255 at 258 per Lloyd J; *NRG Vision Ltd v Churchfield Leasing Ltd* [1988] BCLC 624 at 635, 4 BCC 56 at 64–65, per Knox J. Both of these kinds of guarantee fall within the first of Lord Selborne's three classes of case to which the principles of the law of guarantees may apply: see *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 10–11, HL, per Lord Selborne LC; and PARA 1018.

2 *Moschi v Lep Air Services Ltd* [1973] AC 331 at 344–345, [1972] 2 All ER 393 at 398, HL, per Lord Reid; *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255 at 258 per Lloyd J; *NRG Vision Ltd v Churchfield Leasing Ltd* [1988] BCLC 624 at 635, 4 BCC 56 at 64–65, per Knox J. This kind of guarantee has been described as a contract to indemnify the promisee on a contingency: *Sampson v Burton* (1820) 4 Moore CP 515. See, however, note 5.

3 See *Moschi v Lep Air Services Ltd* [1973] AC 331 at 344–345, [1972] 2 All ER 393 at 398, HL, per Lord Reid; *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255 at 258 per Lloyd J; *NRG Vision Ltd v Churchfield Leasing Ltd* [1988] BCLC 624 at 635, 4 BCC 56 at 64–65, per Knox J.

4 The liability is secondary whenever the promise to be answerable for another does not exonerate that other from liability but leaves him primarily liable: *Mallet v Bateman* (1865) LR 1 CP 163 at 171, Ex Ch; *Fahey v MSD Speirs Ltd* [1973] 2 NZLR 655, NZ CA. Where the guarantor covenants jointly with the debtor and severally to pay a debt on a future day, the debt is not contingent, but present: *Atkinson v Grey* (1853) 1 Sm & G 577; see also *Re Houlder* [1929] 1 Ch 205.

5 *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255 at 258 per Lloyd J (a promise to pay if the principal debtor does not do so, irrespective of any obligation on the part of the debtor, is not a guarantee). For the guarantor's liability where the principal obligation is discharged by the creditor's acceptance of the debtor's breach, or by insolvency, see PARA 1100. Similarly, the distinction between the two possible types of guarantee does not produce a material distinction in the guarantor's legal liability where the principal obligation has not been terminated: *NRG Vision Ltd v Churchfield Leasing Ltd* [1988] BCLC 624 at 635, 4 BCC 56 at 64–65, per Knox J.

6 *Antrobus v Davidson* (1817) 3 Mer 569, cited in *Wolmershausen v Gullick* [1893] 2 Ch 514 at 524 per Wright J.

7 Formerly known as a 'Mareva' injunction after *Mareva Cia Naviera SA v International Bulkcarriers SA, The Mareva* (1975) [1980] 1 All ER 213n, [1975] 2 Lloyd's Rep 509, CA. See generally INJUNCTIONS vol 24 (Reissue) PARA 866 et seq.

8 See *Steamship Mutual Underwriting Association (Bermuda) Ltd v Thakur Shipping Co Ltd* [1986] 2 Lloyd's Rep 439n, CA, where the potential claim was under a counter-indemnity backing a guarantee.

9 *Goodricke v Taylor* (1864) 2 De GJ & Sm 135 at 141 per Turner LJ. See also *Re Ridler, Ridler v Ridler* (1882) 22 ChD 74, CA, where the guarantor's contingent liability under his guarantee was taken into account in deciding whether he was bankrupt at the date of a voluntary settlement. As to the avoidance of pre-bankruptcy transactions which defeat the interests of creditors see the Insolvency Act 1986 ss 339, 423; and see also BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 653 et seq.

1091. Evidence of guarantor's liability. In a claim against the guarantor by the creditor, a judgment or award obtained by the creditor against the principal debtor is not evidence against the guarantor[1]. This is so even if the arbitration

award arises from an arbitration clause in the contract which contains the obligations of the principal debtor which are the subject of the guarantee[2]. However, such a judgment or award may bind the guarantor if the guarantee on its true construction covers the liability of the principal debtor arising from the judgment or award itself[3]. In any event, the principal debtor's admissions of liability in such proceedings may be admissible as evidence against the guarantor if the requirements of the Civil Evidence Act 1995 are complied with[4].

An account stated, delivered by an agent to his employer and charging himself, is evidence against the agent's guarantor on the question of appropriation of payments as between the agent and the employer[5]. After the death of the principal debtor, entries in his private records of receipts of money are admissible, as admissions against interest[6]. Similarly, entries in official books and reports which the person whose fidelity has been guaranteed was bound to keep as a duty incidental to his office are admissible after that person's death against the guarantor[7].

1 *Re Kitchin, ex p Young* (1881) 17 ChD 668, CA; *Bruns v Colocotronis, The Vasso* [1979] 2 Lloyd's Rep 412. See also *Mercantile Investment and General Trust Co v River Plate Trust, Loan and Agency Co* [1894] 1 Ch 578; and cf *Cia Sudamericana de Fletes SA v African Continental Bank Ltd, The Rosarina* [1973] 1 Lloyd's Rep 21, considered in note 3. As to the admissibility of judgments as evidence see generally EVIDENCE vol 17(1) (Reissue) PARAS 591 et seq, 866 et seq.

2 *Bruns v Colocotronis, The Vasso* [1979] 2 Lloyd's Rep 412. Under the Contracts (Rights of Third Parties) Act 1999 ss 1, 8, however, the guarantor, although not a party to the contract between the guarantor and the principal debtor containing the arbitration clause, may be given the right to enforce that clause and be treated as a party to the arbitration agreement. See further CONTRACT.

3 *Cia Sudamericana de Fletes SA v African Continental Bank Ltd, The Rosarina* [1973] 1 Lloyd's Rep 21. In that case Mocatta J held, applying *Bremer Oeltransport GmbH v Drewry* [1933] 1 KB 753, CA, that the principal debtor's obligation to meet the arbitration award was an obligation arising out of the agreement performance of which had been guaranteed, and was therefore covered by a guarantee of 'any obligation'. The matter was put beyond doubt by a separate promise in the guarantee to 'pay as surety ... in accordance with any arbitration award'.

4 See EVIDENCE vol 17(1) (Reissue) PARA 653 et seq. See also *Evans v Beattie* (1803) 5 Esp 26; *Bacon v Chesney* (1816) 1 Stark 192; *King v Norman* (1847) 4 CB 884. A receipt signed by a guarantor is not always conclusive evidence against him (*Straton v Rastall* (1788) 2 Term Rep 366), although a receipt given with full knowledge of all the circumstances depending between the parties is usually so regarded (*Bristow v Eastman* (1794) 1 Esp 172).

5 *Lysaght v Walker* (1881) 5 Bli NS 1, HL.

6 *Middleton v Melton* (1829) 5 Man & Ry KB 264; *Perchard and Hamerton v Tindall* (1795) 1 Esp 394.

7 *Goss v Watlington* (1821) 3 Brod & Bing 132; *Whitnash v George and Gifford* (1828) 8 B & C 556. In Ireland, such records have been held to be presumptive evidence against the guarantor, even though the principal debtor is still living: see *Abbeyleix Union Guardians v Sutcliffe* (1890) 26 LR Ir 332; and see *Union Town v Bermes* (1882) 43 American Reports 369. In a United States case a guarantor was held not to be estopped from contesting the correctness of the voluntary official reports made by the principal debtor as to the amount of money in his hands at the commencement of the term which the bond was intended to cover: *Van Sickel v Buffalo County* (1882) 42 American Reports 753. Sed quaere.

1092. Conclusive evidence clauses. Guarantees often contain a clause which states that a certificate or other document signed by or on behalf of the creditor shall be either prima facie or conclusive evidence against the guarantor of the extent of the principal debtor's liability to the creditor. Provided that they are expressed in sufficiently clear and explicit terms, such clauses are effective to bind the guarantor[1] in the absence of proof of fraud[2], bad faith[3] or other special circumstances[4].

1 *Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA* [1973] 2 Lloyd's Rep 437, CA. See also *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, [1985] 2 All ER 947, PC.

2 Fraud unravels all contracts, both at law and in equity: *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72 at 81, CA, per Farwell LJ. Cf the 'fraud exception' to the obligation of a bank which has issued a standby letter of credit or a performance bond to pay against a conforming demand: see PARA 1275. See also generally PARA 791 et seq.

3 *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643, Aust HC. Cf *Jones v Sherwood Computer Services plc* [1992] 2 All ER 170, [1992] 1 WLR 277, CA (third party certificate).

4 In *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 651, Aust HC, it was said that such a clause should not be interpreted as 'covering all grounds which go to the validity of the debt', citing illegality as an example. Manifest error may also prevent reliance on the clause: see *Je Maintiendrai Pty Ltd v Australia and New Zealand Banking Group Ltd* (1985) 38 SASR 70. It is also possible that the inclusion of a conclusive evidence clause in a standard form guarantee could be challenged under the Unfair Contract Terms Act 1977 s 3: see CONTRACT vol 9(1) (Reissue) PARA 823 et seq. Cf *Westpac Banking Corpn v Sugden* (1988) NSW Conv R 55–377 where, applying the Contracts Review Act 1980 (NSW), Brownlie J held that the conclusive evidence clause went far beyond what was reasonably necessary for the protection of the bank.

(ii) Extent of Guarantor's Liability

A. SUBJECT MATTER OF LIABILITY

1093. Guarantor as favoured debtor. It has been said that a guarantor is a favoured debtor[1]. He is entitled to insist upon a rigid adherence to the terms of his obligation by the creditor, and cannot be made liable for more than he has undertaken[2].

A receiver owes a duty, in equity, to the guarantor of a mortgagor's debt to act honestly and in good faith for the purpose of realising the security, and that duty may be more extensive, depending on the facts of any particular case[3].

1 *Wheatley v Bastow* (1855) 7 De GM & G 261 at 279–280 per Turner LJ; *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692 at 703, CA, per Lord Selborne LC; *Blest v Brown* (1862) 4 De GF & J 367; *Williamson v Goold* (1823) 1 Bing 171 at 176 per Dallas CJ. For a contrary view see *Eshelby v Federated European Bank Ltd* [1932] 1 KB 254 at 266 per Swift J; affd [1932] 1 KB 423, CA. See also *Re O'Neill* (1837) Sau & Sc 686.

2 *Wright v Russel* (1774) 2 Wm Bl 934 at 935; *Pearsall v Summersett* (1812) 4 Taunt 593 at 600; *Warre v Calvert* (1837) 7 Ad & El 143; *Leigh v Taylor* (1827) 7 B & C 491; *Gordon v Rae* (1858) 8 E & B 1065; *Morten v Marshall* (1863) 2 H & C 305; *Mortgage Insurance Corpn v Pound* (1895) 65 LJQB 129, HL; *Plastic Decoration and Papier-Maché Co Ltd v Massey-Mainwaring* (1895) 11 TLR 205; *Wembley UDC v Poor Law and Local Government Officers' Mutual Guarantee Association Ltd* (1901) 17 TLR 516; and see *Luning v Milton* (1890) 7 TLR 12; *Tanner v Woolmer* (1853) 8 Exch 482; *Hoole UDC v Fidelity and Deposit Co of Maryland* [1916] 1 KB 25; affd on different grounds [1916] 2 KB 568, CA; *Spencer, Turner and Boldero v Lotz* (1916) 32 TLR 373. It is probably in this context that the many statements to the effect that a guarantee is to be construed strictly in favour of the guarantor should be understood. For examples of such statements see *First National Finance Corpn Ltd v Goodman* [1983] BCLC 203 at 208, CA, per Stephenson LJ; *Coghlan v SH Lock (Australia) Ltd* (1987) 3 BCC 183 at 187, PC; and the cases cited in PARA 1085 note 2.

3 See *Cohen v TSB Bank plc* [2002] 2 BCLC 32 at [42], [2001] All ER (D) 450 (Nov) per Etherton J.

1094. Ascertaining the extent of liability. The extent of the liability undertaken by the guarantor will depend upon the terms of the contract of guarantee[1]. It need not be co-extensive with that of the principal debtor; but, in so far as it exceeds it, it is not a guarantee liability[2].

In order to ascertain the extent of the guarantor's liability, if any, to the creditor, it is first necessary to determine the amount and nature of the principal

debtor's debt to the creditor and the circumstances in which it has arisen. This having been done, the contract of guarantee should then be construed strictly to see whether it covers the nature, extent and circumstances of the principal debt sought to be recovered from the guarantor[3].

1 See *Moschi v Lep Air Services Ltd* [1973] AC 331 at 345, [1972] 2 All ER 393 at 399, HL, per Lord Reid. That contract will be construed in accordance with the principles set out in PARA 1083 et seq. The extent of the guarantor's liability is the same at law and in equity: *Samuell v Howarth* (1817) 3 Mer 272 at 278 per Lord Eldon LC; *Ratcliffe v Graves* (1683) 1 Vern 196.

2 See PARA 1013 et seq. See also *Ferry v Burchard* 21 Conn 597 at 602 (1852) per Storrs J.

3 See *Associated Dairies Ltd v Pierce* (1982) 265 Estates Gazette 127 at 129, CA, per May LJ. This dictum was expressed to cover only situations where the underlying contract between creditor and principal debtor and the contract of guarantee were both still subsisting. However, it is probably of more general application. See also *Moschi v Lep Air Services Ltd* [1973] AC 331 at 345, [1972] 2 All ER 393 at 399, HL, per Lord Reid; *Kova Establishment v Sasco Investments Ltd* [1998] 2 BCLC 83 (debt owed by a third party and later assigned to the creditor not subject to guarantee); *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep 429, [2004] All ER (D) 04 (Apr) (the words 'my liability to you shall be in respect of the whole debt' capable of referring to the existing as well as any further future debt).

1095. Nature of obligation guaranteed. A guarantor in a bond conditioned to answer for any balance which may become due from another to a bank is only liable for a balance which constitutes a legal debt[1], that is to say a debt recoverable by bringing a claim[2]. If the guarantee stipulates that money is to be lent to a principal debtor, the money lent must, apparently, first have reached the creditor's hand, and then have been lent to the principal debtor, to render the surety liable[3]. Where a guarantee unlimited in amount is given in respect of goods to be supplied to another, there must be a subsequent genuine supply, and to a reasonable extent, to render the guarantor liable[4], although, subject to this condition, the amount supplied is discretionary[5]. Similarly, any condition to be performed by the creditor to render the principal debtor liable must be performed before the guarantor can be made liable[6].

A guarantee of 'future indebtedness' has been held to cover not only a present obligation to pay a sum certain in the future, but also an unquantified sum in the future or on a contingency, including an obligation arising in the future[7].

1 *Swan v Bank of Scotland* (1836) 10 Bli NS 627, HL.

2 *Re Moss, ex p Hallet* [1905] 2 KB 307 at 314 per Darling J; *Re British Salicylates Ltd* [1919] 2 Ch 155 at 159 per Astbury J.

3 See *Halford v Byron* (1701) Prec Ch 178; *Stone v Compton* (1838) 5 Bing NC 142; *Burton v Gray* (1873) 8 Ch App 932; and see *Offord v Davies* (1862) 12 CBNS 748; *Grahame v Grahame* (1887) 19 LR Ir 249.

4 *Westhead v Sproson* (1861) 6 H & N 728; *Boyd v Moyle* (1846) 2 CB 644 at 650; *Johnston v Nicholls* (1845) 1 CB 251; *Broom v Batchelor* (1856) 1 H & N 255; *Wood v Benson* (1831) 2 Cr & J 94.

5 *White v Woodward* (1848) 5 CB 810.

6 *Eshelby v Federated European Bank Ltd* [1932] 1 KB 423, CA.

7 *Banner Lane Realisations Ltd (in liquidation) v Berisford plc* [1997] 1 BCLC 380, CA.

1096. Guarantor not liable beyond terms of contract. A promissory note given by a principal debtor and guarantor for a definite sum, payable on a fixed day, is presumed to be given in consideration of an advance at the date of the note, and not in payment of the balance of an account current between the principal debtor and the creditor, and unless this presumption is disproved the advance must have been made if the guarantor is to be liable[1].

A guarantor who guarantees the payment of a bill of exchange to be drawn for a specific sum is not liable, even to the extent of that sum, on a bill given for a larger sum[2]. However, a guarantee given to a bank requiring the payment of a given sum will not be discharged by the creditor's subsequently agreeing to require a lesser sum from the debtor[3]; nor will a limited guarantee for money lent to a specified amount be invalidated by the fact of money being lent in excess of that amount, although the guarantor cannot be made liable beyond the amount prescribed by the guarantee[4]. A guarantee limited to the loan of a fixed sum will not extend the guarantor's liability for continuing payments made after part of that sum has been reimbursed[5].

A guarantor for payment by joint purchasers of the purchase money of an estate will not be liable if it appears that one of the purported purchasers is not bound by the transaction[6].

Where the consideration for the guarantor's promise is forbearance to sue, or to continue legal proceedings against, the principal debtor, all stipulations which constitute part of that consideration must be strictly complied with or the guarantor will not be bound[7]. Nor will a guarantor for payment of what may be recovered by the claimant in a claim be held liable if, in a case where the guarantee stipulates that the claim is to be defended, judgment is allowed to go by default[8].

1 *Re Boys, Eedes v Boys, ex p Hop Planters Co* (1870) LR 10 Eq 467.
2 *Philips v Astling* (1809) 2 Taunt 206; and see *Sumner v Powell* (1816) 2 Mer 30; affd (1823) Turn & R 423.
3 *Croydon Commercial Gas Co v Dickinson* (1876) 2 CPD 46 at 51, CA, per Amphlett JA.
4 *Hall v Grose* (1814) cited in Chitty on Commercial Law Vol III 323; and see *Williams v Rawlinson* (1825) 3 Bing 71 at 78; *Mason v Pritchard* (1810) 12 East 227; *Parker v Wise* (1817) 6 M & S 239; *R v O'Callaghan* (1838) 1 I Eq R 439.
5 *Kirby v Duke of Marlborough* (1813) 2 M & S 18; and see *Browning v Baldwin* (1879) 40 LT 248.
6 *De Brettes v Goodman* (1855) 9 Moo PCC 466.
7 See PARAS 1106–1107.
8 *Luning v Milton* (1890) 7 TLR 12.

1097. Landlord and tenant. At common law, in the absence of clear words, a guarantor of a tenant's obligations will be liable only for those arising under the original contract which he guaranteed. Accordingly, where the landlord waives a notice to quit given by him to a yearly tenant and thereby creates a new tenancy, a guarantor for payment of the rent under the original tenancy is not liable for rent accruing after the time when the notice to quit would have expired[1]. Nor is a guarantor for the rent of a business tenancy liable for rent accruing due for the period during which the tenancy is statutorily extended[2]. Even where the guarantee is expressed to extend into that period, further clear words will be required in order to make the guarantor liable for interim rent[3] ordered to be paid in excess of the contractual rent[4]. But a guarantee of all rent payable under an agreement which provides for the extension of a tenancy at the tenant's option extends to rent accruing due in the further period[5]. The benefit of a guarantee runs with the reversion and is enforceable by the landlord from time to time[6].

Under the Landlord and Tenant (Covenants) Act 1995, the liability of a former tenant or his guarantor for rent and service charges is restricted[7]. These provisions, which apply to both 'old' and 'new' tenancies, are discussed elsewhere in this work[8].

1 *Tayleur v Wildin* (1868) LR 3 Exch 303. See also *Freeman v Evans* [1922] 1 Ch 36, CA.

2 *Junction Estates Ltd v Cope* (1974) 27 P & CR 482; *A Plesser & Co Ltd v Davis* [1983] 2 EGLR 70, 267 Estates Gazette 1039.

3 Ie under the Landlord and Tenant Act 1954 s 24A: see LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 730.

4 See *City of London Corpn v Fell, Herbert Duncan Ltd v Cluttons (a firm)* [1993] QB 589, [1993] 2 All ER 449, CA. In *Collin Estates Ltd v Buckley* [1992] 2 EGLR 78, [1992] 40 EG 151 the guarantee expressly covered interim rent.

5 *Philip v Ryan* (1901) Times, 12 January. The liability of guarantors in a replevin bond is limited to the amount of rent in arrear at the time of the distress and the costs, and they are not liable for subsequent rent: *Ward v Henley* (1827) 1 Y & J 285.

6 *P & A Swift Investments (a firm) v Combined English Stores Group plc* [1989] AC 632, [1988] 2 All ER 885, HL. Payment by the guarantor under his guarantee is not payment of rent, so acceptance of that payment will not waive the landlord's right to forfeit: *London and County (A & D) Ltd v Wilfred Sportsman Ltd (Greenwoods (Hosiers & Outfitters) Ltd, third party)* [1971] Ch 764, [1970] 2 All ER 600, CA. However, it has been suggested that the landlord may refuse a tender from a third party such as a guarantor, where he might be prejudiced by accepting it: see *Richards v De Freitas* (1975) 29 P & CR 1.

7 See the Landlord and Tenant (Covenants) Act 1995 ss 17, 18; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 289, 291.

8 See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 578 et seq.

1098. Limitation of guarantor's liability. The guarantor's liability will not be unduly extended[1]. He will not, therefore, be liable for the costs of a fruitless claim by the creditor against the principal debtor if the creditor has given him no notice of his intention to sue the principal debtor[2], nor when his liability is limited to a fixed sum will he be liable for interest on a larger sum[3]. It nevertheless comprises all transactions which naturally and reasonably are entered into on the faith of the guarantee[4].

1 So, when an assurance company gave a bond to the Board of Trade covering any loss or damage occasioned to a bankrupt's estate by any default of the trustee, it was not liable to make good the trustee's default in payment of the penal interest exacted from him for improper retention of money of the estate: *Board of Trade v Employers' Liability Assurance Corpn Ltd* [1910] 2 KB 649, CA.

2 *Baker v Garratt* (1825) 3 Bing 56 at 60 per Best CJ. See also *Colvin v Buckle* (1841) 8 M & W 680; *Keily v Murphy* (1837) Sau & Sc 479. Where, however, as the result of criminal proceedings taken against a defaulting employee whose fidelity the guarantor had guaranteed, property was recovered, it was held that the costs of the proceedings should be deducted from the value of the property recovered before giving the guarantor credit for it under the guarantee: *Hatch, Mansfield & Co Ltd v Weingott* (1906) 22 TLR 366.

3 *Meek v Wallis* (1872) 27 LT 650. Bank guarantee forms sometimes provide to the contrary. If such a stipulation is expressed in clear words, it will be given effect: see PARA 1094 et seq.

4 *Ogden v Aspinall* (1826) 7 Dow & Ry KB 637; *Pattison v Belford Union Guardians* (1856) 1 H & N 523, Ex Ch; *Gwynne v Burnell* (1840) 7 Cl & Fin 572, HL; *Loveland v Knight* (1828) 3 C & P 106; *Melville v Doidge* (1848) 6 CB 450; *Saunders v Taylor* (1829) 9 B & C 35; *Barber v Mackrell* (1892) 41 WR 341, CA; *Pybus v Gibb* (1856) 6 E & B 902; *Skillett v Fletcher* (1867) LR 2 CP 469, Ex Ch; *Oswald v Berwick-upon-Tweed Corpn* (1856) 5 HL Cas 856. A guarantor for the due payment over by a treasurer of a poor law union to the guardians, upon his (the treasurer's) removal from office, of the balances, money etc, which should then be in his possession by virtue of the office, was held liable for all money which had actually or in effect passed to the treasurer in his official capacity: *Pattison v Belford Union Guardians* above, where in the accounts of the treasurer, for whom the guarantor was liable, debits and credits were treated and allowed by the auditors as if they were actual payments in cash and therefore covered by the guarantee. Cf *Cosford Union Guardians v Grimwade* (1892) 8 TLR 775.

1099. Liability for accruing interest. A covenant by a guarantor for the due payment of interest during the continuance of a mortgage security obliges him to pay interest so long as the principal sum remains unpaid, and therefore after default has been made by the principal debtor in payment of the mortgage

money on the day prescribed[1]; and if he guarantees the payment of a bill of exchange by the acceptor, he is liable for the interest on the amount if not paid when due[2].

Even after the right to recover the principal sum from a guarantor has become statute-barred, interest due on it is sometimes recoverable[3], although normally interest, being accessory to the principal, is irrecoverable when the claim to the principal is barred[4].

The recovery of judgment against the principal debtor for the principal sum due operates to relieve the guarantor from liability to pay future interest[5]. The bankruptcy of the principal debtor will not relieve from further liability for interest a guarantor whose guarantee provides for payment of interest 'until repayment'[6]. However, the bankruptcy of the principal debtor will relieve from further liability for interest a guarantor who is to continue liable for that interest only so long as anything remains due in respect of the principal money[7]. Where a guarantor pays a sum in respect of interest due from the principal debtor, that sum ranks as interest and not as a sum in lieu of interest for the purpose of any provision concerned with the payment of interest[8].

1 *King v Greenhill* (1843) 6 Man & G 59.

2 *Ackermann v Ehrensperger* (1846) 16 M & W 99. So too he is liable for interest on the sum secured by a bond with a penalty (*Dawson v Raynes* (1826) 2 Russ 466), for such a bond is an interest-bearing security, carrying interest, although not mentioned, beyond the date fixed for the payment of the debt (*Re Dixon, Heynes v Dixon* [1900] 2 Ch 561, CA); and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 126. There is no rule of law that upon a contract for the payment of money on a day certain, with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest is to be implied: *Cook v Fowler* (1874) LR 7 HL 27 at 37 per Lord Selborne LC. For a guarantee which, upon its proper construction, excluded a liability for interest upon a sum awarded in an arbitration see *Cia Sudamericana de Fletes SA v African Continental Bank Ltd, The Rosarino* [1973] 1 Lloyd's Rep 21.

3 *Parr's Banking Co Ltd v Yates* [1898] 2 QB 460, CA, where interest, commission and other banking charges were construed as being guaranteed on the same basis as advances of principal, and consequently interest and charges accruing due within six years of action brought were recoverable even though there was no longer a right to recover the amount of the actual advances from the guarantor. Cf *Re FitzGeorge, ex p Robson* [1905] 1 KB 462, where a guarantor who guaranteed the payment of interest on a debenture bond, issued by a company, until repayment of the principal sum was held liable to make payment of such interest after the dissolution of the company.

4 See eg *Elder v Northcott* [1930] 2 Ch 422.

5 *Faber v Earl of Lathom* (1897) 77 LT 168. Bank guarantee forms sometimes provide to the contrary. If such a stipulation is expressed in clear words, it will be given effect to: see PARA 1094 et seq.

6 *Re FitzGeorge, ex p Robson* [1905] 1 KB 462.

7 *Re Moss, ex p Hallet* [1905] 2 KB 307; and see also *Re Lennard, Lennard's Trustee v Lennard* [1934] Ch 235.

8 *Re Hawkins, Hawkins v Hawkins* [1972] Ch 714, [1972] 3 All ER 386.

1100. Liability after determination of the principal contract. Where the guaranteed obligation is properly discharged by performance, the obligations of a guarantor of that obligation are also thereby discharged[1]. Similarly, the guarantor will be discharged where the underlying contract is discharged by frustration before the time for performance[2].

However, the creditor's termination of the principal contract, whether by the exercise of an express right of termination[3] or by acceptance of the debtor's breach[4], will not discharge the guarantor from liability. Where the liability of the guarantor under the guarantee equals in extent and amount that of the principal debtor, the guarantor makes himself responsible for any loss sustained by the

creditor through the principal debtor's default[5]. Thus, where a creditor accepts the repudiation by a debtor of an agreement to pay a debt by instalments, the guarantor for that agreement is liable to the creditor for instalments accrued but unpaid at the date of termination[6], and for damages representing the total debt[7].

Similarly, where the guarantee is of the tenant's obligations under a lease, the landlord's action in forfeiting the lease on the grounds of the tenant's breach of covenant will not release the guarantor from his liability in respect of accrued causes of action[8]. Nor will it relieve the guarantor from liability in respect of damage suffered by the landlord after the termination of the tenancy if that damage is referable to a breach of the tenant's covenants, for example a failure to yield up the premises in accordance with a covenant to do so[9].

The insolvency of the principal debtor does not discharge the guarantor from liability[10]. Further, where the trustee or liquidator of an insolvent principal debtor disclaims onerous property, the statutory release of the principal debtor from liabilities in or in respect of the disclaimed property[11] does not operate also to release any guarantor for those liabilities[12].

The position is less clear where the principal debtor enters into an individual voluntary arrangement under Part VIII[13] of the Insolvency Act 1986[14].

1 See *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255 at 258–259 per Lloyd J. As to the discharge of contracts by performance see generally CONTRACT vol 9(1) (Reissue) PARA 921 et seq.

2 As to the discharge of contracts by frustration see generally CONTRACT vol 9(1) (Reissue) PARA 909 et seq.

3 *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep 502 at 506, CA, per Roskill LJ; *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1979] 1 Lloyd's Rep 130, CA; affd [1980] 2 All ER 29, [1980] 1 WLR 1129, [1980] 2 Lloyd's Rep 1, HL.

4 *Moschi v Lep Air Services Ltd* [1973] AC 331, [1972] 2 All ER 393, HL.

5 *Oastler v Pound* (1863) 11 WR 518; *Moschi v Lep Air Services Ltd* [1973] AC 331 at 349, [1972] 2 All ER 393 at 402, HL, per Lord Diplock.

6 *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep 502 at 506, CA, per Roskill LJ; *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1979] 1 Lloyd's Rep 130, CA; affd [1980] 2 All ER 29, [1980] 1 WLR 1129, [1980] 2 Lloyd's Rep 1, HL.

7 *Moschi v Lep Air Services Ltd* [1973] AC 331, [1972] 2 All ER 393, HL.

8 *Apus Properties Ltd v Douglas Farrow & Co Ltd* [1989] 2 EGLR 265, [1989] NPC 38. A guarantor's contractual obligation to pay arrears of rent or to take up a new lease in the event of a liquidator of the tenant company disclaiming the lease survives disclaimer but comes to an end on the landlord retaking possession: see *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70, [1996] 1 All ER 737, HL; *Active Estates Ltd v Parness* [2002] EWHC 893 (Ch), [2002] 3 EGLR 13, [2002] 36 EG 147; *Scottish Widows plc v Tripipatkul* [2003] EWHC 1874 (Ch), [2004] 1 P & CR 461, [2003] All ER (D) 24 (Aug).

9 *Associated Dairies Ltd v Pierce* (1982) 265 Estates Gazette 127, CA; *Thames Manufacturing Co Ltd v Perrotts (Nichol & Peyton) Ltd* (1984) 50 P & CR 1.

10 See the Insolvency Act 1986 s 281(7); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 644. The position was the same at common law: see *English v Darley* (1800) 2 Bos & P 61 at 62; *Browne v Carr* (1831) 7 Bing 508; *Ex p Jacobs, Re Jacobs* (1875) 10 Ch App 211 at 213; *Rainbow v Juggins* (1880) 5 QBD 422, CA. Cf *Re Moss, ex p Hallett* [1905] 2 KB 307, distinguished in *Bank of Montreal v McFatridge* (1958) 14 DLR (2d) 552; affd (1959) 17 DLR (2d) 557 (Nfld SC). The dissolution of a company after completion of the winding up does not generally release a guarantor of its obligations: *Re FitzGeorge, ex p Robson* [1905] 1 KB 462.

11 Under the Insolvency Act 1986 s 178(4) (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 868) and s 315(3) (individuals: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 474).

12 *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70, [1996] 1 All ER 737, HL, overruling *Stacey v Hill* [1901] 1 KB 660, CA (a bankruptcy case); and see PARA 1014. See also *Scottish Widows plc v Tripipatkul* [2003] EWHC 1874 (Ch), [2004] 1 P & CR 461, [2003] All ER (D) 24 (Aug).

13 Ie under the Insolvency Act 1986 Pt VIII (ss 252–263G): see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 81 et seq.

14 See *Johnson v Davies* [1999] Ch 117 at 138, [1998] 2 All ER 649 at 666, CA, per Chadwick LJ (it is up to the debtor to propose, and for the creditors to accept or reject, proposals which either do or do not have the effect of releasing co-debtors or sureties); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 107. Cf *RA Securities Ltd v Mercantile Credit Co Ltd* [1995] 3 All ER 581, [1994] 2 BCLC 721 (an outsider who was not a party could gain no assistance from the terms of the arrangement as such). See also *Greene King plc v Stanley* [2001] EWCA Civ 1966, [2002] All ER (D) 56 (Jan) (no relevant distinction between the position of a surety and that of a co-debtor and it has long been accepted that on the release of a co-debtor a creditor may reserve his rights against other co-debtors; accordingly, it is open to a creditor to release the debtor under an individual voluntary arrangement ('IVA') whilst reserving its rights against the debtor's sureties. Further, it is open to the court in construing an IVA to look at all the circumstances, including the dealings between the parties which have led to the IVA).

1101. Guarantor's liability under fidelity guarantee, etc. A guarantor's liability for the faithful discharge by another person of duties attaching to a particular office does not extend to losses incurred in respect of the performance by that other person of duties ordinarily performed by another official[1], or subsequently imposed by statute[2]. So a policy for the guarantee of the fidelity of an assistant overseer of a parish was held not to cover defalcations committed by him as clerk of the parish council[3].

A guarantor for the due performance of his duties by a deputy appointed by the Court of Protection of the property and affairs of a mental patient is not liable for any default made in respect of the receipt of rents and profits after the death of the patient, since the deputy himself is not responsible in that capacity[4]; but the guarantor is liable for everything for which the deputy is liable[5].

The liability of a principal debtor and his guarantor on a bond with a penalty cannot exceed the penalty[6].

1 *Wembley UDC v Poor Law and Local Government Officers' Mutual Guarantee Association Ltd* (1901) 17 TLR 516. Fidelity guarantees are now rarely encountered: see further PARA 1111 et seq.

2 *Bartlett v A-G* (1709) Park 277; and see *Nares v Rowles* (1811) 14 East 510; *Webb v James* (1840) 7 M & W 279; *Kepp v Wiggett* (1850) 10 CB 35; *Durham Corpn v Fowler* (1889) 22 QBD 394 at 413. Cf *Napier v Bruce* (1842) 8 Cl & Fin 470, HL, where the guarantor was held not liable for an agent's failure to account for money received by him during the term of his agency, but not in pursuance of the particular agency recited in the fidelity bond, although the bond was conditioned for due accounting during the whole time the agent should continue to act as agent.

3 *Cosford Union v Poor Law and Local Government Officers' Mutual Guarantee Association Ltd* (1910) 103 LT 463.

4 See *Re Walker* [1907] 2 Ch 120, CA, decided under the old law relating to lunacy; see now, generally and as to the Court of Protection, MENTAL HEALTH vol 30(2) (Reissue) PARAS 676, 750.

5 For the security required from any person other than the Official Solicitor appointed as receiver under the Mental Health Act 1983 see MENTAL HEALTH vol 30(2) (Reissue) PARA 748. As to provisions in regard to a deputy under the Mental Capacity Act 2005 see also MENTAL HEALTH vol 30(2) (Reissue) see PARAS 749 et seq, 760. As to transitional provisions in regard to receivers see MENTAL HEALTH vol 30(2) (Reissue) PARA 406.

6 *Butcher v Churchill* (1808) 14 Ves 567.

1102. Allowable deductions. In estimating the loss occasioned by the principal debtor's default, the creditor must give credit for sums received by him from the principal debtor[1], or paid by the guarantor to keep up a security for the guaranteed debt[2], and he is not entitled to the benefit of any counter-security received by the guarantor from the principal debtor[3].

1 *Burnand v Rodocanachi, Sons & Co* (1882) 7 App Cas 333 at 339, 341, HL, per Lord Blackburn; *Bardwell v Lydall* (1831) 7 Bing 489; *Gee v Pack* (1863) 33 LJQB 49; *Castellain v Preston* (1883) 11 QBD 380, CA; *Randal v Cockran* (1748) 1 Ves Sen 98; *Re Miller, Gibb & Co Ltd* [1957] 2 All ER 266, [1957] 1 WLR 703; and see *Re Bedell, ex p Gilbey* (1878) 8 ChD 248, CA.

2 *Aylwin v Witty* (1861) 30 LJCh 860.

3 *Re Walker, Sheffield Banking Co v Clayton* [1892] 1 Ch 621. See PARA 1128.

B. WHEN GUARANTOR'S LIABILITY ARISES

1103. Debtor's default. The guarantor's liability arises when the principal debtor has made default[1], but not until then[2].

To render the guarantor liable the default relied upon must not be due to the creditor's misconduct[3] or connivance[4], nor, generally speaking, result from vis major, such as robbery with irresistible violence[5].

It is not always easy to determine whether, in a particular case, a default has been committed, and, on this, precedent can only be suggestive[6].

1 *Moschi v Lep Air Services Ltd* [1973] AC 331, [1972] 2 All ER 393, HL; *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255. See also *Belford Union Guardians v Pattison* (1856) 11 Exch 623; affd sub nom *Pattison v Belford Union Guardians* 1 H & N 523, Ex Ch; *Wright v Simpson* (1802) 6 Ves 714 at 733; *Barber v Mackrell* (1892) 68 LT 29 at 31, CA.

2 *Halliwell v Counsell* (1878) 38 LT 176; *Blest v Brown* (1862) 4 De GF & J 367; and see the old cases cited in note 1.

3 *Halliwell v Counsell* (1878) 38 LT 176; *Blest v Brown* (1862) 4 De GF & J 367.

4 See *Bank of India v Trans Continental Commodity Merchants Ltd and Patel* [1982] 1 Lloyd's Rep 506 at 512 per Bingham J; affd [1983] 2 Lloyd's Rep 298, CA. See also *Dawson v Lawes* (1854) Kay 280; *M'Taggart v Watson* (1836) 3 Cl & Fin 525, HL; *Shepherd v Beecher* (1725) 2 P Wms 288; *Sanderson v Aston* (1873) LR 8 Exch 73; *Blest v Brown* (1862) 4 De GF & J 367; *Lodder v Slowey* [1904] AC 442, PC.

5 *Walker v British Guarantee Association* (1852) 18 QB 277; see also *King v Cole* (1848) 2 Exch 628. The surety of a clerk is liable as guarantor for money accidentally lost by the clerk when out riding in his employer's service: *Melville v Doidge* (1848) 6 CB 450; see also *Saunders v Taylor* (1829) 9 B & C 35; *Hornsby v Slack* (1850) 1 ICLR 126.

6 Eg the conversion to his own use by an administrator of a large portion of an intestate's assets is a breach of a condition in an administration bond well and truly to administer the intestate's goods according to law: *Archbishop of Canterbury v Robertson* (1833) 1 Cr & M 690; and see *Dobbs v Brain* [1892] 2 QB 207, CA; *Harvell v Foster* [1954] 2 QB 367, [1954] 2 All ER 736, CA. A mere error in book-keeping by a clerk is not, however, a default rendering a guarantor liable unless, of course, the guarantee stipulates that it is to be so considered: *Jephson v Howkins* (1841) 2 Man & G 366.

1104. Notice of debtor's default unnecessary. On the default of the principal debtor causing loss to the creditor, the guarantor is, apart from special stipulation, immediately liable to the full extent of his obligation, without being entitled to require either notice of the default[1], or previous recourse against the principal[2] or simultaneous recourse against co-guarantors[3].

Unless a demand upon the principal debtor is necessary in order to establish the principal debtor's own liability to the creditor[4], it is not necessary for the creditor, before proceeding against the guarantor, to request the principal debtor to pay[5]. Nor is it necessary for the creditor to sue the principal debtor, although solvent[6], or to take arbitration proceedings against him even though the principal contract contains an arbitration clause[7], unless this is expressly stipulated for in the guarantee[8].

Nor is it necessary for the creditor to prosecute the principal debtor for any offence he may have committed[9] unless this is rendered essential by the terms of the guarantee[10], or to resort to securities for the guaranteed debt received by the creditor from the principal debtor[11].

However, service of a default notice under Part VII of the Consumer Credit Act 1974[12] is necessary before the creditor can become entitled, by reason of the debtor's breach of a regulated agreement[13] under that Act, to terminate the agreement, demand early repayment, treat any right conferred by the agreement on the debtor as terminated, restricted or deferred, or enforce any security[14].

1 *Cutler v Southern* (1667) 1 Saund 116; *Ker v Mitchell* (1786) 2 Chit 487; *Carr v Browne* (1826) 12 Moore CP 62; *Hitchcock v Humfrey* (1843) 5 Man & G 559; *Warrington v Furbor* (1807) 8 East 242; *Walton v Mascall* (1844) 13 M & W 452; *Carter v White* (1883) 25 ChD 666, CA; *Holbrow v Wilkins* (1822) 1 B & C 10; *Van Wart v Woolley* (1824) 3 B & C 439; *Britannia Steamship Insurance Association v Duff* (1909) 46 SLR 894, Ct of Sess.

2 See the text and notes 4–11.

3 *Moschi v Lep Air Services Ltd* [1973] AC 331 at 356–357, [1972] 2 All ER 393 at 408–409, HL, per Lord Simon of Glaisdale. The reason for the rule is that it is the guarantor's duty to see that the principal pays or performs his duty, as the case may be: see *Moschi v Lep Air Services Ltd* at 357 and at 408; and *Wright v Simpson* (1802) 6 Ves 714 at 734 per Lord Eldon LC.

4 Whether a demand is necessary in any given case is, essentially, a question of construction of the contract: *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 129, CA, per Atkin LJ; *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425 at 447, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769 at 785, CA, per Dillon LJ. Generally, where there is a pre-existing debt, no demand is necessary to complete the creditor's cause of action, even where the debt is expressed to be payable on demand: see *Rowe v Young* (1820) 2 Bligh 391 at 465, HL per Bayley J; *Re Brown's Estate, Brown v Brown* [1893] 2 Ch 300; *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA; *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* above. However, there may be circumstances where a demand upon the principal debtor is necessary in order to establish his liability, for example where the creditor seeks to accelerate liability for payment of the whole of a debt otherwise payable by instalments (see eg *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 3 All ER 358, [1975] 1 WLR 1474) or where the principal debtor's liability is itself a liability as guarantor (as in *Coghlan v SH Lock (Australia) Ltd* (1987) 8 NSWLR 88, 3 BCC 183, PC, and *Bank of Scotland v Wright* [1991] BCLC 244). In principle, a demand is necessary to terminate a bank overdraft facility and require repayment of the balance: see *Rouse v Bradford Banking Co* [1894] AC 586, HL; *Cripps (Pharmaceuticals) Ltd v Wickenden* [1973] 2 All ER 606 at 616, sub nom *RA Cripps & Son Ltd v Wickenden* [1973] 1 WLR 944 at 954–55, per Goff J; and cf *Joachimson v Swiss Bank Corpn* above. However, see *Parr's Banking Co Ltd v Yates* [1898] 2 QB 460, CA. As to demands see PARA 1105.

5 *Belfast Banking Co v Stanley* (1867) 15 WR 989; *Rede v Farr* (1817) 6 M & S 121; *Walton v Mascall* (1844) 13 M & W 452; *Lilley v Hewitt* (1822) 11 Price 494; *Warrington v Furbor* (1807) 8 East 242; *Holbrow v Wilkins* (1822) 1 B & C 10; *Re Brown's Estate, Brown v Brown* [1893] 2 Ch 300; *Sheldon and Ackhoff v Milligan* (1907) 14 SLT 703; *DFC Financial Services Ltd v Coffey* [1991] 2 NZLR 513, [1991] BCC 218, PC.

6 *Re Lockey* (1845) 1 Ph 509; *Wright v Simpson* (1802) 6 Ves 714; *Jackson v Digby* (1854) 2 WR 540; *Palmer v Sheridan-Bickers* (1910) Times, 20 July; but see *Ewart v Latta* (1865) 4 Macq 983 at 986, HL, per Lord Westbury LC; *Law v East India Co* (1799) 4 Ves 824.

7 *Thermistocles Navegacion SA v Langton, The Queen Frederica* [1978] 2 Lloyd's Rep 164, CA.

8 *Thermistocles Navegacion SA v Langton, The Queen Frederica* [1978] 2 Lloyd's Rep 164, CA; *Holl v Hadley* (1835) 2 Ad & El 758; *Governor & Co of Bank of Ireland v Beresford* (1818) 6 Dow 233 at 238, HL, per Lord Eldon LC; *Palmer v Sheridan-Bickers* (1910) Times, 20 July. It would, of course be necessary for these steps to be taken if the guarantee was limited to sums payable by the principal debtor under a judgment or award. As to performance bonds see PARA 1271 et seq.

9 *Lee v Bayes and Robinson* (1856) 18 CB 599.

10 *London Guarantee Co v Fearnley* (1880) 5 App Cas 911, HL.

11 *Wilks v Heeley* (1832) 1 Cr & M 249; *Re Howe, ex p Brett* (1871) 6 Ch App 838 at 841. Even where the guarantee expressly stipulated that, before the guarantor could be called upon to pay,

the creditor must have availed himself to the utmost of any bona fide securities which he held of the principal debtor, and it was proved that the creditor had neglected to adopt means to enforce payment of a bill by a party who was shown to be totally insolvent, it was held that the guarantor was not relieved from liability: *Musket v Rogers* (1839) 8 Scott 51. See also *Collins v Gwynne* (1833) 9 Bing 544; revsd sub nom *Gwynne v Burnell* (1840) 6 Bing NC 453, HL. There may, perhaps, be special circumstances in which it is necessary for the creditor, before having recourse to the guarantor, to seek indemnity from a third person: see *Cottin v Blane* (1795) 2 Anst 544; Story s 639.

12 Ie the Consumer Credit Act 1974 Pt VII (ss 86A–104): see generally CONSUMER CREDIT.

13 A 'regulated agreement' is a consumer credit agreement or consumer hire agreement, other than an exempt agreement: Consumer Credit Act 1974 s 189(1). As to the meanings of 'consumer credit agreement', 'consumer hire agreement' and 'exempt agreement' see s 189(1) (definition of 'exempt agreement' amended by the Consumer Credit Act 2006 s 5(10)); and CONSUMER CREDIT. Broadly, consumer credit agreements and consumer hire agreements comprise most agreements by which an individual (or partnership or other unincorporated body including at least one individual) is provided with credit, or with goods on hire: see the Consumer Credit Act 1974 ss 8, 15; and CONSUMER CREDIT.

14 Consumer Credit Act 1974 s 87(1). Regulations may provide that s 87(1) is not to apply to agreements described by the regulations: s 87(4). See also the Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983, SI 1983/1561; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 263. 'Security' includes inter alia an indemnity or guarantee: see PARA 1057 note 1.

1105. Demand. Modern guarantee forms usually require the guarantor to pay on demand[1]. In such cases, a valid demand is a necessary ingredient of the creditor's cause of action against the guarantor[2]. The demand must comply with any requirements imposed by the contract of guarantee as to the form and manner of the demand[3]. Subject to those requirements, and to any particular requirements of the general law[4], it seems that a valid demand under a guarantee can be made orally[5]. It is sufficient that the demand makes clear to the guarantor that the creditor requires to be paid a sum which is, in fact, due[6].

Where there is no express or implied[7] requirement in the guarantee for a demand, and no circumstances rendering a demand upon him a legal obligation[8], the guarantor is liable without being requested to pay[9].

1 Whether a demand is necessary in any given case is, essentially, a question of construction of the contract: *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425 at 447, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769 at 785, CA, per Dillon LJ. A guarantor may waive the contractual requirement for a written demand and then seek a contribution from his co-guarantor for any payment made to the creditor: *Stimpson v Smith* [1999] Ch 340, [1999] 2 All ER 833, CA.

2 *Re Brown's Estate, Brown v Brown* [1893] 2 Ch 300; *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA; *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 3 All ER 358, [1975] 1 WLR 1474. This principle may not apply where the guarantee contains a clause making the guarantor liable as if he were a principal debtor: *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* at 366–367 and at 1483 per Walton J; *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769, CA; and cf *Tate v Crewdson* [1938] Ch 869, [1938] 3 All ER 43. See also *Phillips v Fordyce* (1779) 2 Chit 676; *Sicklemore v Thistleton* (1817) 6 M & S 9; *Payne v Ives* (1823) 3 Dow & Ry KB 664; *Batson v Spearman* (1838) 9 Ad & El 298; *Martin v Wright* (1845) 6 QB 917; *Hartland v Jukes* (1863) 1 H & C 667; *Knox v Gye* (1867) 16 LT 76 at 81 per Lord Chelmsford LC; *Rickaby v Lewis* (1905) 22 TLR 130.

3 Cf *Re Berker Sportcraft Ltd's Agreements, Hartnell v Berker Sportcraft Ltd* (1947) 177 LT 420; and see eg *GMAC Commercial Credit Development Ltd v Sandhu* [2001] EWCA Civ 1209, [2001] 2 All ER (Comm) 782, [2001] All ER (D) 122 (Jul). See also *Frans Maas (UK) Ltd v Habib Bank AG Zurich* [2000] All ER (D) 1152 (a performance guarantee case; held that as a matter of construction, the words 'we claim the sum of £500,000, P having failed to meet their contractual obligations to us' did not comply with the requirement of the guarantee that the

claims should state that the principals had failed to pay under their contractual obligation, since the key concept underlying the wording of the guarantee was a 'failure to pay'; accordingly, P had not made a valid demand under the guarantee). As to performance guarantees see PARA 1271 et seq.

4 Eg under the Law of Property Act 1925 ss 103(i), 196 (see MORTGAGE vol 32 (2005 Reissue) PARAS 654–655), the Consumer Credit Act 1974 (see PARA 1104), or the Insolvency Act 1986 s 123(1)(a) (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 446) or s 268(1)(a) (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 127, 154 et seq).

5 The English courts (see *Re a Company* [1985] BCLC 37 at 41; *Bank of Credit and Commerce International SA v Blattner* (20 November 1986, unreported), CA) have accepted as 'a fair, working definition' of a valid demand the formulation proffered by Walker J in the Australian case *Re Colonial Finance, Mortgage, Investment and Guarantee Corpn Ltd* (1905) 6 SRNSW 6 at 9: 'There must be a clear intimation that payment is required to constitute a demand; nothing more is necessary, and the word 'demand' need not be used; neither is the validity of a demand lessened by its being clothed in the language of politeness; it must be of a peremptory character and unconditional, but the nature of the language is immaterial provided it has this effect'.

6 *NRG Vision Ltd v Churchfield Leasing Ltd* [1988] BCLC 624, 4 BCC 56. A minor error in the amount demanded will not generally invalidate a demand: see *Deverges v Sandeman, Clark & Co* [1902] 1 Ch 579; *Stubbs v Slater* [1910] 1 Ch 632, CA. However, it is less clear whether a material over-statement of the amount due will do so. In *Dow Banking Corpn v Mahnakh Spinning and Weaving Corpn and Bank Mellat* [1983] 2 Lloyd's Rep 561 at 566, Lloyd J held that, in order to give the contract of guarantee business efficacy, it was necessary to imply a term that the demand should state clearly what the guarantor was required to pay. See also *Brown v Great Eastern Rly Co* (1877) 2 QBD 406; *Pigot v Cubley* (1864) 15 CBNS 701 (a pledge case, distinguished in *Deverges v Sandeman, Clark & Co* above); *Re a Company* [1985] BCLC 37 at 41–43 (a case concerning the validity of a statutory demand under the Companies Act 1948 s 223(a) (repealed; re-enacted, in a materially amended form, in the Insolvency Act 1986 s 123(1)(a): see note 4); and *Cryne v Barclays Bank plc* [1987] BCLC 548, CA (where the point does not seem to have been argued). Contrast *Bank of Baroda v Panessar* [1987] Ch 335, [1986] 3 All ER 751, where Walton J held that a demand on a principal debtor for 'all moneys due to us' was sufficient; and see *Bank Negara Indonesia 1946 v Taylor* [1995] CLC 225 (demand for more than was actually due held to constitute a valid demand).

7 See *Morten v Marshall* (1863) 2 H & C 305.

8 See *Payne v Ives* (1823) 3 Dow & Ry KB 664. A guarantor for payment by the acceptor of a bill or note is liable even though there has been no presentment: *Warrington v Furbor* (1807) 8 East 242; *Walton v Mascall* (1844) 13 M & W 452. Unreasonable neglect, however, on the part of the holder of a bill or note to present it or to give notice of dishonour may, it seems, discharge from all liability a surety damnified by such neglect: *Philips v Astling* (1809) 2 Taunt 206; *Van Wart v Woolley* (1824) 3 B & C 439 at 447 per Abbott CJ; *Peacock v Pursell* (1863) 14 CBNS 728.

9 *Hitchcock v Humfrey* (1843) 5 Man & G 559; *Rede v Farr* (1817) 6 M & S 121; *Lilley v Hewitt* (1822) 11 Price 494. See also *Thomas v Nottingham Incorporated Football Club Ltd* [1972] Ch 596, [1972] 1 All ER 1176.

1106. Conditions precedent to guarantor's liability. Any express or implied conditions precedent to the guarantor's liability must be fulfilled before recourse can be had to him[1].

Where a guarantee recited that the loan to the principal debtor was secured by a charge upon shares, which was also mentioned in the operative part of the guarantee, the existence of the security was held to constitute a condition precedent to the guarantor's liability, and the guarantor was held not to be estopped by the recital from asserting the non-existence of the shares, since the recital was intended as a statement by the creditor and not by him[2].

Where a guarantor agrees to give a guarantee on condition that other named persons also sign the guarantee as co-guarantors, the guarantor will not be liable if any of those persons do not sign, or if the signature of any of those persons is forged[3]. It is the creditor's duty to see that the guarantee is executed by the

proper parties, and the known insolvency of one of the named co-guarantors will not dispense with the duty of obtaining his signature to the guarantee[4].

Similarly, where a guarantor stipulates that the principal debtor is to execute a particular instrument, this will be regarded as a condition precedent requiring fulfilment[5]. In such a case, however, the guarantor will not be discharged from liability if the principal debtor, although he has not executed the guarantee bond, has executed an instrument on which the guarantor may sue him and become his specialty creditor[6].

The mere fact that the taking of other security is intended or contemplated by the creditor will not make the taking of that security a condition precedent to the guarantor's liability, unless the guarantor makes the fact that his guarantee is so conditional clear to the creditor before he gives it, or there are other exceptional circumstances[7]. The guarantor will not be relieved from liability simply because persons he merely thought or assumed would also sign the guarantee have not done so, or further security that he merely thought or assumed would be taken has not been taken[8].

1 See *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902, [1989] 1 WLR 255, and the cases cited in notes 2–8.

2 *Re Parent Trust and Finance Co Ltd* [1936] 3 All ER 432, CA; affd sub nom *Greer v Kettle* [1938] AC 156, [1937] 4 All ER 396, HL. See also *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902, [1989] 1 WLR 255, discussed in PARA 1033 note 1.

3 *James Graham & Co (Timber) Ltd v Southgate-Sands* [1986] QB 80, [1985] 2 All ER 344, CA. See also *Re Semple* (1846) 3 Jo & Lat 488; *Emmet v Dewhurst* (1851) 3 Mac & G 587; *Evans v Bremridge* as reported in (1855) 25 LJCh 334; affd (1856) 25 LJCh 334; *Hansard v Lethbridge* (1892) 8 TLR 346, CA; *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75; *Fitzgerald v M'Cowan* [1898] 2 IR 1; *West Riding Union Banking Co Ltd v Elmore* (1905) Times, 24 February, CA; *Re Cowardine* (1905) Times, 21 December; *National Provincial Bank of England v Brackenbury* (1906) 22 TLR 797; *Re Parent Trust and Finance Co Ltd* [1936] 3 All ER 432, CA; affd sub nom *Greer v Kettle* [1938] AC 156, [1937] 4 All ER 396, HL; *Lady Naas v Westminster Bank Ltd* [1940] AC 366, [1940] 1 All ER 485, HL. Where A executed a bond as the joint and several bond of himself and B, and signed it 'A and B', having no authority to do so, the bond was held to be a good several bond of A: *Elliot v Davis* (1800) 2 Bos & P 338. Where a person signs a promissory note on a representation that others are to join, and one afterwards refuses to sign, the payees cannot in general recover against the person who signed it: *Leaf v Gibbs* (1830) 4 C & P 466. See also *Hollies Stores Ltd v Timmis* [1921] 2 Ch 202 (lease; covenant by guarantors for payment of rent; option to renew on same terms, including covenant by the guarantors; death of one guarantor; failure of option).

4 *Fitzgerald v M'Cowan* [1898] 2 IR 1. Where a guarantee of the solvency of the underwriters of a policy recited that the policy had been signed by five underwriters, and that the signatures of the underwriters were known to the guarantors, evidence to show that the policy had not been signed by all the underwriters was held inadmissible: *Anglo-Californian Bank Ltd v London and Provincial Marine and General Insurance Co Ltd* (1904) 20 TLR 665.

5 *Cooper v Evans* (1867) LR 4 Eq 45.

6 *Cooper v Evans* (1867) LR 4 Eq 45. See *Anglo-Californian Bank Ltd v London and Provincial Marine and General Insurance Co Ltd* (1904) 20 TLR 665.

7 See *Byblos Bank SAL v Al-Khudairy* [1987] BCLC 232, 2 BCC 99, CA.

8 *Byblos Bank SAL v Al-Khudairy* [1987] BCLC 232, 2 BCC 99, 549, CA. See also *Coyte v Elphick* (1874) 22 WR 541 at 544; *Lawrence v Harris* (1902) Times, 10 March; *Ward v National Bank of New Zealand* (1883) 8 App Cas 755, PC; *Traill v Gibbons* (1861) 2 F & F 358; *Horne v Ramsdale* (1842) 9 M & W 329; *Dallas v Walls* (1873) 29 LT 599.

1107. Effect of particular stipulations. Where the guarantor stipulates for forbearance for a stated time to sue or enforce payment from the principal debtor, the stipulation must be exactly fulfilled or the guarantor will not be

liable[1]. Similarly, a stipulation that goods are to be supplied or advances made to the principal debtor must be fulfilled, as being a condition precedent to the guarantor's liability[2].

A guarantor who agrees to pay the creditor within a stated period after the receipt by the principal debtor of a written notice demanding payment from him is nevertheless discharged from liability where the giving of that notice is no longer possible owing to the death of the principal debtor[3].

A guarantor for payment of a promissory note across which words are written making it payable at a particular place is liable even though presentation is not made at that place, because, to be effectual, such words should be in the body of the note[4]. Failure by an employer to comply with statutory directions in his dealings with an employee will not necessarily discharge the employee's guarantor where such directions are not clearly imperative but are merely permissive[5].

Notice by or on behalf of the creditor should be given to the guarantor of the waiver by the creditor of any stipulation, introduced for his benefit, the non-fulfilment of which would have discharged the guarantor[6].

In the case of a guarantee for the good behaviour of another in an office or employment, the guarantor's liability does not commence until the principal debtor has been legally appointed to the office or employment[7].

1 See *Rolt v Cozens* (1856) 18 CB 673. Cf *Board v Hoey* (1948) 65 TLR 43; and see PARA 1084 note 13. It has, however, been held in Scotland that where a guarantee stipulates that no payment of the principal sum to which it relates is to be demanded before a certain date, breach of this stipulation does not discharge the guarantor: see *London and Midland Bank Ltd v Forrest* (1899) 2 F 179, Ct of Sess. See also PARAS 1049, 1242–1243.

2 *Westhead v Sproson* (1861) 6 H & N 728; *Boyd v Moyle* (1846) 2 CB 644 at 650; *Broom v Batchelor* (1856) 1 H & N 255; *Johnston v Nicholls* (1845) 1 CB 251; *Wood v Benson* (1831) 2 Cr & J 94; *Hartland v Jukes* (1863) 1 H & C 667 at 675 per Pollock CB.

3 *Rickaby v Lewis* (1905) 22 TLR 130; and see *Bonser v Cox* (1841) 4 Beav 379; *Stoneham v Ocean, Railway and General Accident Insurance Co* (1887) 19 QBD 237.

4 *Stevenson v Brown* (1902) 18 TLR 268.

5 *Gwynne v Burnell* (1840) 7 Cl & Fin 572, HL.

6 *Morten v Marshall* (1863) 2 H & C 305.

7 *Kepp v Wiggett* (1850) 10 CB 35; *Holland v Lea* (1854) 9 Exch 430; *Nares v Rowles* (1811) 14 East 510; *Webb v James* (1840) 7 M & W 279. As to the circumstances in which a recital in the guarantee of the appointment of the principal debtor will operate as an estoppel against the guarantor see PARA 1086.

C. DURATION OF GUARANTOR'S LIABILITY

1108. Duration of a guarantee. The duration[1] of the guarantor's liability depends upon the terms of the guarantee[2]. Some guarantees are intended to cover a single credit or transaction only[3], while others, called 'continuing guarantees'[4], are framed so as to apply to a series of credits or transactions. In the case of a single credit or transaction the guarantor's liability extends only to the one credit or transaction agreed upon, while in the case of a continuing guarantee the liability endures until the credits or transactions contemplated by the parties and covered by the guarantee have been exhausted or until the guarantee itself has been revoked[5].

As the language of guarantees and their subject matter and the surrounding circumstances differ in almost every case, the question whether a guarantee is continuing or not cannot be determined by any hard and fast rule[6]. It is in each case a question of construction of the guarantee in its context[7].

1 As to when time begins to run in favour of a guarantor see PARAS 1103 et seq, 1181: and see generally LIMITATION OF ACTIONS.

2 Thus, where a bond on the face of it appears to be a simple money bond to secure a sum certain with interest, it must be construed, so far at least as regards the guarantor, as given to secure the debt then existing, and not a floating balance: *Walker v Hardman* (1837) 4 Cl & Fin 258, HL; *Re Medewe's Trust* (1859) 26 Beav 588. On the other hand, a guarantee given to secure 'whatever may be owing' up to the pecuniary limit of the guarantor's prescribed liability applies, prima facie at least, not to a specific and ascertained sum already due to the creditor from the principal debtor at the date of the guarantee, but to what may afterwards become due: *Wood v Priestner* (1866) LR 2 Exch 66; affd (1867) LR 2 Exch 282, Ex Ch. The words 'whatever may be owing' are, apparently, descriptive not so much of a present debt as of something to become due hereafter: *Wood v Priestner* (1866) LR 2 Exch 66. See also *Kirby v Duke of Marlborough* (1813) 2 M & S 18.

3 If a party means to be guarantor only for a single dealing he should take care to say so: *Merle v Wells* (1810) 2 Camp 413 at 414 per Lord Ellenborough.

4 As to the meaning of 'continuing guarantee' see PARA 1013. In the case of a guarantee to cover advances, the effect of the word 'continuing' is to extend the guarantee beyond the original advance to subsequent advances: *Parr's Banking Co Ltd v Yates* [1898] 2 QB 460 at 466, CA, per Rigby LJ. See also *Re Quest Cae Ltd* [1985] BCLC 266 at 270 per Nourse J.

5 As to the revocation of guarantees see PARA 1200 et seq.

6 *Coles v Pack* (1869) LR 5 CP 65 at 70 per Bovill CJ.

7 See PARA 1084, especially at the text and note 16.

1109. Mercantile or trade guarantees. Mercantile or trade guarantees are usually given either to secure the supply of goods on credit or advances of money, and, so far as the guarantor's liability is concerned, may be limited in amount[1] or absolutely unlimited[2]. Where there is a prescribed pecuniary limit, the guarantee, if continuing, is not exhausted by the first advance or credit equal to the prescribed amount[3], but a guarantee, although continuing and limited to a certain given sum, may, and sometimes does, stipulate that the guarantor is only to be liable for a definite period of time and no longer[4], in which case, as where it is given as security for the acceptor of bills, it is often a nice question of construction whether it covers transactions completed, but not matured, during the time limit[5].

1 See *Laurie v Scholefield* (1869) LR 4 CP 622; *Wood v Priestner* (1866) LR 2 Exch 66; affd (1867) LR 2 Exch 282, Ex Ch; *Heffield v Meadows* (1869) LR 4 CP 595; *Beckett v Addyman* (1882) 9 QBD 783, CA; *Coles v Pack* (1869) LR 5 CP 65; *Harriss v Fawcett* (1873) 8 Ch App 866; *R v O'Callaghan* (1838) 1 I Eq R 439; *Grahame v Grahame* (1887) 19 LR Ir 249; *Parker v Wise* (1817) 6 M & S 239; *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA; *Bradbury v Morgan* (1862) 1 H & C 249; *Ellis v Emmanuel* (1876) 1 ExD 157, CA; *Batson v Spearman* (1838) 9 Ad & El 298; *Browning v Baldwin* (1879) 40 LT 248; *Mason v Pritchard* (1810) 12 East 227; *Boyd v Robins and Langlands* (1859) 5 CBNS 597, Ex Ch; *Bastow v Bennett* (1812) 3 Camp 220; *Allan v Kenning* (1833) 9 Bing 618; *Mayer v Isaac* (1840) 6 M & W 605; *Martin v Wright* (1845) 6 QB 917; *Mann, Taylor & Co Ltd v Royal Bank of Canada* (1935) 40 Com Cas 267.

2 See *Hitchcock v Humfrey* (1843) 5 Man & G 559; *Nottingham Hide, Skin and Fat Market Co v Bottrill* (1873) LR 8 CP 694; *Burgess v Eve* (1872) LR 13 Eq 450; *Lloyd's v Harper* (1880) 16 ChD 290, CA; *Calvert v Gordon* (1828) 3 Man & Ry KB 124; *Coulthart v Clementson* (1879) 5 QBD 42; and see *Australian Joint Stock Bank v Bailey* [1899] AC 396, PC.

3 *Williams v Rawlinson* (1825) Ry & M 233; *Mason v Pritchard* (1810) 12 East 227; *Laurie v Scholefield* (1869) LR 4 CP 622; *Mayer v Isaac* (1840) 6 M & W 605; *Whelan v Keegan* (1858) 7 ICLR 544; *Hitchcock v Humfrey* (1843) 5 Man & G 559; and see *Australian Joint Stock Bank v Bailey* [1899] AC 396, PC; *Kirby v Duke of Marlborough* (1813) 2 M & S 18.

4 *Laurie v Scholefield* (1869) LR 4 CP 622.

5 See *Hollond v Teed* (1848) 7 Hare 50, where the guarantee was held to apply to bills accepted before but not payable until after its termination; and see generally PARA 791 et seq. Apparently a guarantee for payment of goods to be supplied will cover goods contracted for the day before it was given and subsequently supplied: see *Simmons v Keating* (1818) 2 Stark 426.

1110. Framing non-continuing guarantees. Whatever is the nature of the guarantee, if it is intended to limit its scope and operation to a single transaction, great care should be taken in framing it[1], and in the avoidance of words consistent with or more suitable to an intention on the part of the guarantor to extend his responsibility to several transactions rather than to limit it to one transaction only[2].

A continuing guarantee will normally be appropriate as security for an overdraft facility, since the overdraft will fluctuate in amount and will often continue for an indefinite period. Guarantees for bank overdrafts usually state in terms that they are to be by way of continuing security, and that they are not to be satisfied, discharged or affected by any intermediate payment or settlement of account[3]. The fact that a guarantee is a continuing one may sometimes be implied from a statement that the guarantor is to be liable for the ultimate balance[4].

1 See *Merle v Wells* (1810) 2 Camp 413. As to mortgages to secure bank loans see *Hopkinson v Rolt* (1861) 9 HL Cas 514; *Bradford Banking Co Ltd v Briggs & Co Ltd* (1866) 12 App Cas 29, HL; *Bank of Africa Ltd v Salisbury Gold Mining Co* [1892] AC 281, PC; *Burgess v Eve* (1872) LR 13 Eq 450 at 459 per Malins V-C.

2 For examples of continuing guarantees see *Heffeld v Meadows* (1869) LR 4 CP 595; *Coles v Pack* (1869) LR 5 CP 65; *Bastow v Bennett* (1812) 3 Camp 220; *Burgess v Eve* (1872) LR 13 Eq 450; *Tanner v Moore* (1846) 9 QB 1; *Merle v Wells* (1810) 2 Camp 413; *Woolley v Jennings* (1826) 5 B & C 165; *Simpson v Manley* (1831) 2 Cr & J 12; *Browning v Baldwin* (1879) 40 LT 248; *Laurie v Scholefield* (1869) LR 4 CP 622; *Williams v Rawlinson* (1825) Ry & M 233; *Martin v Wright* (1845) 6 QB 917; *Allan v Kenning* (1833) 9 Bing 618; *Nottingham Hide, Skin and Fat Market Co v Bottrill* (1873) LR 8 CP 694; *Mayer v Isaac* (1840) 6 M & W 605; *Dry v Davy* (1839) 10 Ad & El 30; *Hitchcock v Humfrey* (1843) 5 Man & G 559; *Hargreave v Smee* (1829) 6 Bing 244; *Weston v Empire Assurance Corpn Ltd* (1868) 19 LT 305. For examples of specific or non-continuing guarantees see *Kirby v Duke of Marlborough* (1813) 2 M & S 18; *Nicholson v Paget* (1832) 1 Cr & M 48; *Tayleur v Wildin* (1868) LR 3 Exch 303; *Kay v Groves* (1829) 6 Bing 276; *Bovill v Turner* (1815) 2 Chit 205; *Melville v Hayden* (1820) 3 B & Ald 593; *Walker v Hardman* (1837) 4 Cl & Fin 258, HL; *Re Medewe's Trust* (1859) 26 Beav 588; *Atwood v Crowdie* (1816) 1 Stark 483.

3 Without this provision it might be argued that by virtue of the operation of the rule in *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 529, 572 (sometimes referred to simply as *Clayton's Case*; see also *Deeley v Lloyds Bank Ltd* [1912] AC 756, HL), under which credits to the account are be treated as appropriated to the earliest debits, the obligation secured no longer exists once sufficient credits have been paid into the account to repay the original borrowing, and that subsequent debits though not increasing the overdraft were new borrowings not covered by the guarantee: see *Re Quest Cae Ltd* [1985] BCLC 266 at 270 per Nourse J.

4 Cf *Wright v New Zealand Farmers' Co-operative Association of Canterbury Ltd* [1939] AC 439, [1939] 2 All ER 701, PC. The argument sometimes put forward by guarantors, that until all other recoveries have been completed there can be no ultimate balance, and so nothing for the guarantee to bite on, is misconceived.

1111. Fidelity guarantees. Continuing guarantees given for the fidelity of a person in some office or employment have often given rise to difficult questions as to the duration of the guarantor's liability[1].

Where there is nothing to control the general and indefinite language of the condition of a fidelity bond, and it does not appear from any recital in it or in any other way that the office or employment for the due discharge of which the bond has been given is limited in duration, the liability of the guarantor is co-extensive in duration with that of the employee[2].

1 Where a fidelity bond is given as part of the consideration for the appointment of the principal debtor to an office or employment, it should, in the guarantor's interest, expressly stipulate that the bond is to be determinable by notice or by the guarantor's death: *Re Crace, Balfour v Crace* [1902] 1 Ch 733; *Gordon v Calvert* (1828) 4 Russ 581.

Where the office is for a specific time only, the guarantor's liability is confined to that specific time (see *Kitson v Julian* (1855) 4 E & B 854; *Bamford v Iles and Neale* (1849) 3 Exch 380; *Hassell v Long* (1814) 2 M & S 363; *Wardens of St Saviour's, Southwark v Bostock* (1806) 2 Bos & PNR 175) unless the fidelity bond contains apt words extending his liability to subsequent reappointments (*Peppin v Cooper* (1819) 2 B & Ald 431; *Augero v Keen* (1836) 1 M & W 390; and see also *Dartmouth Corpn v Silly* (1857) 7 E & B 97; *Oswald v Berwick-upon-Tweed Corpn* (1856) 5 HL Cas 856; *Portsea Island Union Guardians v Whillier* (1860) 6 Jur NS 887).

It sometimes happens that, while the condition of the bond is general and indefinite as to the time during which the guarantor is to remain liable for the employee, the recital shows that the employee's appointment to the office in question is for a specific time only. In such cases the condition is controlled by the recital and the guarantor's liability restricted to that specific time (*Lord Arlington v Merricke* (1672) 2 Saund 403; *Liverpool Waterworks Co v Atkinson* (1805) 6 East 507), whether the recital specifies in so many words the length of the term of office (*Lord Arlington v Merricke* above; *Liverpool Waterworks Co v Atkinson* above) or merely states that the appointment was made under some statute by which the office is expressly limited to a specified period (*Peppin v Cooper* above). However, this is not so when a statute is indefinite as to the period of duration of the appointment (*Curling v Chalklen* (1815) 3 M & S 502).

Even where the guarantor may have consented to the employee's reappointment, he is apparently only liable for defaults committed during the period for which the original appointment was made: *Kitson v Julian* (1855) 4 E & B 854; and see *Williams v Jones* (1729) Bunb 275.

Owing to delay in getting guarantee bonds passed in the head office of an English company in London it has happened that where the bond of an English guarantee company is accepted in Scotland, the time prescribed for finding security expires before the bond can be obtained. Accordingly, in *Cuthbertson v Macdougall* (1905) 13 SLT 205, Ct of Sess (OH), the Lord Ordinary directed a bond of a Scottish guarantee company to be substituted for that of an English company.

Fidelity guarantees are now rarely encountered: see further PARA 1133.

2 See *Birmingham Corpn v Wright* (1851) 16 QB 623; *Sansom v Bell* (1809) 2 Camp 39; *Curling v Chalklen* (1815) 3 M & S 502.

See also *Tullamore UDC v Robins* (1913) 48 ILT 180, where the guarantor was held liable for defalcations committed before the date of the bond and failure after the date of the bond to account at audit. A bond conditioned for the due accounting by a collector of church and poor rates to the obligees 'and their successors', who were churchwardens and overseers, was held not to extend beyond their year of office, as the collector's appointment was only for such period (*Leadley v Evans* (1824) 2 Bing 32), although, apparently, had the collector's appointment been for a longer period than that of the obligees, the guarantors would have remained liable to 'the successors' of the original obligees (*M'Gahey v Alston* (1836) 1 M & W 386).

1112. Principal's appointment to new office. Where the principal debtor for whom a fidelity guarantee has been given is subsequently appointed to a new office, and his original appointment is thereby terminated, the guarantor, unless the guarantee provides to the contrary, ceases to be liable, even though the second appointment does not involve additional or different duties from those originally imposed[1]. The guarantor is also freed from further liability under a fidelity guarantee where the old and new appointments of the principal debtor are so incompatible that acceptance of the new appointment necessarily vacates the old one[2]. However, the mere acceptance by the principal debtor of an incompatible office will not have this effect in a case where he cannot divest himself of his original office by his own act, but requires the concurrence of another authority to his resignation, that authority not being privy or consenting to the second appointment[3]. So where the second appointment does not operate as an implied resignation from the old office because the authority making the second appointment cannot remove the principal debtor from his original office or accept a surrender of it, the guarantor continues liable[4].

Where the new office or employment is not incompatible with the original one, so that the old appointment does not terminate, the guarantor is not discharged[5].

1 *Malling Union v Graham* (1870) LR 5 CP 201. Fidelity guarantees are now rarely encountered. See further PARA 1133. See also PARA 1111.
2 *Frank v Edwards* (1852) 8 Exch 214; *Anderson v Thornton* (1842) 3 QB 271; and see *R v Pateman* (1788) 2 Term Rep 777; *Milward v Thatcher* (1787) 2 Term Rep 81. As to incompatible offices see generally CORPORATIONS vol 9(2) (2006 Reissue) PARA 1170.
3 *R v Patteson* (1832) 4 B & Ad 9.
4 *Worth v Newton* (1854) 10 Exch 247.
5 See *Frank v Edwards* (1852) 8 Exch 214; *Anderson v Thornton* (1842) 3 QB 271. Thus, where a person becomes guarantor for a clerk in a bank, who is afterwards appointed manager of the bank, the guarantor will not be relieved from liability unless it is proved that when the principal became manager he ceased to be a clerk: *Anderson v Thornton*.

1113. Change in tenure of appointment. The conversion of the office filled by the principal debtor from an annual office into one during pleasure will determine the guarantor's liability[1] unless the guarantee provides to the contrary[2]. On the other hand, where one of the terms of a contract of service makes it determinable by one month's notice on either side, and afterwards, without the guarantor's knowledge, it is agreed that the service is to be terminable by three months' notice, the guarantor is not discharged where he has not chosen to make that term part of his own contract[3].

1 *Cambridge Corpn v Dennis* (1858) EB & E 660.
2 *Oswald v Berwick-upon-Tweed Corpn* (1856) 5 HL Cas 856; *Dartmouth Corpn v Silly* (1857) 7 E & B 97.
3 *Sanderson v Aston* (1873) LR 8 Exch 73, where the guarantor was ultimately discharged from liability on other grounds; see also *Nicholsons v Burt* (1882) 10 R 121, Ct of Sess.

1114. Change in duties of office. Any material alteration in the duties of the office of the principal debtor, whether effected by statute[1] or otherwise, will discharge the guarantor under a fidelity guarantee[2]. Where, however, the duties are not materially altered, but lessened, the guarantor's liability continues, even though the salary is reduced as well, unless the guarantee otherwise specifies[3]. Where the guarantor has guaranteed the fidelity of a person holding two offices, one of which is subsequently altered while the other is not, his guarantee still applies to the unaltered office[4], although, in general, any alteration in the contract between the creditor and the principal debtor to which the guarantor has not consented will discharge the guarantor unless it is evident, without inquiry, that the alteration is insubstantial, or that it cannot but be beneficial to the guarantor[5].

The sub-division of the original office in respect of which a fidelity guarantee has been given, when coupled with an alteration in the amount and character of the remuneration will terminate the guarantor's liability[6].

1 *Pybus v Gibb* (1856) 6 E & B 902; *Bartlett v A-G* (1709) Park 277; *Malling Union v Graham* (1870) LR 5 CP 201.
2 *Bonar v Macdonald* (1850) 3 HL Cas 226; *Wembley UDC v Poor Law and Local Government Officers' Mutual Guarantee Association Ltd* (1901) 17 TLR 516.
3 *Frank v Edwards* (1852) 8 Exch 214.
4 *Skillett v Fletcher* (1867) LR 2 CP 469, Ex Ch; *Harrison v Seymour* (1866) LR 1 CP 518; *Croydon Commercial Gas Co v Dickinson* (1876) 2 CPD 46, CA; *Brown & Co v Brown, Brown v Brown & Co* (1877) 36 LT 272, CA.
5 *Holme v Brunskill* (1878) 3 QBD 495 at 505, CA, per Cotton LJ; and see PARA 1235. Thus, a guarantor in a bond conditioned for the good conduct of a bank clerk is not liable for

misbehaviour consequent upon his being allowed to become a customer and to keep an account with the bank: *Stoveld v Upton* (1836) 6 LJCP 126.

6 *R v Herron and Montgomery* [1903] 2 IR 474. Where, however, a person was appointed collector of poor rates for a whole parish, his subsequent transfer from one district to another district of the same parish did not per se discharge his guarantor: *Portsea Island Union Guardians v Whillier* (1860) 2 E & E 755.

1115. Change of salary. Whether a reduction or increase of the principal debtor's salary or an alteration in the mode of its payment will relieve the guarantor from liability depends upon the construction of the guarantee[1]. If, however, the amount of the salary is to be treated as an essential ingredient in the contract, care must be taken by the guarantor to have a stipulation on the subject introduced into the guarantee or condition of the fidelity bond, as otherwise the alteration will not affect his liability[2].

1 As to the interpretation of guarantees see PARA 1083 et seq.

2 *Frank v Edwards* (1852) 8 Exch 214 at 220–221 per Parke B. The substitution of payment by commission for remuneration at a fixed salary as originally arranged will, however, operate as a discharge: *North Western Rly Co v Whinray* (1854) 10 Exch 77.

1116. Contemplated appointment not made. Where the principal debtor's appointment contemplated by the guarantee is not made at all, but another appointment is made at a higher salary, the guarantor will not be bound[1]. Moreover, when the original appointment is for an indefinite time, and the guarantor has agreed to be liable so long as the debtor continues in office, the subsequent reappointment of the principal debtor at a different salary will, unless the guarantee provides otherwise, revoke the original appointment and terminate the guarantor's liability[2].

1 *Holland v Lea* (1854) 9 Exch 430.

2 *Bamford v Iles and Neale* (1849) 3 Exch 380 at 386 per Pollock CB; and see *Toames Co-operative Agricultural and Dairy Society Ltd v Foley* [1910] 2 IR 277, CA. Where the principal debtor obtained an increase of salary from his employers by fraud, not only was his guarantor not thereby discharged, but, on the contrary, the loss occasioned to the employers by the fraud was held to be recoverable from the guarantor under a policy for the due and faithful discharge of his duties by the principal debtor: *Bramley Union Guardians v Guarantee Society* (1900) 64 JP 308, CA.

1117. Change in partnership. In the absence of agreement to the contrary, a continuing guarantee is revoked as to future transactions by any change in the constitution of the partnership to which or in respect of which a guarantee was given[1].

1 Partnership Act 1890 s 18. Cf *Backhouse v Hall* (1865) 6 B & S 507 at 520 per Blackburn J; *Barclay v Lucas* (1783) 3 Doug KB 321 at 326 note (d); and see PARAS 1118–1119.

1118. Increase in number of obligees. Whether the guarantor's liability will continue after an increase has taken place in the number of the persons to whom the guarantee was originally given is largely a question of intention, ascertainable by reference to the terms of the guarantee[1] and to its subject matter[2]. This intention should, however, be clearly expressed, if effect is to be given to it[3], and the mere use of language indicating that the guarantee is given to certain individuals in their capacity as partners in a 'firm' or 'house' will not suffice for the purpose[4].

So it has been held that a guarantee given to one person for the fidelity of another ceases to operate after the first person has taken a third party into

partnership with him[5]; and that securities given to a banking firm for a current balance do not cover transactions subsequent to the admission of a new partner[6].

1 *Backhouse v Hall* (1865) 6 B & S 507 at 519–520 per Blackburn J; and see *Pease v Hirst* (1829) 10 B & C 122; *Ex p Watson* (1815) 19 Ves 459; *Pariente v Lubbock* (1856) 8 De GM & G 5; *Eyton v Knight* (1838) 2 Jur 8.

2 *Barclay v Lucas* (1783) as reported in 1 Term Rep 291n at 293 per Lord Mansfield. This dictum still holds good, although the actual decision given can no longer be supported (see *Dance v Girdler* (1804) 1 Bos & PNR 34) having regard to the cases cited in note 4.

3 *Strange v Lee* (1803) 3 East 484 at 491 per Lawrence J; *Backhouse v Hall* (1865) 6 B & S 507 at 519–520 per Blackburn J; and see *Metcalf v Bruin* (1810) 12 East 400; *Kipling v Turner* (1821) 5 B & Ald 261; *Ex p Kensington* (1813) 2 Ves & B 79.

4 *Weston v Barton* (1812) 4 Taunt 673; and see *Pemberton v Oakes* (1827) 4 Russ 154; *Hollond v Teed* (1848) 7 Hare 50; *Spiers v Houston* (1829) 4 Bli NS 515, HL; *Wright v Russel* (1774) 3 Wils 530. A different view from that expressed in these cases was formerly held: see *Weston v Barton* above at 681 per Sir James Mansfield CJ; *Backhouse v Hall* (1865) 6 B & S 507 at 519 per Blackburn J; *Barclay v Lucas* (1783) as reported in 1 Term Rep 291n. This last-named case is apparently overruled: see *Dance v Girdler* (1804) 1 Bos & PNR 34; *Strange v Lee* (1803) 3 East 484; *Weston v Barton* above.

5 *Wright v Russel* (1774) 3 Wils 530.

6 *Eyton v Knight* (1838) 2 Jur 8; and see *Royal Bank of Scotland v Christie* (1841) 8 Cl & Fin 214, HL.

1119. Decrease in number of obligees. The death of a member of the firm to which a guarantee is given will generally discharge the guarantor[1], even though the guarantee is given for a fixed time which has not expired when the death occurs[2], unless a contrary intention is indicated by the guarantee[3]. A bond given by a guarantor for repayment of such sums as may be advanced to meet bills drawn by two persons in partnership or either of them does not extend to bills drawn by one of those persons after the death of the other[4]. A bond conditioned for faithful service of the principal to the obligee and his executors does not make the guarantor liable for defaults committed by the principal, after the obligee's death, when in the service of the executors who continue the business and retain him in their employment[5]. The retirement of a partner from the firm to which a guarantee has been given will determine the guarantor's liability as to future transactions under it[6] in the absence of any expression of intention to the contrary contained in the guarantee[7]. Unless such an intention is indicated, the retirement from the firm of a partner for whose fidelity the guarantor has made himself liable will determine the guarantor's future liability, even where the guarantee contemplates its continuance after that partner's death[8].

1 See the Partnership Act 1890 s 18; *Phillips v Alhambra Palace Co* [1901] 1 KB 59; *Strange v Lee* (1803) 3 East 484; *Weston v Barton* (1812) 4 Taunt 673; *Pemberton v Oakes* (1827) 4 Russ 154; *Chapman v Beckinton* (1842) 3 QB 703; *Royal Bank of Scotland v Christie* (1841) 8 Cl & Fin 214, HL. The effect of change by death etc in a firm to which an apprentice is bound on the contract of apprenticeship, and consequently on the liability of a guarantor for that contract, is uncertain: see *Lloyd v Blackburn* (1842) 9 M & W 363; *R v St Martin's, Exeter, Inhabitants* (1835) 2 Ad & El 655. As to the revocation of a continuing guarantee upon the death of the guarantor or the principal debtor see PARA 1202 et seq.

2 *Hollond v Teed* (1848) 7 Hare 50; and see the Partnership Act 1890 s 18.

3 See *Metcalf v Bruin* (1810) 12 East 400; and the Partnership Act 1890 s 18.

4 *Simson v Cooke* (1824) 1 Bing 452.

5 *Barker v Parker* (1786) 1 Term Rep 287.

6 *Myers v Edge* (1797) 7 Term Rep 254; *Dry v Davy* (1839) 10 Ad & El 30; *Solvency Mutual Guarantee Co v Freeman* (1861) 7 H & N 17; and see the Partnership Act 1890 s 18.

7 *Pease v Hirst* (1829) 10 B & C 122; *Re Carlill, ex p Marsh* (1815) 2 Rose 240 at 242; *Re Ireland and Harrison, ex p Lloyd* (1838) 3 Deac 305.

8 *Cambridge University v Baldwin* (1839) 5 M & W 580.

1120. Change in principal's position. A guarantor for the fidelity of an agent is not liable after the agency has been entrusted by the employers to a new firm comprising that agent[1], even where the guarantor had knowledge, before he executed the fidelity bond, that the agent intended to enter into the partnership after the execution of the fidelity bond[2]; although where on the true construction of the contract it appears that the guarantor agrees to remain liable after the principal has taken another into partnership with him, the guarantee will continue applicable to future transactions[3].

1 *Bellairs v Ebsworth* (1811) 3 Camp 53.

2 *Montefiore v Lloyd* (1863) 15 CBNS 203; *London Assurance Co v Bold* (1844) 6 QB 514; and see *Mills v Alderbury Union Guardians* (1849) 3 Exch 590 at 596.

3 *Leathley v Spyer* (1870) LR 5 CP 595; and see *Bank of British North America v Cuvillier* (1861) 4 LT 159, PC.

D. ENFORCEMENT OF GUARANTOR'S LIABILITY

1121. Remedy against guarantor. The remedy against a solvent[1] guarantor on his guarantee is by bringing a claim in the High Court or in a county court[2]. In both courts procedure exists by which the creditor may in a proper case recover final judgment against the guarantor in a summary manner[3].

It is an abuse of process to present a winding-up petition against a solvent guarantor company as a means of putting pressure on it to pay money which is bona fide disputed, instead of applying for summary judgment[4].

1 As to the effect of bankruptcy on a guarantee see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 490, 504 et seq. The guarantor for an account should be joined to the proceedings where the trustee in bankruptcy seeks to show that payments by the debtor to the person with whom he was in account are voidable as a transaction at an undervalue or a preference: *Re Idenden (a bankrupt), ex p Trustee of the Property of the Bankrupt v Bateman & Co Ltd* [1970] 2 All ER 387n, [1970] 1 WLR 1015; and see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 653 et seq.

2 A county court now has unlimited jurisdiction to hear and determine any claim founded on contract: see the County Courts Act 1984 s 15(1) (amended by SI 1991/724); and COURTS vol 10 (Reissue) PARA 712. For the limited exceptions (which do not affect guarantees) see the County Courts Act 1984 s 15(2); and COURTS vol 10 (Reissue) PARA 722. The remedy of the creditor against the guarantor may be barred by the running of time: see PARA 1180.

3 As to summary judgment see CPR Pt 24; and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 921 et seq. For examples of cases concerning the principles applicable to applications for summary judgment involving claims under a guarantee see eg *Lloyds Bank plc v Ellis-Fewster* [1983] 2 All ER 424, [1983] 1 WLR 559, CA; *Banque de Paris et des Pays-Bas (Suisse) SA v de Naray* [1984] 1 Lloyd's Rep 21, CA; *Morgan Guaranty Trust Co v Hadjantonakis (No 2)* [1988] 1 Lloyd's Rep 375; *Den Norske Creditbank v Sarawak Economic Development Corpn* [1988] 2 Lloyd's Rep 616; affd [1989] 2 Lloyd's Rep 35, CA; *Standard Chartered Bank Ltd v Yaacoub* [1990] CA Transcript 699; *National Westminster Bank plc v Daniel* [1994] 1 All ER 156, [1993] 1 WLR 1453, CA. Conversely, many authorities concerning the law of guarantees have been decided on applications for summary judgment: see eg *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep 502, CA; *Hyundai Heavy Industries Co v Papadopoulos* [1979] 1 Lloyd's Rep 130, CA; affd [1980] 2 All ER 29, [1980] 1 WLR 1129, [1980] 2 Lloyd's Rep 1, HL; *Dow Banking Corpn v Mahnakh Spinning and Weaving Corpn and Bank Mellat* [1983] 2 Lloyd's Rep 561; *Byblos Bank SAL v Al-Khudairy* [1987] BCLC 232, CA.

4 See *Re a Company (No 0012209 of 1991)* [1992] 2 All ER 797, [1992] 1 WLR 351.

1122. Joinder of parties. Where a guarantee is given to two or more creditors jointly[1], each of them if solvent[2] must, unless the court gives leave to the contrary, be a party to any claim on the guarantee[3]. If it is given to them severally, any one of them, or the personal representative of any one of them,

may sue upon it by himself[4], although all may join as claimants[5]. The court's permission is, however, required to add a party, unless the claim form has not been served[6].

A claim may be maintained by the several partners of a firm upon a guarantee given to one of them, if it was given for the benefit of all[7], and especially if the partner to whom the guarantee was addressed did not carry on any separate business to which the guarantee could relate[8]; but where a guarantee is given to one member of a firm personally, in consideration of his undertaking not to sue certain debtors of the firm, he must sue on the guarantee alone without joining his partners as co-claimants[9].

A claim may be maintained upon a bond, expressed to be payable to a firm, by the persons who constituted the firm when the bond was executed[10].

1 By statute, a covenant or obligation under seal made after 1925 (or, as from 31 July 1990, executed as a deed) with two or more persons jointly is construed, in the absence of the expression of a contrary intention, as being also made with each of them: see the Law of Property Act 1925 s 81(1), (5) (s 81(5) added by the Law of Property (Miscellaneous Provisions) Act 1989 Sch 1 para 5). Apart from statute, where a guarantee is given to more persons than one it is a question of construction whether it is given to them jointly or severally. A joint security will not be construed to be joint and several even though one of the parties to it is a guarantor: *Jones v Beach* (1852) 2 De GM & G 886 at 888, doubting *Thorpe v Jackson* (1837) 2 Y & C Ex 553, contra. There is no principle of equity that a joint covenant or promise is to be treated as joint and several: see *Sumner v Powell* (1816) 2 Mer 30; affd (1823) Turn & R 423; *Other v Iveson* (1855) 3 Drew 177; *Kendall v Hamilton* (1879) 4 App Cas 504, HL. See CONTRACT vol 9(1) (Reissue) PARA 1083; DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 116, 265.

2 Where one of two or more joint contractors is bankrupt, the other or others may sue or be sued in respect of that contract without the joinder of the bankrupt: Insolvency Act 1986 s 345(4); and see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 677.

3 See CPR 19.3(1); and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 255. See also *Roche v Sherrington* [1982] 2 All ER 426, [1982] 1 WLR 599; *Pugh v Stringfield* (1857) 3 CBNS 2; *Pugh v Stringfield* (1858) 4 CBNS 364; *Anderson v Martindale* (1801) 1 East 497; but as to the caution to be exercised in applying pre-CPR authorities see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 60.

4 See *Place v Delegal* (1838) 4 Bing NC 426; *Palmer v Sparshott* (1842) 4 Man & G 137.

5 Any number of claimants or defendants may be joined as parties to a claim: CPR 19.1.

6 See CPR 19.4(1); and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 258.

7 *Garrett v Handley* (1825) 4 B & C 664.

8 *Walton v Dodson* (1827) 3 C & P 162.

9 *Agacio v Forbes* (1861) 14 Moo PCC 160.

10 *Moller v Lambert* (1810) 2 Camp 548. As to claims by and against firms see generally CPR 7.2A, CPR 73.22; and PARTNERSHIP.

1123. Trustees, etc. A guarantee given to the trustees of an unincorporated company[1], or to an official of a court of justice acting as trustee for a fluctuating and unknown body of suitors[2], or to a committee of an association of underwriters[3] may be sued upon by such persons for the benefit of those whom they represent.

1 *Metcalf v Bruin* (1810) 12 East 400.

2 *Lamb v Vice* (1840) 6 M & W 467.

3 *Lloyd's v Harper* (1880) 16 ChD 290, CA; and see *Leathley v Spyer* (1870) LR 5 CP 595; *Moller v Lambert* (1810) 2 Camp 548. As to the effect of amalgamation of firms or companies see PARA 1205.

1124. Who may enforce guarantee. A guarantee which is not addressed to anyone may be enforced by the party to whom or for whose benefit it was given, if accepted by him in writing signed by him[1].

A person who is not a party to a guarantee or indemnity or fidelity bond of guarantee may sometimes sue on it as being entitled to the benefit of it[2]. To entitle him to sue either of the contracting parties he must possess an actual beneficial right which places him in the position of beneficiary under the contract[3].

Subject to any contractual restrictions contained within the guarantee itself, the person to whom a guarantee is given may assign the guaranteed debt and the securities for the debt[4]. Where he does so, the assignee acquires all the rights of the assignor[5], including the right to sue in his own name on the guarantee[6]. It is not necessary, although it may be prudent, for the creditor to give notice to the guarantor of the assignment of a guarantee[7]. However, unless and until such notice is given, the creditor cannot recover the amount due under the guarantee in a claim to which the assignor is not a party[8]. In the context of an all-moneys guarantee of present and future debts, it will be a question of construction as to whether an assignment of the guarantee entitles the assignee to claim under the guarantee in respect of advances made by him (and not by the assignor) to the principal debtor after the date of the assignment[9].

1 *Williams v Byrnes* (1863) 1 Moo PCCNS 154 at 198; and see *Re Agra and Masterman's Bank, ex p Asiatic Banking Corpn* (1867) 2 Ch App 391. The ruling in *Walton v Dodson* (1827) 3 C & P 162 seems to suggest that such a guarantee is enforceable even if not so accepted in writing, but it is difficult to reconcile this ruling with those cases (see PARA 1071) which decide that to satisfy the Statute of Frauds (1677) s 4 (see PARA 1052), the contracting parties must be named or sufficiently described in writing.

2 See *Kenney v Employers' Liability Assurance Corpn* [1901] 1 IR 301, CA (action by mortgagees as obligees and mortgagor as person entitled to equity of proceeds of mortgage security where bond given by defendant for due discharge of his duties by a fraudulent receiver appointed by mortgagees). Cf *Lloyd's v Harper* (1880) 16 ChD 290, CA (guarantee of performance of engagements by member of association of underwriters; association subsequently incorporated; committee of association, and corporation as its successors, entitled to enforce guarantee for benefit of all persons with whom member had contract engagement). In *Re Stratton, ex p Salting* (1883) 25 ChD 148, CA, a third person whose securities had been fraudulently pledged to a bank for a debt of a partnership firm was held entitled pro tanto to the benefit of a guarantee for payment to the bank of the partnership debt given by a member of the firm who was innocent of the fraudulent pledge.

3 *Gandy v Gandy* (1885) 30 ChD 57 at 66–67, CA; *Lloyd's v Harper* (1880) 16 ChD 290, CA; *Tomlinson v Gill* (1756) Amb 330; *Re Flavell, Murray v Flavell* (1883) 25 ChD 89, CA; *Drimmie v Davies* [1899] 1 IR 176, CA; *Gregory v Williams* (1817) 3 Mer 582; *Page v Cox* (1852) 10 Hare 163; *Tweddle v Atkinson* (1861) 1 B & S 393; *Dickson v Reuter's Telegram Co* (1877) 3 CPD 1, CA; and see *Kenney v Employers' Liability Assurance Corpn* [1901] 1 IR 301 at 307, CA; *West v Houghton* (1879) 4 CPD 197; *Beswick v Beswick* [1966] Ch 538, [1966] 3 All ER 1, CA; affd in part [1968] AC 58, [1967] 2 All ER 1197, HL (applying *Drimmie v Davies* above). See also EQUITY vol 16(2) (Reissue) PARA 609.

4 *Wheatley v Bastow* (1855) 7 De GM & G 261 at 279–280 per Turner LJ; *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA; but see *Re Barrington and Burton* (1804) 2 Sch & Lef 112; *Re Barned's Banking Co, ex p Stephens* (1868) 3 Ch App 753.

5 *Wheatley v Bastow* (1855) 7 De GM & G 261 at 279–280 per Turner LJ.

6 See *Re Hallett & Co, ex p Cocks, Biddulph & Co* [1894] 2 QB 256, CA. As to assignments of debts and choses in action see the Law of Property Act 1925 s 136; and CHOSES IN ACTION vol 6 (2003 Reissue) PARA 9 et seq.

7 *Wheatley v Bastow* (1855) 7 De GM & G 261 at 280 per Turner LJ; *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833 at 841–842, 846, 852, CA.

8 *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454, HL; *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1922] 2 KB 433, CA; affd [1924] AC 1, HL; *Central Insurance Co Ltd v Seacalf Shipping Corpn, The Aiolos* [1983] 2 Lloyd's Rep 25, CA; *Weddell v JA Pearce & Major* [1988] Ch 26, [1987] 3 All ER 624. A claim brought by an equitable assignee in his own name without joining the assignor is not a nullity. However, such a claim will usually be stayed pending joinder, either as a co-claimant or as co-defendant, of the assignor: *Weddell v JA Pearce & Major*; see also *EM Bowden's Patents Syndicate Ltd v H Smith*

& Co [1904] 2 Ch 86; affd [1904] 2 Ch 122, CA. The requirement to join the assignors is not a legal one, but one of practice, and if the assignors retain no interest in the claims or their subject-matter, and there is no real purpose in having them before the court, that requirement is one which the court can dispense with: see *Central Insurance Co Ltd v Seacalf Shipping Corpn, The Aiolos* above at 33–34, CA. In particular, the court will not insist on joinder of the assignor where there is no risk of a separate claim by the assignor: see *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68 at [60], [2001] QB 825, [2001] 3 All ER 257 per Mance LJ.

9 *Sterling Bank v Rastogi* (12 March 2003, unreported) per Mitting J, a case about a guarantee governed by New York law.

1125. Defendants to claim on guarantee. The claimant may join as defendants to a claim on a guarantee all or any of the persons liable under it[1], whether their liability is joint, joint and several or several[2]. The principal debtor and the guarantor may be sued in the same claim[3]. There is, in general, no need for the creditor to sue or arbitrate against the principal debtor, even if the principal debtor is solvent[4]; but the court may order a person to be added as a new party if it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings or there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue[5].

1 The court's permission is required to remove, add or substitute a party, unless the claim form has not been served: see CPR 19.4(1); and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 258.

2 Prior to the enactment of the Civil Liability (Contribution) Act 1978 s 3, judgment against one of two joint contractors, even though unsatisfied, released the others from liability: *King v Hoare* (1844) 13 M & W 494; *Kendall v Hamilton* (1879) 4 App Cas 504, HL. Judgment recovered against any person liable in respect of any debt or damage is not now a bar to a claim, or to the continuance of a claim, against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage: see the Civil Liability (Contribution) Act 1978 s 3. Thus the claimant may now choose which of the joint contractors he wishes to sue, and need not join and cannot be compelled to join the other joint contractors. If the defendant wishes to claim contribution from co-guarantors who have not been made defendants, he must himself join them as third parties. Cases (such as *Cockburn v Thompson* (1809) 16 Ves 321 at 326; *Madox v Jackson* (1746) 3 Atk 405; *Fell v Goslin* (1852) 7 Exch 185; *Collins v Prosser* (1823) 1 B & C 682; *Ellis v Emmanuel* (1876) 1 ExD 157, CA; *Armstrong v Cahill* (1880) 6 LR Ir 440) holding that all joint guarantors must be joined in a claim to recover the aggregate due from them are no longer good law.

3 See note 1. See also *Berwick-upon-Tweed Corpn v Murray* (1857) 7 De GM & G 497.

4 See PARA 1104.

5 See CPR 19.2(1); and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 257.

1126. Set-off. In an appropriate case, a guarantor who has a money claim against the creditor may be able to rely upon that claim[1] as a total or partial defence by way of set-off to the creditor's claim under the guarantee. Similarly, in an appropriate case, the creditor may set up his claim under the guarantee as a defence to a money claim against him by the guarantor[2].

Where all parties are solvent[3], these defences are only available where both liabilities are presently payable. In the absence of agreement, the creditor may not set off the guarantor's contingent liability under the guarantee in reduction of the creditor's present debts or other money obligations to the guarantor[4].

The right of set-off may be excluded by the terms of the contract of guarantee[5].

Where the creditor or the guarantor is insolvent, the right of set-off is statutory[6]. Parties may not increase[7] or diminish[8] by contract the extent of the rights of set-off conferred in bankruptcy and liquidation. Where demand has

been made under the guarantee prior to the insolvency, or the guarantee contains a principal debtor clause by virtue of which the guarantor is liable without demand[9], the statutory set-off takes effect automatically[10].

Where the guarantor's liability to the creditor is reduced by virtue of a set-off, that reduction also automatically reduces the liability of the principal debtor to the creditor[11].

1 For the extent of the guarantor's entitlement to rely upon rights of set-off available to the principal debtor see PARA 1135.

2 A claim under a guarantee (which is properly regarded as a liability to the creditor for unliquidated damages: see *Moschi v Lep Air Services Ltd* [1973] AC 331 at 348–349, [1972] 2 All ER 393 at 401–402, HL, per Lord Diplock, and at 357 and 409 per Lord Simon of Glaisdale) cannot form the subject of a legal set-off until the amount of the liability in respect of which the guarantee was given has been established: *Axel Johnson Petroleum AB v MG Mineral Group AG, The Jo Lind* [1992] 2 All ER 163 at 166, [1992] 1 WLR 270 at 272, CA, per Leggatt LJ; *Crawford v Stirling* (1802) 4 Esp 207; *Morley v Inglis* (1837) 4 Bing NC 58. However, if the amount of that liability has been established (eg because the underlying obligation is a debt), so that the amount claimed against the guarantor is 'capable of being liquidated or ascertained with precision at the time of pleading' (*Morley v Inglis* (1837) 4 Bing NC 58 at 71 per Tindal CJ), it may form the subject of a set-off at law: *Axel Johnson Petroleum AB v MG Mineral Group AG* above; *Banco Central SA and Trevelan Navigation Inc v Lingoss & Falce Ltd and BFI Line Ltd, The Raven* [1980] 2 Lloyd's Rep 266. Where the claims are not for liquidated sums, they may nevertheless be the subject of an equitable set-off if they are sufficiently connected to make it inequitable to insist upon the one claim without taking the other into account: *The Raven*; *Axel Johnson Petroleum AB v MG Mineral Group AG* above: and see *Hanak v Green* [1958] 2 QB 9, [1958] 2 All ER 141, CA; *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc* [1978] QB 927, [1978] 3 All ER 1066, CA; affd in part on a different point [1979] AC 757, [1979] 1 All ER 307, HL; *Dole Dried Fruit and Nut Co v Trustin Kerwood Ltd* [1990] 2 Lloyd's Rep 309, CA. As to set-off at law, and the defence of equitable set-off, see *Bim Kemi AB v Blackburn Chemicals Ltd* [2001] EWCA Civ 457, [2001] 2 Lloyd's Rep 93, [2001] All ER (D) 13 (Apr); and see generally SET-OFF AND COUNTERCLAIM.

3 As to set-off in bankruptcy or company liquidation see the text and notes 6–10.

4 'You cannot retain a sum of money which is actually due against a sum of money which is only becoming due at a future time': *Jeffryes v Agra and Masterman's Bank* (1866) LR 2 Eq 674 at 680 per Page Wood V-C; *Bower v Foreign and Colonial Gas Co Ltd, Metropolitan Bank, Garnishees* (1874) 22 WR 740.

5 *Continental Illinois National Bank and Trust Co of Chicago v Papanicolaou, The Fedora, The Tatiana and The Eretrea II* [1986] 2 Lloyd's Rep 441, CA; *Hongkong and Shanghai Banking Corpn v Kloekner & Co AG* [1990] 2 QB 514, [1989] 3 All ER 513. However, where the guarantor deals as consumer or the guarantee is in the creditor's standard form, provisions excluding the right of set-off must satisfy the requirement of reasonableness imposed by the Unfair Contract Terms Act 1977 in order to be effective: cf *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] QB 600, [1992] 2 All ER 357, CA. See also *Quadrant Visual Communications Ltd v Hutchison Telephone (UK) Ltd* [1993] BCLC 442, CA. Where the guarantee takes the form of a legal mortgage, the mortgagor guarantor cannot usually resist the creditor mortgagee's claim for possession by claiming an equitable set-off for a sum exceeding the amount secured: *National Westminster Bank plc v Skelton* [1993] 1 All ER 242, [1993] 1 WLR 72n, CA; *Ashley Guarantee plc v Zacaria* [1993] 1 All ER 254, [1993] 1 WLR 62, CA.

6 See the Insolvency Act 1986 s 323 in relation to bankruptcy; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 547 et seq; the Insolvency Rules 1986, SI 1986/1925, r 4.90 in the case of company liquidation; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 792.

Where an insurer, in relation to which an administration order has been made, subsequently goes into liquidation, sums due from the insurer to another party are not to be included in the account of mutual dealings rendered under the Insolvency Rules 1986, SI 1986/1925, r 4.90 (mutual credits and set-off) if, at the time they became due: (1) an administration application had been made under the Insolvency Act 1986 Sch B1 para 12 in relation to the insurer; (2) in the case of an appointment of an administrator under Sch B1 para 14, a notice of appointment had been filed with the court under Sch B1 para 18 in relation to the insurer; or (3) in the case of an appointment of an administrator under Sch B1 para 22, a notice of intention to appoint had been filed with the court under Sch B1 para 27 in relation to the insurer: Financial Services

and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2002, SI 2002/1242, art 5 (substituted by SI 2003/2134); and see also PARA 492.

7 *British Eagle International Air Lines Ltd v Cie Nationale Air France* [1975] 2 All ER 390, [1975] 1 WLR 758, HL.

8 *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL.

9 See PARA 1105 note 2. A contingent debt under a guarantee which has not fallen due at the date of the bankruptcy order or order or resolution for winding up may be the subject of a set-off under the Insolvency Act 1986 s 323 or the Insolvency Rules 1986 r 4.90: see *Re Charge Card Services Ltd* [1987] Ch 150, [1986] 3 All ER 289 (affd without considering this point [1989] Ch 497, [1988] 3 All ER 702, CA), where Millett J held that contingent debts and liabilities which arose from mutual dealings prior to the insolvency could be the subject of a set-off under the Bankruptcy Act 1914 s 31 (now repealed) as applied to company liquidation (applying *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85, CA; *Re a Debtor (No 66 of 1955), ex p the Debtor v Trustee of the Property of Waite* [1956] 3 All ER 225, [1956] 1 WLR 1226, CA; not following *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207, [1985] 1 All ER 155; and explaining *Re Asphaltic Wood Pavement Co, Lee and Chapman's Case* (1885) 30 ChD 216, CA; *Re Daintrey, ex p Mant* [1900] 1 QB 546, CA). See also *Re Bank of Credit and Commerce International (in liquidation) No 8* [1998] AC 214, [1997] 4 All ER 568, HL; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 557. Cf the Insolvency Act 1986 s 322(3) and the Insolvency Rules 1986, SI 1986/1925, r 4.86(1), which provide for the valuation of contingent debts for the purpose of proving for them in the insolvency. See further BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 540; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 789. As to insurers see note 6.

10 *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769, CA. So where the guarantor for a company's liabilities has deposited with the creditor bank a sum of money by way of security for his guarantee liability under a guarantee and charge containing clauses which state that his liability is to be as principal debtor, his liability under the guarantee is automatically set off in the bank's insolvency against the bank's liability to repay his deposit, thereby reducing or extinguishing not only his indebtedness to the bank under the guarantee, but also that of the principal debtor company: *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)*.

11 *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769, CA. Where neither party is insolvent, this principle can be excluded by contract: *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)*; and see the cases cited in note 5.

1127. Executor withholding sum due from guarantor. Where the creditor has by will bequeathed a legacy to the guarantor, the executor of the will is entitled to withhold out of the legacy the amount due from the guarantor to the testator under the guarantee[1].

1 *Coates v Coates* (1864) 33 Beav 249; and see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 488. See also *Re Melton, Milk v Towers* [1918] 1 Ch 37, CA; and TRUSTS vol 48 (2007 Reissue) PARA 923.

1128. Counter-securities. The creditor is not entitled to the benefit of counter-bonds or collateral securities given by the principal debtor to the guarantor to indemnify the guarantor in respect of liability under the guarantee[1].

1 *Ex p Waring, Inglis, Clarke* (1815) 19 Ves 345; *Re Walker, Sheffield Banking Co v Clayton* [1892] 1 Ch 621: but see, contra, *Wright v Morley, Morley v St Alban* (1805) 11 Ves 12 at 22 per Sir William Grant MR, and *Maure v Harrison* (1692) 1 Eq Cas Abr 93, explained in *Re Walker, Sheffield Banking Co v Clayton* above.

(3) GUARANTOR'S RIGHTS AGAINST CREDITOR

(i) Guarantor's Rights before Payment

A. GUARANTOR'S RIGHTS BEFORE DEMAND OF PAYMENT

1129. Guarantor's rights from relationship created. The rights of a guarantor against the creditor accrue to him from the relationship created by the guarantee[1], and arise at the time of his becoming guarantor, and not merely when he discharges the principal debtor's obligation[2]. It is not, therefore, the law that the guarantor has no rights until he pays the guaranteed debt[3].

1 *Pooley v Harradine* (1857) 7 E & B 431; *Hollier v Eyre* (1840) 9 Cl & Fin 1, HL; *Greenough v McClelland* (1860) 2 E & E 429; *Samuell v Howarth* (1817) 3 Mer 272 at 277; *Craythorne v Swinburne* (1807) 14 Ves 160. For the position of a guarantor who is a volunteer see PARA 1148.

2 *Dixon v Steel* [1901] 2 Ch 602; and see *Lake v Brutton* (1856) 8 De GM & G 440; *Pledge v Buss* (1860) John 663; *South v Bloxam* (1865) 2 Hem & M 457.

3 *Dixon v Steel* [1901] 2 Ch 602 at 607 per Cozens-Hardy J; but see *Re Howe, ex p Brett* (1871) 6 Ch App 838 at 841 per Mellish LJ. See also *Themehelp Ltd v West* [1996] QB 84, [1995] 4 All ER 215, CA (interim injunction granted restraining defendants, against whom the claimant guarantors alleged fraud, from giving notice to enforce the guarantee until the trial of the claim). This decision was, however, doubted in *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 2 Lloyd's Rep 187, [1999] 1 All ER (Comm) 190. Cf the rights possessed by the guarantor against the principal debtor prior to satisfying the guaranteed debt, discussed in PARA 1151 et seq. Cf also the guarantor's limited rights against co-guarantors, discussed in PARA 1165 et seq; and the proposing guarantor's right to information, discussed in PARA 1038 et seq.

1130. Arrangements between debtors. A person who executes an instrument or enters into an agreement as guarantor for another will have some of the rights and liabilities of a guarantor, even though the instrument or agreement makes him liable as principal debtor to the creditor and even though the instrument or agreement is a deed[1]. Similarly, where it is agreed between two or more principal co-debtors that the liability of one is to be secondary to that of the others, that one will have some of the rights and liabilities of a guarantor[2].

Those rights and liabilities will exist between the person primarily liable and the person whose liability is agreed to be secondary from the time that the agreement between them is made[3]. The creditor, however, may treat both as principal debtors unless and until he has notice of the arrangement[4]. Once the creditor becomes aware of the arrangement, he is obliged to respect the rights of the co-debtor who has assumed the position of guarantor[5]. It is not necessary that the principal debtor should consent to the arrangement, only that he should have notice of it, for the guarantor's rights in these circumstances are rights which arise in equity and not from contract, and depend upon notice[6].

1 *Wythes v Labouchere* (1859) 5 Jur NS 499 at 500; *White v Corbett* (1859) 1 E & E 692, Ex Ch; *Hollier v Eyre* (1840) 9 Cl & Fin 1, HL; *Mutual Loan Fund Association v Sudlow* (1858) 5 CBNS 449; *Pooley v Harradine* (1857) 7 E & B 431. At law this rule was confined to instruments not under seal. Before the introduction of equitable pleas by the Common Law Procedure Act 1854 ss 83–86 (repealed), oral evidence was inadmissible at law to prove that one of several persons, jointly and severally bound, was, in fact, only a surety and entitled to be so treated by the creditor. However, in equity such evidence was always admitted in proof of the fact: *Craythorne v Swinburne* (1807) 14 Ves 160 at 170–171 per Lord Eldon LC; and see *Clarke v Henty* (1838) 3 Y & C Ex 187. The rule in equity, which now prevails (see the Supreme Court Act 1981 s 49(1); PARA 1197; and EQUITY vol 16(2) (Reissue) PARA 500) was that the creditor was bound to regard the position of the surety by notice, and not by contract, and that notice after the contract was entered into was sufficient, and this rule extended to instruments under

seal: see the cases cited above and in note 2: and see *Greenough v McClelland* (1860) 2 E & E 429, Ex Ch; *Wauthier v Wilson* (1912) 28 TLR 239, CA.

2 See *Rouse v Bradford Banking Co* [1894] AC 586, HL. See also *Oakeley v Pasheller* (1836) 4 Cl & Fin 207, HL; *Ashbee v Pidduck* (1836) 1 M & W 564; *Oakford v European and American Steam Shipping Co* (1863) 1 Hem & M 182; *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corpn Ltd (liquidators)* (1874) LR 7 HL 348; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL; *Goldfarb v Bartlett and Kremer* [1920] 1 KB 639. The agreement may be express or implied: *Rouse v Bradford Banking Co* above. See also *Other v Iverson* (1855) 3 Drew 177 at 182 per Kindersley V-C; *Jones v Beach* (1852) 2 De GM & G 886; *Rawstone v Parr* (1827) 3 Russ 539; *Richardson v Horton* (1843) 6 Beav 185; *Strong v Foster* (1855) 17 CB 201; *Pooley v Harradine* (1857) 7 E & B 431; but cf *Thorpe v Jackson* (1837) 2 Y & C Ex 553.

3 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL.

4 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL; *Nicholas v Ridley* [1904] 1 Ch 192.

5 *Rouse v Bradford Banking Co* [1894] AC 586, HL. See also *Oakeley v Pasheller* (1836) 4 Cl & Fin 207, HL; *Ashbee v Pidduck* (1836) 1 M & W 564; *Oakford v European and American Steam Shipping Co* (1863) 1 Hem & M 182; *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corpn Ltd (liquidators)* (1874) LR 7 HL 348; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL; *Goldfarb v Bartlett and Kremer* [1920] 1 KB 639. Parol evidence is admissible to show that the creditor was aware of the true relationship between the co-debtors: *Mutual Loan Fund Association v Sudlow* (1858) 5 CBNS 449. However, the creditor may (and often does) exclude the guarantor's equitable rights by the express terms of the guarantee.

6 *Rouse v Bradford Banking Co* [1894] AC 586, HL (overruling *Swire v Redman and Holt* (1876) 1 QBD 536). See also *Oakeley v Pasheller* (1836) 4 Cl & Fin 207, HL; *Ashbee v Pidduck* (1836) 1 M & W 564; *Oakford v European and American Steam Shipping Co* (1863) 1 Hem & M 182; *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corpn Ltd (liquidators)* (1874) LR 7 HL 348; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL; *Goldfarb v Bartlett and Kremer* [1920] 1 KB 639. To the extent that *York City and County Banking Co v Bainbridge* (1880) 43 LT 732 suggests the contrary, it is probably no longer good law.

1131. Whether guarantor can compel creditor to collect debt. After the guaranteed debt has become due, and before he has been asked to pay it, the guarantor may require the creditor to call upon the principal debtor to pay off the debt[1]. It is doubtful, however, whether the guarantor has any right to require the creditor to do so if he has not discharged himself of his liability[2]. In the absence of agreement the creditor is not bound to sue the principal debtor before suing the guarantor[3]. Moreover the guarantor, even where he deposits the amount of the guaranteed debt, cannot without such agreement compel the creditor to proceed against the principal debtor unless he undertakes to indemnify the creditor for the risk, delay and expense which he thereby incurs[4], and, apparently, satisfies him that the principal debtor is solvent[5].

1 *Rouse v Bradford Banking Co* [1894] 2 Ch 32 at 75, CA, per AL Smith LJ; affd [1904] AC 586, HL; *Rees v Berrington* (1795) 2 Ves 540 at 542 per Lord Loughborough LC; *Wright v Simpson* (1802) 6 Ves 714 at 734 per Lord Eldon LC; *Governor and Co of Bank of Ireland v Beresford* (1818) 6 Dow 233 at 238, HL, per Lord Eldon LC; *Nisbet v Smith* (1789) 2 Bro CC 579 at 582 per Lord Thurlow LC.

2 *Ewart v Latta* (1865) 4 Macq 983 at 987, 989, HL, per Lord Westbury LC; and see *Jackson v Digby* (1854) 2 WR 540; Story s 639.

3 See PARA 1104.

4 *Wright v Simpson* (1802) 6 Ves 714 at 734 per Lord Eldon LC; and see Story ss 327, 849.

5 See *Wheeler v Benedict* 43 NY 478 (1885).

1132. Guarantor's right to sue principal debtor. At any time after the debt is due the guarantor may apply to the creditor and pay him off and then, on giving a proper indemnity for costs, he may sue the principal debtor in the creditor's name[1], or, apparently, in his own name, should he obtain an assignment of the

guaranteed debt[2]. There does not, however, seem to be any reported instance in which a guarantor has in practice exercised this right, and certainly the cases in which a guarantor makes use of it must be rare[3].

1 *Swire v Redman and Holt* (1876) 1 QBD 536 at 541.
2 See the Law of Property Act 1925 s 136; and CHOSES IN ACTION vol 6 (2003 Reissue) PARA 9 et seq. As to the position of a guarantor who is a volunteer see PARA 1148.
3 *Swire v Redman and Holt* (1876) 1 QBD 536 at 541.

1133. Fidelity guarantees. Fidelity guarantees are now rarely encountered; and the impact of employment protection legislation on the principles set out below has not been judicially considered. The older authorities state that if, to the knowledge of a guarantor for the good behaviour of another in an employment, the employee is guilty of misconduct rendering him liable to dismissal, the guarantor may insist on the employer dismissing that employee[1]. Where the employer himself possesses the power of dismissal, the guarantor will be discharged from future liability on the guarantee if the employer fails to comply with the guarantor's demand for the employee's dismissal[2]. If misconduct by the employee during the currency of the guarantee is actually known to the employer but not to the guarantor[3], and the employer without disclosing the misconduct to the guarantor[4] continues the employee in his employment, the guarantor will not be liable in respect of any further misconduct of the employee subsequent to the employer's discovery of the original misconduct[5]. The guarantor is not, however, discharged where the power of dismissal is vested in other persons who are not parties to the contract of guarantee, and who refuse to exercise it when requested to do so by the employer[6].

Where an employee for whom the guarantor is answerable has to his knowledge been guilty of dishonesty or other misconduct justifying dismissal, the guarantor, for his own protection, should insist on having the guarantee or fidelity bond given up to him, for otherwise he may be taken to have consented to remain liable, notwithstanding the misconduct[7].

An employer may, alternatively, protect himself against an employee's misconduct by means of fidelity insurance, which is discussed elsewhere in this work[8].

1 *Sanderson v Aston* (1873) LR 8 Exch 73 at 77; *Phillips v Foxall* (1872) LR 7 QB 666 at 678, 681–682; *Burgess v Eve* (1872) LR 13 Eq 450 at 457–459.
2 *Phillips v Foxall* (1872) LR 7 QB 666 at 678, 681–682; *Burgess v Eve* (1872) LR 13 Eq 450 at 457–459; *Lloyd's v Harper* (1880) 16 ChD 290 at 307, CA, per Fry J.
3 As to the necessity for proof of the employer's knowledge cf *Federal Supply and Coal Storage Co of South Africa v Angehrn and Piel* (1910) 80 LJPC 1 at 8; and see *Enright v Falvey* (1879) 4 LR Ir 397. Where it appears that the guarantor must have known of the misconduct, the onus is on the guarantor to prove his ignorance: *Caxton and Arrington Union v Dew* (1899) 68 LJQB 380 at 383.
4 On discovering the misconduct the employer is under a duty to disclose it to the guarantor in order that the guarantor may, if he thinks fit, insist on the employee's dismissal: *Enright v Falvey* (1879) 4 LR Ir 397. As to the type of misconduct which must be disclosed see *Caxton and Arrington Union v Dew* (1899) 68 LJQB 380 at 382; *Sanderson v Aston* (1873) LR 8 Exch 73 at 76–77; and see also *Byrne v Muzio* (1881) 8 LR Ir 396. For the effect of failure to disclose misconduct upon the creditor's right to recover in respect of the misconduct in question, as distinct from his right to recover in respect of subsequent misconduct, see PARA 1251. As to the effect of non-disclosure to an intending guarantor of misconduct before the guarantee is entered into see PARA 1042.
5 *Sanderson v Aston* (1873) LR 8 Exch 73; *Phillips v Foxall* (1872) LR 7 QB 666 at 672; *Enright v Falvey* (1879) 4 LR Ir 397.
6 *Caxton v Arrington Union v Dew* (1899) 68 LJQB 380; *Byrne v Muzio* (1881) 8 LR Ir 396, where the employer had merely a power of suspending the employee.

7 *Shepherd v Beecher* (1725) 2 P Wms 288.
8 See INSURANCE vol 25 (2003 Reissue) PARAS 783–784. For a modern example see *New Hampshire Insurance Co v Philips Electronics North America Corpn (No 2)* [1999] Lloyd's Rep IR 66, [1999] Lloyd's Rep IR 58, CA.

1134. Equitable defences. In any claim that may be brought against a guarantor by the creditor on the guarantee, the guarantor may set up a defence of discharge from liability on equitable grounds[1].

On application made to the Chancery Division of the High Court[2] a guarantee may be cancelled and set aside on equitable grounds. Thus a fidelity guarantee may be ordered to be cancelled where the employee has been guilty of misconduct and the employer has refused to dismiss him or to give up the guarantee[3]. Any division of the High Court may give effect to an equitable defence alleging grounds for the cancellation of a guarantee[4].

1 See the Supreme Court Act 1981 s 49; and EQUITY vol 16(2) (Reissue) PARA 499. Formerly an injunction for the purpose was obtainable: *Hawkshaw v Parkins* (1819) 2 Swan 539 at 544; *Samuell v Howarth* (1817) 3 Mer 272; *Moore v Bowmaker* (1815) 6 Taunt 379; *Small v Currie* (1854) 5 De GM & G 141; *Allan v Inman* (1843) 7 Jur 433.
2 See the Supreme Court Act 1981 ss 49, 61, Sch 1 para 1(g); and COURTS vol 10 (Reissue) PARA 611; EQUITY vol 16(2) (Reissue) PARA 499. As to the equity jurisdiction of county courts see COURTS vol 10 (Reissue) PARA 719.
3 *Burgess v Eve* (1872) LR 13 Eq 450 at 458–459; *Phillips v Foxall* (1872) LR 7 QB 666 at 681–682. As to the cancelling of documents generally see EQUITY vol 16(2) (Reissue) PARAS 485–486.
4 See the Supreme Court Act 1981 s 49; and EQUITY vol 16(2) (Reissue) PARA 499.

B. GUARANTOR'S RIGHTS ON PAYMENT BEING DEMANDED

1135. Guarantor's right to set-off and counterclaim. On being sued by the creditor for payment of the debt guaranteed, a guarantor may rely upon any right of set-off or counterclaim which the principal debtor could set up against the creditor in reduction of the guaranteed debt in reduction of the claim against him under the guarantee[1]. Whenever the set-off or counterclaim relied on does not operate directly to reduce the debt guaranteed, the principal debtor should be made a party, so as to bind him and prevent him afterwards claiming payment from the creditor[2].

However, the guarantor will not be entitled to rely upon the principal debtor's rights of set-off or counterclaim if the guarantee, on its true construction, requires the guarantor to pay a particular amount due irrespective of the accounting position between the principal debtor and the creditor[3]. Nor, where the guarantee takes the form of a legal mortgage, can the mortgagor guarantor usually resist the creditor mortgagee's claim for possession by relying upon the fact that the principal debtor has a claim for unliquidated damages by way of set-off against the creditor for an amount which exceeds the amount secured[4].

1 *Bechervaise v Lewis* (1872) LR 7 CP 372; *Murphy v Glass* (1869) LR 2 PC 408; *Alcoy and Gandia Rly and Harbour Co v Greenhill* (1897) 76 LT 542 at 552–553; on appeal (1898) 79 LT 257, CA; see also *Thornton v Maynard* (1875) LR 10 CP 695; *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep 502 at 508, CA, per Roskill LJ, where the passage in the text as it appeared in an earlier edition of this title was cited with approval. The guarantor will be entitled to rely (provided all parties are solvent) upon any provision in the principal contract widening the principal debtor's right of set-off: *Aurora Borealis Compania Armadora SA and Buenamar Compania Naviera SA v Marine Midland Bank NA, The Maistros* [1984] 1 Lloyd's Rep 646. See also *Bowyear v Pawson* (1881) 6 QBD 540; *Newton v Lee* 139 NY 332 (1893); *Gillespie v Torrance* 25 NY 306 (1862); *Cheetham v Crook* (1825) M'Cle & Yo 307. Contrast *R v Shaw* (1901) 27 VLR 70 (Vict SC) (where the decision to deny set-off may

be explained on the grounds of public policy), and *Cellulose Products Pty v Truda* (1970) 92 WNNSW 561. As to set-off see generally SET-OFF AND COUNTERCLAIM.

2 *Murphy v Glass* (1869) LR 2 PC 408. Where the principal debtor's cross-claim would not provide him with a defence to the creditor's claim (as, for example, where the creditor's claim against the principal is under a bill of exchange or for charter hire or freight), it will similarly not provide the guarantor with a defence to the creditor's claim under the guarantee: *Aliakmon Maritime Corpn v Trans Ocean Continental Shipping Ltd, The Aliakmon Progress* [1978] 2 Lloyd's Rep 499, CA.

3 *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep 502, CA; applied in *Hyundai Heavy Industries Co v Papadopoulos* [1979] 1 Lloyd's Rep 130, CA; and approved [1980] 2 All ER 29, [1980] 1 WLR 1129, [1980] 2 Lloyd's Rep 1, HL. In that case the underlying contract provided that payments were not to be withheld in consequence of any dispute, and the guarantee stated that 'in case the [principal debtor] is in default of any such payment [the guarantor] will forthwith make the payment in default on behalf of the [principal debtor]'. Since the application of this principle depends upon the construction of the guarantor's obligation under the contract of guarantee, not upon any breach or unexpected performance by the creditor, it is unlikely that it could be challenged under the Unfair Contract Terms Act 1977.

4 *National Westminster Bank plc v Skelton* [1993] 1 All ER 242, [1993] 1 WLR 72n; *Ashley Guarantee plc v Zacaria* [1993] 1 All ER 254, [1993] 1 WLR 62, CA.

1136. Marshalling. When payment is demanded of the guarantor by the creditor, the guarantor may compel the creditor, if he has a claim upon two funds in respect of the guaranteed debt, of one only of which the guarantor can avail himself, to resort to the other first[1].

A guarantor is not entitled to marshal in his favour securities held in respect of different debts or of a different part of the same debt[2]. Where, however, the creditor has security for a different debt from that guaranteed by the guarantor, and can consolidate that security with another held by him for the guaranteed debt, the guarantor may have the securities marshalled in his favour; thus, after the creditor has been paid in full the guarantor has a right to be reimbursed, not only out of the security for the guaranteed debt, but also, in case of any deficiency, out of the other security, and to insist, where the latter security is sufficient to cover both debts, upon having the guaranteed debt liquidated out of it[3].

1 *Ex p Kendall* (1811) 17 Ves 514; *The Chioggia* [1898] P 1. See EQUITY vol 16(2) (Reissue) PARA 758 et seq.

2 *Wade v Coope* (1827) 2 Sim 155; *Re Butlers Wharf Ltd* [1995] 2 BCLC 43, [1995] BCC 717.

3 *Heyman v Dubois* (1871) LR 13 Eq 158; *Praed v Gardiner* (1788) 2 Cox Eq Cas 86; *Re Holland, ex p Alston* (1868) 4 Ch App 168; *Re Stratton, ex p Salting* (1883) 25 ChD 148, CA; *Aldrich v Cooper* (1803) 8 Ves 382 at 388–389; Story s 638; and see also *Drew v Lockett* (1863) 32 Beav 499; *Wright v Morley, Morley v St Alban* (1805) 11 Ves 12 at 22; *Newton v Chorlton* (1853) 10 Hare 646. As to the right of a mortgagee to marshal securities against a guarantor see *South v Bloxam* (1865) 2 Hem & M 457. As to the position of a guarantor in relation to tacking (the right to which is partially abolished: see MORTGAGE vol 32 (2005 Reissue) PARA 464) and the consolidation of mortgages see PARAS 1143–1144; and as to marshalling see generally EQUITY vol 16(2) (Reissue) PARA 758 et seq; MORTGAGE vol 32 (2005 Reissue) PARA 833 et seq.

(ii) Guarantor's Rights after Payment

1137. Recovery of money improperly paid. Money improperly paid by a guarantor to the creditor under a mistake[1] may be recovered[2].

1 *Mills v Alderbury Union Guardians* (1849) 3 Exch 590. As to the recovery of money paid under a mistake of fact see generally *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677, [1979] 3 All ER 522; and MISTAKE vol 32 (2005 Reissue) PARA 67 et seq. As to the defence of change of position see *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL; and see generally RESTITUTION. It was formerly thought that money

paid under a mistake of law could not be recovered (see eg *British Workman's and General Assurance Co Ltd v Cunliffe* (1902) 18 TLR 502, CA; *Re Carnac, ex p Simmonds* (1885) 16 QBD 308, CA; and see generally *Woolwich Equitable Building Society v IRC* [1993] AC 70, [1992] 3 All ER 737, HL); but see now *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL; and see *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941, [1999] 1 WLR 1249; *Deutsche Morgan Grenfell Group plc v IRC* [2003] EWHC 1779 (Ch), [2003] 4 All ER 645, [2003] STC 1017.

2 See EQUITY vol 16(2) (Reissue) PARA 439 et seq; and MISTAKE vol 32 (2005 Reissue) PARA 67 et seq. It has been held that a co-guarantor should not be joined in such a claim: *Mills v Alderbury Union Guardians* (1849) 3 Exch 590. As to the joinder of parties see now PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 254 et seq.

1138. Guarantor's right of subrogation. As soon as the guarantor has paid to the creditor what is due to the creditor under the guarantee, he is entitled, unless he has waived them[1], to be subrogated[2] to all the rights possessed by the creditor in respect of the debt, default or miscarriages to which the guarantee relates[3].

Thus, on payment, but not before[4], the guarantor has a right to the benefit of all the securities (whether known to him or not at the time he became guarantor[5]) which the creditor has received from the principal debtor[6] before, contemporaneously with or after the creation of the guarantee[7], and whether or not they existed at the time the guarantee was given[8]. Money which by contract is appropriated to a particular purpose stands, as regards the guarantor, on the same footing as securities[9]. Moreover, if the creditor assigns the guaranteed debt and the securities for the debt[10], the assignment is subject to the obligation to preserve the securities for the guarantor's benefit[11].

Where, however, the guarantor is reimbursed under a counter-guarantee, he loses his rights of subrogation, which are transferred by operation of law to the counter-guarantor[12].

1 As to waiver of a guarantor's rights see PARA 1146.

2 As to subrogation see EQUITY vol 16(2) (Reissue) PARA 770 et seq; INSURANCE.

3 See the Mercantile Law Amendment Act 1856 s 5; and *Re Lord Churchill, Manisty v Churchill* (1888) 39 ChD 174; and see *Scholefield Goodman & Sons Ltd v Zyngier* [1986] AC 562, [1985] 3 All ER 105, PC; *Re Westdock Realisations Ltd* [1988] BCLC 354, 4 BCC 192. As to the rights of a guarantor who has paid a debt which is a preferential debt see PARA 1159. A person claiming to be subrogated to the rights of another can only have the rights possessed by the person whose position he takes: *The Millwall* [1905] P 155 at 163, CA, per Sir Richard Henn Collins MR; *Re Walters' Deed of Guarantee, Walters' Palm Toffee Ltd v Walters* [1933] Ch 321 (guarantor paying dividend on preference shares cannot recover amount as a debt from the company); see also *Re British Power Traction and Lighting Co Ltd, Halifax Joint Stock Banking Co Ltd v British Power Traction and Lighting Co Ltd* [1910] 2 Ch 470 (unpaid creditors of receiver of company subrogated only to net amount of receiver's indemnity against company assets, and not entitled to recover against receiver's guarantors). Cf the rights of subrogation possessed by insurers, as to which see *Finlay v Mexican Investment Corpn* [1897] 1 QB 517; and INSURANCE vol 25 (2003 Reissue) PARA 195 et seq. Clear words (or the necessity of supplying those words by implication) are required if rights of subrogation are to be removed: *Liberty Mutual Insurance Co (UK) Ltd v HSBC Bank plc* [2002] EWCA Civ 691, [2002] All ER (D) 232 (May).

4 *Re Howe, ex p Brett* (1871) 6 Ch App 838 at 841 per Mellish LJ; and see *Re Jeffrey's Policy* (1872) 20 WR 857; *Lake v Brutton* (1856) 8 De GM & G 440. The right of a guarantor to a collateral security is not in abeyance until he is called upon to pay: *Dixon v Steel* [1901] 2 Ch 602 at 607.

5 *Forbes v Jackson* (1882) 19 ChD 615; *Leicestershire Banking Co v Hawkins* (1900) 16 TLR 317; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL; *Nicholas v Ridley* [1904] 1 Ch 192, CA; *Mayhew v Crickett* (1818) 2 Swan 185 at 191; *Allen v De Lisle* (1856) 3 Jur NS 928; *Pearl v Deacon* (1857) as reported in 26 LJCh 761 (on appeal 1 De G & J 461); *Lake v Brutton* (1856) 8 De GM & G 440; *Merchants Bank of London v Maud* (1871) 19 WR 657; *Yonge v Reynell* (1852) 9 Hare 809; *Hodgson v Shaw* (1834) 3 My & K 183; *Craythorne v Swinburne* (1807) 14 Ves 160. A guarantee by one partner for the debt of the firm,

which gives the creditor a right of proof against the separate estate of that partner, in addition to his right of proof against the partnership's joint estate, is a security within the meaning of the principle laid down in *Re Holland, ex p Alston* (1868) 4 Ch App 168 (*Re Stratton, ex p Salting* (1883) 25 ChD 148 at 153, CA, per Fry LJ), and to which, therefore, a person standing in the position of a guarantor is entitled (*Re Stratton, ex p Salting* at 152).

6 *Crispe v Perrit* (1744) Willes 467, sub nom *Ex p Crisp* 1 Atk 133; *Goddard v Whyte* (1860) 2 Giff 449; *O'Carroll's Case* (1745) Amb 61; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL; *Brandon v Brandon* (1859) 3 De G & J 524; *Parsons and Cole v Briddock* (1708) 2 Vern 608; *Morgan v Seymour* (1638) 1 Rep Ch 120; *Craythorne v Swinburne* (1807) 14 Ves 160; *Mayhew v Crickett* (1818) 2 Swan 185; *Wright v Morley* (1805) 11 Ves 12; *Pledge v Buss* (1860) John 663; *Ex p Rushforth* (1805) 10 Ves 409; *Robinson v Wilson* (1814) 2 Madd 434; *Hodgson v Shaw* (1834) 3 My & K 183; *Strange v Fooks* (1863) 4 Giff 408; *Swain v Wall* (1641) 1 Rep Ch 149.

7 *Forbes v Jackson* (1882) 19 ChD 615 at 621; *Pledge v Buss* (1860) John 663; *Lake v Brutton* (1856) 8 De GM & G 440; *Campbell v Rothwell* (1877) 47 LJQB 144; *Re Davison's Estate* [1894] 1 IR 56, CA.

8 Mercantile Law Amendment Act 1856 s 5. See also *Scott v Knox* (1838) 2 Jo Ex Ir 778; *Pledge v Buss* (1860) John 663; *Lake v Brutton* (1856) 8 De GM & G 440. As to the effect of loss of such securities see PARA 1244.

9 *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692 at 702, CA, per Lord Selborne LC.

10 See PARA 1124.

11 *Wheatley v Bastow* (1855) 7 De GM & G 261 at 279 per Turner LJ. As to the creditor's right to surrender the security and prove for the whole debt if the principal debtor becomes bankrupt without discharging the guarantor see *Rainbow v Juggins* (1880) 5 QBD 422; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 561. In proving for the whole debt he need not deliver up the guarantee or other collateral security not forming part of the principal debtor's property: *Re Goodman, ex p Goodman* (1818) 3 Madd 373.

12 *Brown Shipley & Co Ltd v Amalgamated Investment (Europe) BV* [1979] 1 Lloyd's Rep 488.

1139. Origin and enforcement of right. The guarantor's right to the creditor's securities on payment of the guaranteed debt is derived[1] from the obligation imposed on the principal debtor of indemnifying the surety[2], which makes it inequitable for a creditor, by electing not to avail himself of the securities for the guaranteed debt, to throw the whole liability on to the guarantor[3]. This right, which prevents the creditor from appropriating a security for the guaranteed debt to the payment of any other debt or liability[4], rests not upon contract but upon general principles of equity similar to those governing the marshalling of funds when one creditor of the same debtor may resort to either of two funds and another creditor to one only[5].

If securities to which the guarantor is entitled are not voluntarily given up to him by the creditor, he may bring a claim to compel delivery[6].

1 These rights of the guarantor, as developed in the authorities cited in this paragraph and PARA 1138, were recognised and enacted by the Mercantile Law Amendment Act 1856 s 5: see *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 19, HL, per Lord Blackburn.

2 *Yonge v Reynell* (1852) 9 Hare 809; *Nicholas v Ridley* [1904] 1 Ch 192, CA; *Lord Harberton v Bennett* (1829) Beat 386.

3 *Aldrich v Cooper* (1803) 8 Ves 382 at 389 per Lord Eldon LC.

4 *Pearl v Deacon* (1857) as reported in 26 LJCh 761.

5 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 12, HL, per Lord Selborne (discussed in *Niru Battery Manufacturing Co v Milestone Trading* [2004] EWCA Civ 487, [2004] 2 All ER (Comm) 289); and see *Heyman v Dubois* (1871) LR 13 Eq 158; *Aldrich v Cooper* (1803) 8 Ves 382. The right is available to the indorser of a bill of exchange on his paying the amount of it to the discounter of the bill after its dishonour by the acceptor: *Duncan, Fox & Co v North and South Wales Bank* above. As to marshalling see PARAS 1136, 1178; and EQUITY vol 16(2) (Reissue) PARA 758 et seq.

6 *Goddard v Whyte* (1860) 2 Giff 449.

1140. Guarantor for a limited sum. A guarantor for a limited sum only has, on payment of that sum, all the rights of the creditor in respect of that amount. He is entitled to share in any security held by the creditor for the whole debt[1], even if that security was given without his knowledge and to secure a further debt in addition to that for which he became guarantor[2]. However, such a guarantor is not entitled to the benefit of a security given by the principal debtor to the creditor, without the guarantor's knowledge, at a different time and for another part of the debt to which his guarantee does not extend[3].

1 *Goodwin v Gray* (1874) 22 WR 312.

2 *Scott v Knox* (1838) 2 Jo Ex Ir 778; and see *Berridge v Berridge* (1890) 44 ChD 168; *Lake v Brutton* (1856) 8 De GM & G 440. Where two debts were due from a debtor to a creditor, and there was a guarantor for the second debt only, it was held that, as the securities lodged by the debtor with his creditor for the first debt were more than sufficient to pay it, the guarantor was entitled to the benefit of the surplus towards the liquidation of the second debt: *Praed v Gardiner* (1788) 2 Cox Eq Cas 86; and see *Heyman v Dubois* (1871) LR 13 Eq 158.

3 *Wade v Coope* (1827) 2 Sim 155. Thus, where a guarantee is given to a bank to secure advances to one of its customers, and subsequently successive advances are made by the bank to him, not under the guarantee, but independently of it, and against securities which on the repayment of each advance so made are returned by the bank to its customer, the guarantor, though he has not been consulted with reference to such transactions, has no valid ground of objection, and the customer is in such circumstances entitled, as against the guarantor, to retain the securities returned to him by the bank: *Wilkinson v London and County Banking Co* (1884) 1 TLR 63, HL.

1141. Satisfied securities. If a guarantor for a debt or duty pays the debt or performs the duty in full[1], he is entitled to have assigned to him all securities held by the creditor in respect of the debt or duty, whether or not the security is deemed at law to have been satisfied by the payment of the debt or performance of the duty[2]. A guarantor whose estate has been resorted to beyond what, in equity, it is bound to bear has the right to have an assignment made to him of every security which the creditor possesses against the principal debtor[3], and the satisfied debt is dealt with as still subsisting to the extent to which the guarantor is improperly resorted to[4].

This principle applies only where the joint liability arises out of contract. One of two joint tortfeasors who has paid the damages due under a judgment against him and his co-tortfeasor is not entitled to an assignment of the judgment to enable him to recover contribution from his co-tortfeasor[5], although by statute he is entitled to contribution[6].

The right to an assignment of satisfied securities may be enforced by bringing a claim[7]. Where the creditor has refused to assign the judgment, the guarantor may recover as damages the value of the specific assets which would have been available for execution under the judgment, if it had been duly assigned, without showing, in the first instance, that there were no other assets available[8]. In the case of insolvency, the right to stand in the place of a judgment creditor and to enforce that right against the insolvent estate is not affected by the circumstance that actual assignment of the judgment has not been obtained[9].

When the judgment is assigned, the assignee must obtain leave to issue execution on it[10]. In considering whether leave ought to be given, the court may take into consideration the state of accounts between the parties entitled and liable to execution and generally their mutual rights and liabilities, legal or equitable[11].

1 If the guarantor does not pay the debt in full he is not entitled to an assignment of the principal security: *Ewart v Latta* (1865) 4 Macq 983, HL; *Re Howe, ex p Brett* (1871) 6 Ch App 838 at 841.

2 Mercantile Law Amendment Act 1856 s 5. Section 5 abrogated the common law rule to the contrary, for which see *Copis v Middleton* (1823) Turn & R 224; *Gammon v Stone* (1749) 1 Ves Sen 339; *Woffington v Sparks* (1754) 2 Ves Sen 569; and see *Batchellor v Lawrence* (1861) 9 CBNS 543 at 552–553 per Williams J. A guarantor who has paid the debt in full is entitled to pursue all the creditor's remedies, including the use of the creditor's name, upon giving a proper indemnity, in order himself to obtain indemnity from the principal debtor or a co-guarantor, although against a co-guarantor he may recover only the proportion for which, as between themselves, the co-guarantor is liable: Mercantile Law Amendment Act 1856 s 5. As to the rights of co-guarantors among themselves see *Dale v Powell* (1911) 105 LT 291 at 294 per Parker J; *Brown v Cork* [1985] BCLC 363, CA; and PARA 1175. A right of distress for rent in arrear is not within the provisions of the Mercantile Law Amendment Act 1856: *Re Russell, Russell v Shoolbred* (1885) 29 ChD 254, CA.

3 *Silk v Eyre* (1875) IR 9 Eq 393 at 395 per Chatterton V-C.

4 *Silk v Eyre* (1875) IR 9 Eq 393 at 395 per Chatterton V-C; and see *Batchellor v Lawrence* (1861) 9 CBNS 543.

5 *The Englishman and The Australia* [1895] P 212.

6 See the Civil Liability (Contribution) Act 1978; and TORT vol 45(2) (Reissue) PARA 348 et seq.

7 *Phillips v Dickson* (1860) 8 CBNS 391; *The Englishman and The Australia* [1895] P 212.

8 *Oddy v Hallett* (1885) Cab & El 532. Refusal to assign the judgment does not release the guarantor, but merely discharges his liability to the extent to which he has suffered damage thereby: *Dale v Powell* (1911) 105 LT 291. The case is analogous to that which arises when securities obtained by the creditor after the contract are dealt with by the creditor to the prejudice of the guarantor's rights to them. See PARA 1244 et seq.

9 *Re M'Myn, Lightbown v M'Myn* (1886) 33 ChD 575; and cf *Re Lord Churchill, Manisty v Churchill* (1888) 39 ChD 174; *Re Lamplugh Iron Ore Co Ltd* [1927] 1 Ch 308.

10 See CPR Sch 1 RSC Ord 46 r 2(1)(b); *Kayley v Hothersall* [1925] 1 KB 607, CA, approving the dictum of Parker J in *Dale v Powell* (1911) 105 LT 291 at 292; and ENFORCEMENT vol 17(1) (Reissue) PARA 110. As to the caution to be exercised in applying pre-CPR authorities see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 60. For the equivalent provisions in county courts see CPR Sch 2 CCR Ord 26 r 5(1)(b); and ENFORCEMENT vol 17(1) (Reissue) PARA 122.

11 *Kayley v Hothersall* [1925] 1 KB 607 at 616, CA; *Dale v Powell* (1911) 105 LT 291 at 292, 294; and see note 10.

1142. Guarantor's right to transfer of mortgage security. Where the guaranteed debt is secured by a mortgage executed by the principal debtor the guarantor is, on payment of the debt, entitled to a transfer of the mortgage[1], even though he was not originally aware of its existence[2]. Prior to the transfer a guarantor for payment of the mortgage debt itself has, on payment of any portion of it, an equitable charge on the mortgaged property[3] arising automatically, which is not, however, regarded as being an interest in the mortgaged land[4].

Where a mortgage debt was in fact paid out of charges created by the guarantor further to secure the mortgage debt, he was entitled to the benefit of the mortgagee's securities against the mortgagor's land, although according to the proviso for redemption in the event of the mortgagor or his guarantor repaying the mortgage debt, the mortgagee undertook to reconvey the land and charges to the uses on which they were held before the execution of the mortgage deed[5]. Moreover, a guarantor who mortgages his own property as collateral security for a mortgage debt secured on another property has an interest in that other property and is a necessary party to a claim for its foreclosure or redemption[6].

A guarantor is entitled to redeem if he has mortgaged property of his own to secure the debt due from the principal debtor[7], or if he has joined in a mortgage of the principal debtor's property so as to render himself liable to payment of principal or interest, and the principal debtor defaults[8]. When the guarantor redeems a mortgage by the principal debtor, he is deemed to do so for his own benefit, and is not presumed, like the mortgagor, to have done so for the benefit

of subsequent incumbrancers; for the guarantor is not in privity with them, and towards them he has undertaken no obligation for the discharge of their debts[9]. He is therefore entitled to have the mortgage assigned to him as against them, even though their securities were created before the contract of guarantee[10].

Where a claim for foreclosure is brought only one six month period is allowed for redemption for both the mortgagor and the guarantor, and not two successive six month periods[11].

1 Mercantile Law Amendment Act 1856 s 5; *Copis v Middleton* (1823) Turn & R 224 at 229; *Hodgson v Shaw* (1834) 3 My & K 183 at 189 per Lord Broughton LC. Some observations of Page Wood V-C in *South v Bloxam* (1865) 2 Hem & M 457 created a doubt whether the guarantor's right to the benefit of securities held by the creditor arises until the guarantor pays the guaranteed debt. According to subsequent decisions, however, a guarantor's right to a collateral security is not in abeyance until he is called upon to pay: *Dixon v Steel* [1901] 2 Ch 602; and see *Lake v Brutton* (1856) 8 De GM & G 440; *Pledge v Buss* (1860) John 663; and PARA 1129.

2 See the cases cited in PARA 1138 notes 5–7.

3 *Gedye v Matson* (1858) 25 Beav 310; *Green v Wynn* (1869) 4 Ch App 204; *Allen v De Lisle* (1856) 3 Jur NS 928; *Re Davison's Estate* (1893) 31 LR Ir 249; affd [1894] 1 IR 56, CA.

4 *Kennedy v Campbell* [1899] 1 IR 59.

5 *M'Neale v Read* (1857) 71 ICLR 251.

6 *Stokes v Clendon* (1790) 3 Swan 150n; *Gee v Liddell* [1913] 2 Ch 62; *Re a Debtor (No 24 of 1971), ex p Marley v Trustee of the Property of the Debtor* [1976] 2 All ER 1010, [1976] 1 WLR 952. Similarly, where a mortgage of the estate of a married woman was in effect a security for her husband's debts, he was a necessary party: see *Hill v Edmonds* (1852) 5 De G & Sm 603. However, a guarantor is not a necessary party where he is bound by a personal covenant only, unless he has paid off part of the debt: *Newton v Earl of Egmont* (1831) 4 Sim 574; *Gedye v Matson* (1858) 25 Beav 310.

7 See *Dixon v Steel* [1901] 2 Ch 602; and see also *Gleaves v Paine* (1863) 1 De GJ & Sm 87; *Re Gleaves, ex p Paine* (1863) 3 De GJ & Sm 458.

8 *Green v Wynn* (1869) 4 Ch App 204 at 207; *Seligman v Eagle Insurance Co* [1917] 1 Ch 519 (right of guarantor for a debtor, who, since the mortgage, had become an alien enemy, to redeem and obtain a transfer of the security).

9 *Re Davison's Estate* (1893) 31 LR Ir 249 at 255; affd [1894] 1 IR 56, CA; and see *Allen v De Lisle* (1856) 5 WR 158.

10 *Re Davison's Estate* (1893) 31 LR Ir 249 at 254–255; affd [1894] 1 IR 56, CA; and see *Sawyer v Goodwin* (1875) 1 ChD 351, CA. Where the owner of two lots of land mortgaged one of them, his guarantor was held not entitled, on payment of the mortgage debt, to stand in the mortgagee's place as to that lot, where the other lot had been conveyed to him by the mortgagor by way of indemnity: *Cooper v Jenkins* (1863) 32 Beav 337; sed quaere: see *Brandon v Brandon* (1859) 3 De G & J 524; *Lake v Brutton* (1856) 8 De GM & G 440.

11 *Smith v Olding* (1884) 25 ChD 462. As to the period allowed for redemption and the necessary parties to a foreclosure claim see MORTGAGE vol 32 (2005 Reissue) PARA 774 et seq.

1143. Tacking. Whether the right of a guarantor to a transfer of a mortgage can be postponed until he has paid off, in addition to the sum originally advanced and in respect of which he is guarantor, such further advances as may subsequently have been made[1], is doubtful[2]. There can be no such postponement where the guarantor was wholly ignorant of the subsequent advances having been made, and such advances were not contemplated at the time of the original loan[3], nor where there is a special contract excluding the right to tack a second advance to one previously made[4]. On the other hand, where the alleged guarantor is really a principal debtor, he cannot claim the rights of a guarantor[5], and therefore the right of tacking against such a person and his personal representatives will be upheld[6].

The guarantor himself is not entitled, as against a second mortgagee, to tack to the first mortgage, on its transfer to him by the creditor, the costs of unsuccessfully defending an action brought against him by the creditor on his guarantee covenant[7].

1 A mortgagee's right to tack, i e to add later advances to earlier advances so as to obtain priority over an intermediate incumbrancer, has been abolished except as to further advances made (1) by arrangement with a subsequent mortgagee; (2) without notice of a subsequent mortgage at the time of making a further advance; (3) under an obligation imposed by the mortgage: see the Law of Property Act 1925 s 94(1). See generally MORTGAGE vol 32 (2005 Reissue) PARAS 464–465. The cases cited in notes 2–7, which were all decided before the enactment of the 1925 legislation, should be read with this partial abolition in mind.

2 See *Williams v Owen* (1843) 13 Sim 597; *Nicholas v Ridley* [1904] 1 Ch 192, CA. In *Williams v Owen* above the right to tack against a guarantor, who had joined in the covenant in the mortgage deed, was upheld on the ground that he must have known of such right and have impliedly consented to its exercise. This decision was followed in *Farebrother v Wodehouse* (1856) 23 Beav 18, and approved in *Drew v Lockett* (1863) 32 Beav 499. On the other hand, it was neither cited nor followed in *Bowker v Bull* (1850) 1 Sim NS 29, and was disapproved in *Re Kirkwood's Estate* (1878) 1 LR Ir 108; *Dawson v Bank of Whitehaven* (1877) 4 ChD 639; on appeal 6 ChD 218, CA; and in *Forbes v Jackson* (1882) 19 ChD 615, where Hall V-C laid down the principle that the guarantor in effect bargains that the securities which the creditor takes are to be for the guarantor, if and when he is called upon to make any payment, and that it is the creditor's duty to keep the securities intact, and not to give them up and burden them with further advances. See note 1.

3 *Forbes v Jackson* (1882) 19 ChD 615; *Newton v Chorlton* (1853) 10 Hare 646. Sometimes the security expressly gives to the debtor an option to call for further advances: *West v Williams* [1899] 1 Ch 132, CA. In these circumstances a guarantor might, as in *Williams v Owen* (1843) 13 Sim 597, be held to have agreed that, should the option be exercised, the right to tack might be put in force against him. See note 1.

4 *Bowker v Bull* (1850) 1 Sim NS 29. See note 1.

5 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 11, HL, per Lord Selborne LC. See note 1.

6 *Nicholas v Ridley* [1904] 1 Ch 192, CA. See note 1.

7 *South v Bloxam* (1865) 2 Hem & M 457. In this case, which was subsequently explained in *Dixon v Steel* [1901] 2 Ch 602, it was also held that the doctrine of marshalling securities might be applied against a guarantor in favour of a second mortgagee: see EQUITY vol 16(2) (Reissue) PARA 759. As to the statutory abolition of the right to tack except in limited circumstances see note 1.

1144. Consolidation of mortgages. The position of a guarantor with regard to the right of a mortgagee to whom two properties have been separately mortgaged to insist on both mortgage debts being paid off as a condition of the redemption of either property[1] is superior to that of a second mortgagee; for the second mortgagee is necessarily a complete stranger to the first mortgagee, whilst between the first mortgagee and the guarantor a contract exists under which the guarantor has certain rights and equities which must not be impaired by the exercise of the right of consolidation or otherwise, and which bind the mortgage securities into whatever hands they may come[2]. Where, however, the guarantor has in the mortgage deed expressly covenanted that, as between himself and the mortgagee, he is to be treated and regarded as a principal debtor, the right of consolidation may, apparently, be exercised against him[3] in cases where it may be exercised against the mortgagor[4]. This right can only arise when all the mortgages were originally made by the same mortgagor, and it is not enough that the different equities of redemption have passed into the same hands by assignment[5].

Where a person whose estate is already mortgaged to a mortgagee joins as guarantor in a mortgage by which the estates both of the principal and of the

guarantor are mortgaged to that mortgagee, the principal debtor's estate cannot be made liable for the money due under the original mortgage by the guarantor alone[6].

1 For the doctrine of consolidation of mortgages see generally MORTGAGE vol 32 (2005 Reissue) PARA 699 et seq. The right of consolidation was restricted by the Conveyancing Act 1881 s 17(1), which was repealed and substantially re-enacted by the Law of Property Act 1925 s 93(1). Cases decided prior to 1881 should now be read in the light of this statutory restriction.

2 *Bowker v Bull* (1850) 1 Sim NS 29 at 34, 36 per Lord Cranworth V-C; and see *Drew v Lockett* (1863) 32 Beav 499; *Forbes v Jackson* (1882) 19 ChD 615; *Nicholas v Ridley* [1904] 1 Ch 192, CA. See note 1.

3 See *Farebrother v Wodehouse* (1856) 23 Beav 18; *Nicholas v Ridley* [1904] 1 Ch 192, CA; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 11, HL, per Lord Selborne LC. See note 1.

4 See the Law of Property Act 1925 s 93; and MORTGAGE vol 32 (2005 Reissue) PARA 701.

5 *Sharp v Rickards* [1909] 1 Ch 109.

6 *Aldworth v Robinson* (1840) 2 Beav 287. See note 1.

1145. Guarantor's right to all the creditor's equities. Besides his right to securities held by the creditor for the guaranteed debt, a guarantor is entitled to all the equities which the creditor could have enforced, and these prevail not only against the principal debtor himself but also against all persons claiming under him[1].

1 *Drew v Lockett* (1863) 32 Beav 499; and see *Re Kirkwood's Estate* (1878) 1 LR Ir 108; *Imperial Bank v London and St Katharine Docks Co* (1877) 5 ChD 195; *Brandon v Brandon* (1859) 3 De G & J 524.

1146. Waiver of rights of subrogation. The rights which a guarantor possesses of standing in the creditor's place as regards the creditor's securities and equities, and on the bankruptcy of the principal debtor, may be waived by express words in the contract of guarantee itself[1]. They may also be impliedly waived by the guarantor's acceptance of an indemnity from the principal debtor in lieu of the right he would otherwise have possessed[2], or in some other way[3]. Where there has been an express waiver, the fact that the guarantor, in the event of the principal debtor's bankruptcy, realises a counter-security received by him from the principal debtor by way of indemnity, and out of the proceeds discharges his liability to the creditor, will not prevent the creditor from proving for the whole of his debt, so long as he does not receive, in the whole, more than 100 pence in the pound[4].

1 *Re Fernandes, ex p Hope* (1844) 3 Mont D & De G 720; *Earle v Oliver* (1848) 2 Exch 71; *Re Gillespie* (1887) 19 LR Ir 198; *Midland Banking Co v Chambers* (1869) 4 Ch App 398; *Metropolitan Bank of England and Wales v Coppee* (1896) 12 TLR 258, CA. A mere course of dealing between the parties before the bankruptcy will not, it seems, suffice: *Re Bulmer, ex p Johnson* (1853) 3 De GM & G 218. For cases in which the guarantor has agreed that recovery of dividends in the bankruptcy of a debtor should not prejudice the creditor's right to recover the balance from the guarantor see *Re Sass, ex p National Provincial Bank of England* [1896] 2 QB 12; *Re Sellers, ex p Midland Banking Co* (1878) 38 LT 395; *Re Blakely, ex p Aachener Disconto Gesellschaft* (1892) 9 Morr 173; *Re Rees, ex p National Provincial Bank of England* (1881) 17 ChD 98, CA; *Re Porter, ex p Miles* (1848) De G 623.

2 *Cooper v Jenkins* (1863) 32 Beav 337.

3 *Waugh v Wren* (1862) 1 New Rep 142, where the guarantor, on payment of the guaranteed sum, was held to have permitted the creditor to retain the securities against any further liability of the debtor.

4 *Midland Banking Co v Chambers* (1869) 4 Ch App 398; and see *Re Melton, Milk v Towers* [1918] 1 Ch 37 at 46–47, CA.

(4) GUARANTOR'S RIGHTS AGAINST PRINCIPAL DEBTOR

(i) Nature and Acquisition of Guarantor's Rights

1147. Guarantor's express right to indemnification. An express right to indemnification may be conferred upon the guarantor by the principal debtor[1], in which case there can be no implied indemnity[2]. The precise extent of an express indemnity is a question of construction in each particular case[3].

Until the guarantor has paid the creditor, the guarantor's right of indemnification against the principal debtor does not constitute a debt owed to the guarantor by the principal debtor[4].

A bill of sale given by way of indemnity to a guarantor is void, because the statutory form is not applicable to such a security[5].

1 See eg *Cooper v Jenkins* (1863) 32 Beav 337; *Re Moss, ex p Hallet* [1905] 2 KB 307. See also *Re Robinson, ex p Burrell* (1876) 1 ChD 537, CA; *Re Simons, ex p Allard* (1881) 16 ChD 505, CA; *Atkins v Revell* (1860) 1 De GF & J 360, where an indemnity was granted by an intended administratrix to an executor renouncing probate in respect of liability as guarantor for the testator. A counter-security given to a guarantor by a principal debtor reverts to the principal debtor on the discharge of the guarantor from liability: *M'Mahon v Fetherstonhaugh* [1895] 1 IR 182; cf *Brown Shipley & Co Ltd v Amalgamated Investment (Europe) BV* [1979] 1 Lloyd's Rep 488, cited in PARA 1138 text and note 12.

2 See PARA 1261 and the cases there cited. For the principle that the guarantor should sue on the express indemnity see PARA 1163.

3 See eg *Dumbell v Isle of Man Rly Co* (1880) 42 LT 745, PC, where an assignment to secure repayment of a loan made by an assignee to assignors and all other sums which might become due from them to him was held to cover money paid by the assignee as guarantor under a guarantee of a loan by a third party to the assignors. See also PARA 1264.

4 See PARA 1267 text and note 6. For the position of a guarantor who has paid the creditor see PARA 1158.

Where the indemnity takes the form of a deposit of title deeds with the guarantor by the principal debtor, and there is no agreement to execute a formal mortgage, the guarantor is only entitled to insist on having a memorandum signed by the principal debtor, specifying the terms of the deposit, and has no right to have a formal legal mortgage executed in his favour: *Sporle v Whayman* (1855) 20 Beav 607. It is no longer possible to create an equitable charge over land by the mere deposit of title deeds: see MORTGAGE vol 32 (2005 Reissue) PARA 305.

5 *Hughes v Little* (1886) 18 QBD 32, CA. See also *Sibley v Higgs* (1885) 15 QBD 619; and PARA 1728.

1148. Guarantor's implied rights against principal debtor. The implied rights possessed by a guarantor against the principal debtor are not identical with those which the creditor has against the principal debtor[1], but are somewhat similar to those possessed by one guarantor against another[2]. They are available whenever the guarantee has been undertaken at the principal debtor's actual or constructive request[3]. Where such a request has been made, the right to indemnity[4] is an incident of the guarantee[5], and the principal debtor will be liable without the necessity of any further request for all sums subsequently paid by the guarantor under the guarantee as money paid to the use of the principal debtor[6].

A person cannot make himself a creditor of another merely by volunteering to discharge that other person's obligations[7]. However, even where the guarantee is given without any antecedent request, a guarantor may be entitled to be reimbursed by the principal debtor if the guarantor can bring himself within the principle which enables a person who has been compelled to make a payment for which another person is ultimately liable and of which that person obtains the benefit to recover payment from that other person[8].

A guarantor for a receiver appointed by the court is entitled to be indemnified out of a balance due to him[9].

1 *Badeley v Consolidated Bank* (1886) 34 ChD 536 at 556. Thus, although a creditor who has recovered judgment against one partner cannot sue another partner of the same firm, that rule does not take away the rights of a guarantor for one partner against another partner: *Badeley v Consolidated Bank* at 556.

2 *Woods v Creaghe* (1828) 2 Hog 50. As to the rights and liabilities of co-guarantors inter se see PARA 1165 et seq.

3 *Alexander v Vane* (1836) 1 M & W 511; *Re Debtor (No 627 of 1936)* [1937] Ch 156 at 163, CA; *Anson v Anson* [1953] 1 QB 636 at 641, [1953] 1 All ER 867 at 869: and cf *Owen v Tate* [1976] QB 402, [1975] 2 All ER 129, CA. See also *Hodgson v Shaw* (1834) 3 My & K 183 at 190; *Morrice v Redwyn* (1731) 2 Barn KB 26; *Ware v Horwood* (1807) 14 Ves 28; *Kearsley v Cole* (1846) 16 M & W 128; *Re Brooks, Boyd v Brooks* (1865) 34 LJCh 605; *Davies v Humphreys* (1840) 6 M & W 153; *Huntley v Sanderson* (1833) 1 Cr & M 467; *Reynolds v Doyle* (1840) 1 Man & G 753. As to a husband's entitlement to an indemnity from his wife, in respect of any payments made by him as guarantor for her liabilities, see *Re Salisbury-Jones, Hammond v Salisbury-Jones* [1938] 3 All ER 459; *Anson v Anson* above.

4 As to the nature of the guarantor's right of indemnification before he has paid the creditor see PARA 1151 text and note 1.

5 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL. The implied undertaking to repay arises at the time of the request (*Re a Debtor (No 627 of 1936)* [1937] Ch 156, CA) and is not negatived by the mere fact that the guarantor is the husband of the principal debtor (*Anson v Anson* [1953] 1 QB 636, [1953] 1 All ER 867). Cf *Owen v Tate* [1976] QB 402, [1975] 2 All ER 129, CA.

6 *Re Fox, Walker & Co, ex p Bishop* (1880) 15 ChD 400, CA; *Exall v Partridge* (1799) 8 Term Rep 308; *Pitt v Purssord* (1841) 8 M & W 538; *Warrington v Furbor* (1807) 8 East 242; *Davies v Humphreys* (1840) 6 M & W 153; *Pownal v Ferrand* (1827) 6 B & C 439; *Leigh v Dickeson* (1884) 15 QBD 60, CA; *Duffield v Scott* (1789) 3 Term Rep 374. For the right of a guarantor to redeem a mortgage see PARA 1142. Cf also *Scot v Bell* (1672) 2 Lev 70; *Beverly v Gatacre* (1623) 2 Roll Rep 305; *Barling v Bishopp* (1860) 29 Beav 417, where otherwise voluntary transfers of property to guarantors were held, by virtue of those guarantors' rights of indemnity, to be transfers for value.

7 *Hodgson v Shaw* (1834) 3 My & K 183 at 190 per Lord Brougham LC; *Exall v Partridge* (1799) 8 Term Rep 308 at 310; *Pearce v Blagrave* (1855) 3 CLR 338 at 340; and see *Leigh v Dickeson* (1884) 15 QBD 60 at 64 et seq, CA, per Sir Baliol Brett MR; *Johnson v Royal Mail Steam Packet Co* (1867) LR 3 CP 38 at 43.

8 *Owen v Tate* [1976] QB 402, [1975] 2 All ER 129, CA; and see *Re a Debtor (No 627 of 1936)* [1937] Ch 156 at 166, [1937] 1 All ER 1 at 10, CA, per Greene LJ; *Anson v Anson* [1953] 1 QB 636 at 642–643, [1953] 1 All ER 867 at 869–870 per Pearson J; and PARA 1258.

9 *Glossop v Harrison* (1814) 3 Ves & B 134: see RECEIVERS vol 39(2) (Reissue) PARA 478 et seq.

1149. Where there is no right to indemnification. In certain cases it is illegal to indemnify the guarantor, and it follows that in those cases no right to indemnification can arise by implication of law[1].

A guarantor cannot, in his own name, enforce a contract of indemnity against a person who has agreed to indemnify the principal debtor in respect of the guaranteed debt[2]. Where by an agreement between the guarantor and the principal debtor the performance of the guarantee by the guarantor is to operate as payment to the principal debtor of a sum due to him from the guarantor, the guarantor's right to indemnification in respect of payment made by him under the guarantee cannot be enforced[3].

1 See PARA 1269.

2 *Re Law Courts Chambers Co Ltd* (1889) 61 LT 669; and see *Crafts v Tritton* (1818) 8 Taunt 365. He may, however, take an assignment of the contract of indemnity (see PARA 1263); and it appears that he might be allowed to sue upon it in the principal debtor's name.

3 *Copland v Miller* (1903) Times, 28 November.

1150. Where right to indemnification is preserved. The guarantor's right to be indemnified by the principal debtor or his estate will not be held to have been abandoned in the absence of a contract on his part to abandon it[1], and the reservation in a composition deed of a creditor's remedies against a guarantor necessarily implies the continuance of the guarantor's right[2].

1 *Close v Close* (1853) 4 De GM & G 176. Where a wife charged her separate estate as an indemnity to one of two guarantors for her husband, the guarantor so indemnified, by subsequently discharging the other guarantor from liability to contribution, released the wife's estate from the charge to that extent: *Hodgson v Hodgson* (1837) 2 Keen 704; and see *Way v Hearn* (1862) 11 CBNS 774 at 782; *Re Gervais' Estate* [1903] 1 IR 172.

2 *Close v Close* (1853) 4 De GM & G 176; *Cole v Lynn* [1942] 1 KB 142, [1941] 3 All ER 502, CA.

(ii) Guarantor's Rights before He Satisfies the Guaranteed Debt

1151. Guarantor's right to exoneration from liability. When the creditor has acquired a right to immediate payment of the debt from the guarantor, the guarantor is entitled to call upon the principal debtor to pay the amount of the debt guaranteed, so as to relieve the guarantor from his obligation, even though the guarantor has paid nothing under the guarantee[1], and even though the creditor has not demanded payment from him or the principal debtor[2].

It is not necessary that the creditor should have refused to sue the principal debtor in order that the guarantor may obtain this relief[3], but, generally speaking, the guarantor is not entitled to relief until the debt is payable by him[4]. He may not therefore call upon the principal debtor to make provision for payment to the creditor before the debt is due[5], and, moreover, it must be shown that a definite sum is payable[6]; it will not suffice to show that a demand has been made on the guarantor, and that on taking of accounts it may eventually be found that a debt is due[7]. In exceptional cases, however, a guarantor may obtain relief even though his liability has not yet accrued[8].

1 This is a particular instance of the general equitable rule that a person entitled to an indemnity may enforce his right to it before he has suffered loss (see PARAS 1266–1267, and the cases there cited): see *Earl of Ranelaugh v Hayes* (1683) 1 Vern 189 at 190 per Lord Keeper North, afterwards Lord Guildford; *Lee v Rook* (1730) Mos 318 per Sir Joseph Jekyll MR; *Nisbet v Smith* (1789) 2 Bro CC 579 at 592 per Lord Thurlow LC; *Antrobus v Davidson* (1817) 3 Mer 569 at 579 per Sir William Grant MR; *Bechervaise v Lewis* (1872) LR 7 CP 372 at 377 per Willes J; *Alcoy and Gandia Rly and Harbour Co v Greenhill* (1897) 76 LT 542 at 553; on appeal (1898) 79 LT 257, CA. As to claims for protection against future apprehended loss see EQUITY vol 16(2) (Reissue) PARA 484; INJUNCTIONS vol 24 (Reissue) PARAS 832, 835, 837.

2 *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401; *Re Anderson-Berry, Harris v Griffith* [1928] Ch 290, CA; *Tate v Crewdson* [1938] Ch 869, [1938] 3 All ER 43; *Watt v Mortlock* [1964] Ch 84, [1963] 1 All ER 388; *Thomas v Nottingham Incorporated Football Club Ltd* [1972] Ch 596, [1972] 1 All ER 1176. See also *Wolmershausen v Gullick* [1893] 2 Ch 514 (contribution between co-guarantors); *Gray v Phillips* 1905 13 SLT 145; *Doig v Lawrie* (1903) 5 F 295, Ct of Sess; and see the text and note 3.

3 *Mathews v Saurin* (1893) 31 LR Ir 181. See also *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401 at 408 per Swinfen Eady J, refusing to follow the dictum to the contrary in *Padwick v Stanley* (1852) 9 Hare 627.

4 See *Lloyd v Dimmack* (1877) 7 ChD 398; *Hughes-Hallett v Indian Mammoth Gold Mines Co* (1882) 22 ChD 561; *Bradford v Gammon* [1925] Ch 132; *Morrison v Barking Chemicals Co Ltd* [1919] 2 Ch 325; *Re Ledgard, Attenborough v Ledgard* (1922) 66 Sol Jo 405; and PARA 1268.

5 *Dale v Lolley* (1808), referred to in an editor's note to *Nisbet v Smith* (1789) 2 Bro CC 579 at 582.

6 *Morrison v Barking Chemicals Co Ltd* [1919] 2 Ch 325.

7 *Antrobus v Davidson* (1817) 3 Mer 569.

8 *Re Anderson-Berry, Harris v Griffith* [1928] Ch 290, CA.

1152. Mortgages and charges. A person who mortgages his property to secure the debt of another stands in the relation of guarantor towards the person whose debt is thus secured[1], and is entitled to be exonerated by the principal debtor[2]. This principle also applies where jointly owned property is charged to secure the indebtedness of one co-owner[3].

So, where a father helped his son to obtain a bank loan by transferring his house into their joint names as tenants in common in equal shares, and then joining with the son in charging the house to the bank as security for the son's debts, the son's debt to the bank was deducted from the son's half share in the house in valuing the interest which vested in the trustee on the son's bankruptcy[4]. However, the equity of exoneration is a principle of equity which depends upon the presumed intention of the parties[5]. So, where a husband and wife charged their jointly owned home to secure a bank account used by the husband both in connection with his business and for payment of expenses in connection with the matrimonial home, the equity of exoneration was held to apply only to those payments made purely for business purposes and for the husband's sole benefit[6].

1 See *Re Conley, ex p Trustee v Barclays Bank Ltd, Re Conley, ex p Trustee v Lloyd's Bank Ltd* [1938] 2 All ER 127 at 131; *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL.

2 *Lee v Rook* (1730) Mos 318; *Evelyn v Evelyn* (1731) 2 P Wms 659 at 663; on appeal (1733) 6 Bro Parl Cas 114, HL; *Piers v Piers* (1750) 1 Ves Sen 521; cf *Re Westzinthus* (1833) 5 B & Ad 817.

3 See *Re a Debtor (No 24 of 1971), ex p Marley v Trustee of the Property of the Debtor* [1976] 2 All ER 1010, [1976] 1 WLR 952; *Re Pittortou, ex p Trustee of Property of Bankrupt* [1985] 1 All ER 285, [1985] 1 WLR 58. In such a case, the effect of the equity of exoneration is to enhance the proprietary interest of the guarantor/joint mortgagor and not simply to give the guarantor a personal right to an indemnity from the principal debtor who is the other joint mortgagor: *Re Pittortou* at 288 and at 61 per Scott J.

4 *Re a Debtor (No 24 of 1971), ex p Marley v Trustee of the Property of the Debtor* [1976] 2 All ER 1010, [1976] 1 WLR 952.

5 *Re Fittortou, ex p Trustee of Property of Bankrupt* [1985] 1 All ER 285 at 288, [1985] 1 WLR 58 at 62 per Scott J. See also *Re a Debtor (No 24 of 1971), ex p Marley v Trustee of the Property of the Debtor* [1976] 2 All ER 1010 at 1013, [1976] 1 WLR 952 at 955 per Foster J.

6 *Re Pittortou, ex p Trustee of Property of Bankrupt* [1985] 1 All ER 285, [1985] 1 WLR 58. See also *Knight v Lawrence* [1991] 1 EGLR 143, [1991] 01 EG 105; *Paget v Paget* [1898] 1 Ch 470, CA. As to the wife's equity of exoneration where her property is used as security for her husband's debts see also *Earl of Huntington v Countess of Huntington* (1702) 2 Vern 437, HL; *Pocock v Lee* (1707) 2 Vern 604; *Tate v Austin* (1714) 1 P Wms 264; *Christmas v Christmas* (1725) Cas temp King 20; *Parteriche v Powlett* (1742) 2 Atk 383; *Piers v Piers* (1750) 1 Ves Sen 521; *Lewis v Nangle* (1752) Amb 150; *Earl of Kinnoul v Money* (1767) 3 Swan 202n; *Pitt v Pitt* (1823) Turn & R 180; *Ruscombe v Hare* (1828) 6 Dow 1, HL; *Lancaster v Evors* (1846) 10 Beav 154; *Thomas v Thomas* (1855) 2 K & J 79; *Nelson v Booth* (1857) 27 LJCh 110; *Gray v Dowman* (1858) 27 LJCh 702; *Scholefield v Lockwood (No 3)* (1863) 32 Beav 439; *Hall v Hall* [1911] 1 Ch 487. In *Re Woodstock* [1980] CLY 148, ChD, cited in *Re Pittortou* above, Walton J doubted the value of some of these early cases in modern social conditions. There are dicta which suggest that the wife's right of exoneration should be postponed to the rights of the husband's other creditors: see *Tate v Austin* above, cited with approval in *Clinton v Hooper* (1791) 3 Bro CC 201; but see *Hudson v Carmichael* (1854) Kay 613; and cf *Robinson v Gee* (1749) 1 Ves Sen 251.

1153. Declaration of relief from further liability. A guarantor may, by a claim brought before payment against the principal debtor and creditor, obtain a

declaration that he is relieved from all further liability under his guarantee where the acts and conduct of the creditor and principal debtor have in fact so relieved him[1].

1 *Wilson v Lloyd* (1873) LR 16 Eq 60; *Oakeley v Pasheller* (1836) 4 Cl & Fin 207, HL.

1154. Guarantor's right to damages. By express contract the guarantor may before payment be entitled to recover damages from the principal debtor where, for instance, the principal debtor covenants with the guarantor to pay the amount due to the creditor on a day named and then makes default. In such a case, however, the guarantor is under a duty to pay the amount recovered to the creditor, and if the debtor paid the creditor after the due date, the damages subsequently recoverable by the guarantor would be merely nominal[1].

1 *Loosemore v Radford* (1842) 9 M & W 657; *Toussaint v Martinnant* (1787) 2 Term Rep 100; *Penny v Foy* (1828) 8 B & C 11; *Hodgson v Bell* (1797) 7 Term Rep 97; *Carr v Roberts* (1833) 5 B & Ad 78; *Martin v Court* (1788) 2 Term Rep 640.

1155. Rights of guarantor for company. Even before the guarantor for a company has paid the guaranteed debt, he may present a petition for the winding up of the company since he is a contingent or prospective creditor of the company[1]. It seems, however, that he cannot prove in a winding up so long as he has not paid the guaranteed debt[2].

1 For the right of a contingent or prospective creditor to present such a petition see the Insolvency Act 1986 s 124(1); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 450. Formerly a guarantor could not present such a petition: *Re Vron Colliery Co* (1882) 20 ChD 442, CA.

2 See *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85, CA; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 760. See also BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 506.

1156. Stoppage in transit. A guarantor for the obligation of a buyer of goods to pay the price cannot exercise in his own name the seller's right of stoppage in transit against the goods on the buyer becoming insolvent, unless and until the guarantor himself pays the price of the goods to the seller[1]. However, upon paying the seller, the guarantor will be entitled to exercise that right, if not in his own name, at all events in that of the seller[2].

Where the buyer transfers the bill of lading by way of pledge, the unpaid seller may stop in transit everything which is not covered by the pledge, and, being in a position analogous to that of a guarantor for the buyer to the pledgee, may compel the pledgee to have the amount secured by the pledge satisfied in the first instance as far as possible out of any other goods or securities of the buyer in the hands of the pledgee and available against the buyer[3].

1 *Siffken v Wray* (1805) 6 East 371.

2 In such circumstances, the guarantor is 'a person who is in the position of the seller' within of the Sale of Goods Act 1979 s 38(2). The Mercantile Law Amendment Act 1856 s 5 may also lead to the same result: see *Imperial Bank v London and St Katharine Docks Co* (1877) 5 ChD 195.

3 *Re Westzinthus* (1833) 5 B & Ad 817; *Kemp v Falk* (1882) 7 App Cas 573 at 582, HL. As to stoppage in transit generally see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 256 et seq.

(iii) Guarantor's Rights after He Satisfies the Guaranteed Debt

1157. What amounts to payment. The taking of the guarantor's goods in execution[1], or the payment by him of money to prevent the execution[2], is

equivalent to payment[3] entitling him to indemnification[4]. Similarly, the exercise by the creditor of a right of set-off possessed by him against the guarantor, or the automatic set-off which occurs upon the insolvency of the creditor or the guarantor[5], are both equivalent to payment by the guarantor[6].

It is doubtful whether the giving by the guarantor of a promissory note to the creditor has this effect[7]. The giving of a bond by the guarantor to the creditor[8] or the substitution of one bond for another[9] is not equivalent to payment, nor will the payment of part of the guaranteed debt by the guarantor, together with an indemnity from the creditor against personal liability in respect of the balance of the debt[10], operate as a full payment of the guaranteed debt.

The court will be satisfied with slight evidence of payment, especially where there is an admission, by silence or otherwise, on the principal debtor's part, of due payment having been made by the guarantor[11].

1 *Rodgers v Maw* (1846) 15 M & W 444.
2 *Edmunds v Wallingford* (1885) 14 QBD 811, CA; *Exall v Partridge* (1799) 8 Term Rep 308.
3 As to what amounts to payment by a guarantor claiming contribution from a co-guarantor see PARA 1170.
4 As to the guarantor's right of indemnification following payment of the guaranteed debt see PARA 1147 et seq.
5 As to set-off between the creditor and the guarantor see PARA 1126.
6 *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769, CA. See also *Stein v Blake* [1996] AC 243, [1995] 2 All ER 961, HL.
7 *Barclay v Gooch* (1797) 2 Esp 571; *Rodgers v Maw* (1846) 15 M & W 444 at 449 per Pollock CB; *M'Kenna v Harnett* (1849) 13 ILR 206; *Taylor v Higgins* (1802) 3 East 169; *Maxwell v Jameson* (1818) 2 B & Ald 51; but see *Re Roberts, ex p Allen and Cazenove* (1858) 3 De G & J 447. Contrast *Gore v Gore* [1901] 2 IR 269, where a guarantor who gave a promissory note and executed a mortgage to a creditor was entitled to maintain an action against the principal debtor for money paid before payment was made on the note or mortgage; and see *M'Kenna v Harnett* above; *Fahey v Frawley* (1890) 26 LR Ir 78.
8 *Maxwell v Jameson* (1818) 2 B & Ald 51; *Taylor v Higgins* (1802) 3 East 169.
9 *Re Parkinson, ex p Sergeant* (1822) 1 Gl & J 183; affd (1825) 2 Gl & J 23.
10 *Soutten v Soutten* (1822) 5 B & Ald 852.
11 *Price v Burva* (1857) 6 WR 40.

1158. Guarantor's rights on payment of part of guaranteed debt. As often as the guarantor pays anything under his guarantee in relief of the principal debtor he has, unless the terms of the guarantee provide otherwise, an immediate right of action against the principal debtor[1] or, if he is a sub-guarantor, against any principal guarantor[2], although he cannot accelerate his remedy by paying the guaranteed debt before it becomes legally due[3]. Consequently the principal debtor or, as the case may be, a principal guarantor, may be exposed to several claims at the suit of the same guarantor. From this inconvenience and hardship he is not protected by any rule of law requiring the guarantor to pay the whole debt due from the principal debtor before compelling reimbursement[4].

A guarantor for payment of the mortgage debt by the mortgagor is entitled, on liquidating any portion of the debt, to an equitable charge to that extent on the mortgaged property[5].

1 *Davies v Humphreys* (1840) 6 M & W 153; *Taylor v Mills* (1777) 2 Cowp 525; *Paul v Jones* (1787) 1 Term Rep 599; *Ware v Horwood* (1807) 14 Ves 28. A common provision in standard form guarantees limits the guarantor's right to enforce his claim against the principal debtor until the guarantor has repaid all money to which the guarantee extends. For the position of a guarantor who is a volunteer see PARA 1148.
2 *Standard Brands Ltd v Fox* (1972) 29 DLR (3d) 167; affd (1973) 44 DLR (3d) 69 (NS App Div).

3 See *Coppin v Gray* (1842) 1 Y & C Ch Cas 205 at 210.

4 *Davies v Humphreys* (1840) 6 M & W 153 at 167 per Parke B.

5 See PARA 1142.

1159. Guarantor's position after payment. A guarantor who has paid the creditor[1] in relief of the principal debtor becomes to that extent a creditor of the principal debtor[2]. The guarantor stands in the place of the original creditor[3]. So, where the guaranteed debt arose under a contract made by deed, the guarantor becomes a specialty creditor of the principal debtor[4]. A guarantor who makes a payment on account of a debt which is a preferential debt in bankruptcy, the administration of an insolvent estate or the winding up of a company is entitled to the same priority as the creditor would have enjoyed in respect of the amount so paid[5]. A guarantor who has paid the amount secured on the principal debtor's property is entitled to a lien on it[6].

1 As to the nature of the guarantor's right of indemnification before he has paid the creditor see PARA 1267.

2 If payment is made after the debtor's death the guarantor is a creditor of the estate, and as such may be entitled to administration: *Williams v Jukes* (1864) 34 LJPM & A 60; and see *Wooldridge v Norris* (1868) LR 6 Eq 410. For the position of a guarantor who is a volunteer see PARA 1148.

3 Mercantile Law Amendment Act 1856 s 5; *Re Lord Churchill, Manisty v Churchill* (1888) 39 ChD 174 at 176 per North J; *Morris v Ford Motor Co Ltd* [1973] QB 792 at 809, [1973] 2 All ER 1084 at 1097, CA, per James LJ.

4 *Re Cochran's Estate, De Wolf v Lindsell* (1868) LR 5 Eq 209; *Ferguson v Gibson* (1872) LR 14 Eq 379 at 386; *Badeley v Consolidated Bank* (1886) 34 ChD 536 at 556 Stirling J; affd (1888) 38 ChD 238, CA. Formerly in such a case the guarantor was only a simple contract creditor, even where the original contract under which his liability and that of the principal debtor arose was made by deed: see *Badeley v Consolidated Bank* at 556 per Stirling J; *Copis v Middleton* (1823) Turn & R 224; *Simpkins v Poulett* (1824) 2 LJOS Ch 81. Contrast *Hodgson v Shaw* (1834) 3 My & K 183, where the principal debtor executed two bonds to secure the debt, a guarantor joining in one of the bonds only. The guarantor's representatives, having paid off the bond to which he was a party, procured an assignment of the bond to which he was not a party, and were held entitled to each as a specialty creditor of the principal debtor's estate.

5 *Re Lamplugh Iron Ore Co Ltd* [1927] 1 Ch 308 (rates); and cf *Re Lord Churchill, Manisty v Churchill* (1888) 39 ChD 174, where a guarantor to the Crown who had paid the debt was held entitled to the right of priority formerly enjoyed by the Crown by virtue of its prerogative in the administration of the principal debtor's estate. A guarantor for a Crown debtor on paying the debt was formerly entitled to have the writ of extent put in force on his behalf: see *R v Salter* (1856) 1 H & N 274; *R v Robinson* (1855) 1 H & N 275n. See also BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 577 note 4; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 770.

6 *Munnings v Bury* (1829) Taml 147; *Re Jeffery's Policy* (1872) 20 WR 857. See also *Wilding v Richards* (1845) 1 Coll 655 (property conveyed by deed by principal debtor to guarantor upon trust to sell and to pay creditors out of proceeds; no notice to creditors of deed; deed not binding in favour of creditors; guarantor entitled to retain estate conveyed until discharged from liability as guarantor); *Imperial Bank v London and St Katharine Docks Co* (1877) 5 ChD 195 (purchase by broker for undisclosed principal; broker personally liable according to usage of market on principal's default; payment of vendors by broker; unpaid vendor's lien passed to broker, even though principal had pledged goods to third parties and indorsed delivery order to them).

1160. Guarantor's right to indemnification. The guarantor's right to indemnification is a right to be reimbursed the amount which he has actually paid for the principal debtor with interest[1], to which he is entitled because of his right to full indemnification from the principal debtor[2]. Should the guarantor have sustained damage beyond the principal and interest which he has been

compelled to pay under his guarantee, he is entitled to recover that damage as well[3]. On his death the amount expended in respect of the guarantee is a debt due to his estate[4].

A guarantor for an insolvent company which is being wound up is entitled to interest up to the commencement of the winding up or administration (if there is one) on all sums paid by him under his guarantee, but not to interest accruing subsequently[5].

A guarantor who compounds a debt for which he and the principal debtor have become jointly liable can only recover from the principal debtor the amount of the composition agreed to[6].

The guarantor cannot recover from the principal debtor sums paid in respect of a claim which is statute-barred[7] or which the guarantor knows to be illegal[8] or void for fraud or immorality[9].

1 *Re Fox, Walker & Co, ex p Bishop* (1880) 15 ChD 400, CA; *Hitchman v Stewart* (1855) 3 Drew 271; *Lawson v Wright* (1786) 1 Cox Eq Cas 275 at 277. As to the right of the guarantor to recover interest upon any sum paid by him in respect of interest upon the guaranteed debt see *Rigby v Macnamara* (1795) 2 Cox Eq Cas 415, the correctness of which was doubted in *Re Maria Anna and Steinbank Coal and Coke Co, McKewan's Case* (1877) 6 ChD 447 at 455, CA, per Malins V-C. As to the courts' power to award interest on debts and damages see the Supreme Court Act 1981 s 35A; the County Courts Act 1984 s 69; and DAMAGES vol 12(1) (Reissue) PARA 848; ENFORCEMENT vol 17(1) (Reissue) PARA 25; PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 1227.

2 *Petre v Duncombe* (1851) 2 LM & P 107 at 115–116 per Erle CJ; *Re Evans, ex p Davies* (1897) 66 LJQB 499; *Omnium Insurance Corpn Ltd v United London and Scottish Insurance Co Ltd* (1920) 36 TLR 386; but see *Lancaster v Evors* (1847) 10 Beav 266. As to the right of a sub-guarantor to indemnity from a principal guarantor see *Standard Brands Ltd v Fox* (1972) 29 DLR (3d) 167; affd (1973) 44 DLR (3d) 69 (NS App Div).

3 *Badeley v Consolidated Bank* (1886) 34 ChD 536 at 556 per Stirling J; affd [1888] 38 ChD 238, CA.

4 *Willes v Greenhill* (1860) 29 Beav 376.

5 Insolvency Rules 1986, SI 1986/1925, r 4.93(1) (amended by SI 2005/527): see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 795; and cf *Re Beulah Park Estate, Sargood's Claim* (1872) LR 15 Eq 43; *Re Imperial Land Co of Marseilles, ex p Colborne and Strawbridge* (1870) LR 11 Eq 478, both cases decided under the pre-1986 law. As to the payment of interest on debts proved in the liquidation see the Insolvency Act 1986 s 189; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 827.

6 *Reed v Norris* (1837) 2 My & Cr 361. In this case, which was decided before satisfied securities could be assigned to the guarantor (see PARA 1141), the guarantor obtained an assignment to a trustee for himself of the debt compounded. See also *Ex p Rushforth* (1805) 10 Ves 409.

7 *Re Morris, Coneys v Morris* [1922] 1 IR 81; on appeal [1922] 1 IR 136, CA. For the circumstances in which a debt becomes statute-barred see generally the Limitation Act 1980; and LIMITATION OF ACTIONS.

8 *Chambers v Manchester and Milford Rly Co* (1864) 5 B & S 588 at 612 per Blackburn J.

9 *Bryant v Christie* (1816) 1 Stark 329.

1161. Costs. A guarantor may recover from the principal debtor the costs of defending a claim brought against him by the creditor if he undertook the defence with the debtor's authority[1], or reasonably defended the proceedings in the debtor's interests[2], or the costs were for some reason unavoidably incurred[3]. If, however, the guarantor defends the claim solely for his own benefit[4], or incurs costs by unreasonably defending or persisting in defending the claim[5], he cannot recover the costs from the principal debtor or any amount unreasonably incurred.

1 See *Crampton v Walker* (1860) 3 E & E 321; *Garrard v Cottrell* (1847) 10 QB 679. See also PARA 1265.

2 See *South v Bloxam* (1865) 2 Hem & M 457; *Baxendale v London, Chatham and Dover Rly Co* (1874) LR 10 Exch 35 at 44 per Quain J. See further PARA 1265.

3 *Pierce v Williams* (1854) 23 LJEx 322, where a writ issued against the guarantor was the first notification to the guarantor from the creditor of the principal debtor's default. The costs of the writ, but not the costs of the subsequent proceedings were held to be recoverable from the principal debtor. As to the recovery of costs from co-guarantors see PARA 1172. It was formerly the position that a guarantor who was entitled to recover from the principal debtor the costs of defending an action had a right to costs on the common fund basis: *Howard v Lovegrove* (1870) LR 6 Exch 43. The appropriate basis would presumably now be the indemnity basis: cf *Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA; and see COSTS vol 10 (Reissue) PARA 203. Cf also PARA 1265. As to the caution to be exercised in applying pre-CPR authorities see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 60.

4 *Re International Contract Co, Hughes' Claim* (1872) LR 13 Eq 623 at 624–625 per Wickens V-C.

5 *Pierce v Williams* (1854) 23 LJEx 322; *Beech v Jones* (1848) 5 CB 696, which throws considerable doubt upon the proposition apparently laid down in *Jones v Brooke* (1812) 4 Taunt 464, and *Stratton v Mathews* (1848) 3 Exch 48, that an accommodation acceptor was as a matter of law entitled to recover the costs of an action brought against him.

1162. Defence by guarantor to creditor's claim. A guarantor is not bound to resist the creditor's claim against him if he has no good defence to it, and may make the best compromise he can in such circumstances and then recover from the principal debtor indemnification in respect of the loss incurred[1]. Where, however, a guarantor seeks to recover under an indemnity bond the loss sustained by him, the mere production of a judgment signed against him by the creditor is not, apparently, of itself sufficient evidence of the loss[2].

1 *Lord Newborough v Schroder* (1849) 7 CB 342 at 399; and see *Pettman v Keble* (1850) 9 CB 701. As to the liability of a principal debtor to his guarantor for expenses incurred by the guarantor in disputing for some time the payment of a just debt guaranteed by him, see *Re Garway, ex p Marshall* (1751) 1 Atk 262.

2 *King v Norman* (1847) 4 CB 884; see also *Price v Burva* (1857) 6 WR 40.

(iv) Enforcement of Guarantor's Rights

1163. Claim by guarantor for indemnification. A guarantor who wishes to enforce his right to an indemnity from the principal debtor may bring a claim for indemnification either in the High Court or in a county court[1]. Representations made by the guarantor which do not give rise to a promissory estoppel or a contract of release will not prevent him from enforcing his right to an indemnity[2].

Where the principal debtor has expressly agreed to indemnify the guarantor, the guarantor should sue on that agreement[3]. Apart from statute, if an express indemnity is given to more than one guarantor, it is a question of construction whether it is joint or several[4].

Where there is no express agreement by the principal debtor to indemnify the guarantor, the guarantor may enforce his right by bringing a claim in his own name[5] against the principal debtor for money paid to the debtor's use at his request[6]. In the absence of an express stipulation on the subject between the parties an implied promise to indemnify exists[7].

The guarantor may claim indemnification from the principal debtor by bringing a Part 20 claim[8] against him, whether or not the guarantor and the principal debtor are sued in the same claim by the creditor[9].

1 Subject to certain exceptions, a county court now has unlimited jurisdiction to hear and determine any claim founded on contract: see the County Courts Act 1984 s 15; and COURTS vol 10 (Reissue) PARAS 712, 722. The remedy of the guarantor may be barred by the running of time: see PARA 1183 et seq. The way in which the guarantee arose should be stated in the claim

form: see *Ahearn v O'Donovan* (1881) 15 ILT 7. As to the caution to be exercised in applying pre-CPR authorities see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 60.

2 *Chadwick v Manning* [1896] AC 231, PC.

3 *Toussaint v Martinnant* (1787) 2 Term Rep 100 at 104 per Ashhurst J.

4 *Toussaint v Martinnant* (1787) 2 Term Rep 100 at 104 per Ashhurst J. See also *Palmer v Sparshott* (1842) 4 Scott NR 743; and PARA 1122 note 1.

5 *Morris v Ford Motor Co Ltd* [1973] QB 792 at 800, [1973] 2 All ER 1084 at 1089, CA, per Lord Denning MR.

6 *Re a Debtor (No 627 of 1936)* [1937] Ch 156 at 160 per Slesser J.

7 *Toussaint v Martinnant* (1787) 2 Term Rep 100 at 105 per Buller J; and see *Dumbell v Isle of Man Rly Co* (1880) 42 LT 745, PC. See also *Anson v Anson* [1953] 1 QB 636 at 641 et seq per Pearson J, where the two possible legal bases for the right of reimbursement are considered.

8 Ie a claim under CPR Pt 20: see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 684 et seq.

9 See CPR 20.2(1)(b); and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 684. As to filing a notice containing a statement of claim for an indemnity against another party see CPR 20.6; and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 688. As to whether a Part 20 claim should be dealt with separately from the main claim see CPR 20.9; and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 690. Under the former civil procedure, it was held that when the guarantor availed himself of the procedure for serving a third party notice in order to enforce an express contract by the principal debtor to indemnify him, he could sign judgment against the principal debtor before anything has been paid under the guarantee: *English and Scottish Trust Co v Flatau* (1887) 36 WR 238. It was also held that while the guarantor could join the principal debtor by way of a third party notice, the principal debtor could not in general claim to be entitled to join the guarantor: see *Re Kitchin, ex p Young* (1881) 17 ChD 668 at 670, CA, per James LJ. As to the caution to be exercised in applying pre-CPR authorities see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 60.

1164. Set-off or counterclaim. In an appropriate case, a principal debtor who has a money claim against the guarantor may be able to rely upon that claim as a total or partial defence by way of set-off to the guarantor's claim for indemnification. Similarly, in an appropriate case, the guarantor may set up his claim for indemnification as a defence to a money claim against him by the principal debtor[1]. Where there is an express agreement of indemnity and all parties are solvent[2], the right of set-off may be excluded by the terms of that agreement[3].

Where the guarantor or the principal debtor is insolvent, the right of set-off is statutory[4]. Parties may not increase[5] or diminish[6] by contract the extent of the rights of set-off conferred in bankruptcy and liquidation. However, an agreement by the guarantor not to prove in the principal debtor's insolvency in competition with the creditor will be upheld[7].

A guarantor who has not paid the liability guaranteed cannot set off his contingent claim against the insolvent principal debtor for an indemnity against a cross-claim which he owes to the principal debtor[8]. If he pays the liability after the creditor has proved in the principal debtor's insolvency, the creditor will hold any dividends received in the insolvency in respect of that liability on trust for the guarantor[9]. However, where the guarantor pays the guaranteed liability before the creditor proves for the debt[10] in the principal debtor's insolvency, the guarantor may himself prove for the debt and may rely upon his right of indemnity by way of set-off against any claims which the principal debtor may have against him[11].

1 *Jones v Mossop* (1844) 3 Hare 568; *Ribblesdale v Forbes* (1916) 140 LT Jo 483, CA. As to set-off see generally SET-OFF AND COUNTERCLAIM.

2 As to set-off in bankruptcy and company liquidation see the text and note 4.

3 Cf *Continental Illinois National Bank and Trust Co of Chicago v Papanicolaou, The Fedora, The Takana and The Eretrea II* [1986] 2 Lloyd's Rep 441, CA; *Hongkong and Shanghai Banking Corpn v Kloeckner & Co AG* [1990] 2 QB 514, [1989] 3 All ER 513, CA. However, where the one party deals as consumer or the indemnity is in the other party's standard form,

provisions excluding the right of set-off must satisfy the requirement of reasonableness imposed by the Unfair Contract Terms Act 1977 in order to be effective: cf *Stewart Gill Ltd v Horatio Myer Ltd* [1992] QB 600, [1992] 2 All ER 257, CA. See also *Quadrant Visual Communications Ltd v Hutchison Telephone (UK) Ltd* [1993] BCLC 442, CA.

4 See the Insolvency Act 1986 s 323 in relation to bankruptcy; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 547 et seq; the Insolvency Rules 1986, SI 1986/1925, r 4.90 in the case of company liquidation; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 792. As to insurers see the Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2002, SI 2002/1242, art 5; PARA 1126 note 6; and also PARA 492.

5 *British Eagle International Air Lines Ltd v Cie Nationale Air France* [1975] 2 All ER 390, [1975] 1 WLR 758, HL.

6 *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL.

7 See *Kitchen's Trustee v Madders and Madders* [1950] Ch 134, [1949] 2 All ER 1079, CA.

8 *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85, CA; cf *Re a Debtor (No 66 of 1955), ex p the Debtor v Trustee of the Property of Waite* [1956] 3 All ER 225 at 229–230, [1956] 1 WLR 1226 at 1233–1234, CA, per Lord Evershed MR. The reason is that the rule against double proof prevents both the creditor and the guarantor proving in the principal debtor's insolvency for the same debt. See *Re Fenton, ex p Fenton Textile Association Ltd* above; *Re a Debtor (No 66 of 1955), ex p the Debtor v Trustee of the Property of Waite* above; *Re Oriental Commercial Bank, ex p European Bank* (1871) 7 Ch App 99; *Barclays Bank Ltd v TOSG Trust Fund* [1984] AC 626, [1984] 1 All ER 628, CA; affd [1984] AC 626 at 664, [1984] 1 All ER 1060, HL. It follows that the guarantor will be able to prove, and so to set off, if the creditor renounces his right to prove: *Re Fenton* above.

9 See *Re Sass* [1896] 2 QB 12 at 15 per Vaughan Williams LJ; cf *Gray v Seckham* (1872) 7 Ch App 680, CA; *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85 at 118, CA, per Romer LJ.

10 See *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85 at 118, CA, per Romer LJ: but cf the suggestion in *Barclays Bank Ltd v TOSG Trust Fund Ltd* [1984] AC 626 at 636, [1984] 1 All ER 628 at 636, CA, per Oliver LJ, and at 659–660 and 653 per Slade LJ, that the relevant date should be the date upon which a dividend on the creditor's proof is paid.

11 *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85 at 107, CA, per Lord Hanworth MR, and at 118 per Romer LJ. See also *Jones v Mossop* (1844) 3 Hare 568; *Re Moseley Green Coal and Coke Co Ltd, Barrett's Case* (1865) 4 De GJ & Sm 756. This latter case should be regarded as a case depending on its special facts: *Re a Debtor (No 66 of 1955), ex p the Debtor v Trustee of the Property of Waite* [1956] 3 All ER 225 at 229, [1956] 1 WLR 1226 at 1232, CA. Contrast *Re Norwich Equitable Fire Assurance Co, Brasnett's Case* (1885) 34 WR 206, CA.

(5) MUTUAL RIGHTS AND LIABILITIES OF CO-GUARANTORS

(i) Co-guarantor's Right to Contribution

A. BY AND AGAINST WHOM RIGHT TO CONTRIBUTION IS AVAILABLE

1165. How right to contribution arises. A guarantor who has paid more than his share of the common liability is entitled to compel contribution[1] from his co-guarantors[2], whether they are bound jointly and severally[3] or severally[4], and by the same or different instruments[5], and whether the guarantor claiming contribution did or did not know, when he became bound as such, that he was co-guarantor with others[6].

The right to contribution is not founded on contract, but is the result of a general equity arising at the inception of the contract of guarantee on the ground of equality of burden and benefit[7]. In determining whether a relationship is that of principal and guarantor, giving rise to contribution amongst co-guarantors, the substance of the transaction must be considered and the form of the

instrument creating it may, in a proper case, be wholly disregarded[8]. A right to contribution may arise even though the payment was made without the co-guarantor's knowledge and prior consent and in the absence of a written demand by the creditor, as required by the contract of guarantee[9].

It is not entirely clear whether the Civil Liability (Contribution) Act 1978[10] applies to claims for contribution between co-guarantors[11]. It seems that if the guarantor's promise is that a third party will perform specified obligations, then any failure by the third party to do so will mean that the guarantor becomes liable in damages for breach of his promise and the 1978 Act will apply. If, on the other hand, the guarantor's promise is that in certain events he will pay a sum of money, he becomes liable in debt once those events have happened and the 1978 Act does not apply[12].

1 The overpaying guarantor may claim contribution from the underpaying guarantor to equalise the burden upon them in two ways: (1) directly, under the legal and equitable jurisdiction in such cases; or (2) by taking over the creditor's rights by subrogation under the Mercantile Law Amendment Act 1856 s 5. For the jurisdiction to order contribution between persons liable to a common demand see generally RESTITUTION. As to the concurrent jurisdiction in equity to compel contribution see generally EQUITY vol 16(2) (Reissue) PARAS 458–459; and see note 7. As to the Mercantile Law Amendment Act s 5 see PARA 1138 et seq.

2 *Morgan v Seymour* (1638) 1 Rep Ch 120; *Deering v Earl of Winchelsea* (1787) 2 Bos & P 270; *Turner v Davies* (1796) 2 Esp 478; *Cowell v Edwards* (1800) 2 Bos & P 268; *Ex p Gifford* (1802) 6 Ves 805; *Ware v Horwood* (1807) 14 Ves 28 at 31, 34; *Craythorne v Swinburne* (1807) 14 Ves 160; *Dunn v Slee* (1817) 1 Moore CP 2; *Stirling v Forrester* (1821) 3 Bligh 575, HL; *Browne v Lee* (1827) 6 B & C 689; *Davies v Humphreys* (1840) 6 M & W 153 at 167; *Kemp v Finden* (1844) 12 M & W 421; *Batard v Hawes* (1853) 2 E & B 287; *Reynolds v Wheeler* (1861) 10 CBNS 561; *Whiting v Burke* (1871) 6 Ch App 342; *Re Snowdon, ex p Snowdon* (1881) 17 ChD 44, CA; *Macdonald v Whitfield* (1883) 8 App Cas 733, PC.

3 *Underhill v Horwood* (1804) 10 Ves 209 at 226 per Lord Eldon LC; and see *Re Gervais' Estate* [1903] 1 IR 172.

4 See *Ward v National Bank of New Zealand* (1883) 8 App Cas 755 at 765, PC.

5 *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75; *Mayhew v Crickett* (1818) 2 Swan 185 at 192; *Pendlebury v Walker* (1841) 4 Y & C Ex 424; *Swain v Wall* (1641) 1 Rep Ch 149; *Craythorne v Swinburne* (1807) 14 Ves 160 at 167, 170 per Lord Eldon LC; *Dallas v Walls* (1873) 29 LT 599; *Ware v Horwood* (1807) 14 Ves 28.

6 *Craythorne v Swinburne* (1807) 14 Ves 160 at 165 per Lord Eldon LC; *Whiting v Burke* (1871) 6 Ch App 342.

7 *Deering v Earl of Winchelsea* (1787) 2 Bos & P 270; *Ramskill v Edwards* (1885) 31 ChD 100 at 110 per Pearson J; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 19, HL, per Lord Blackburn; *Stirling v Forrester* (1821) 3 Bligh 575 at 590, HL; *Craythorne v Swinburne* (1807) 14 Ves 160; *Shepheard v Bray* [1906] 2 Ch 235 at 253 per Warrington J; *American Surety Co of New York v Wrightson* (1910) 103 LT 663 at 667 obiter per Hamilton J; *Albion Insurance Co v Government Insurance Office of New South Wales* (1969) 121 CLR 342 at 349–350, [1970] ALR 441 at 446–447, Aust HC, obiter per Kitto J; *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd* [1992] QB 887, [1992] 1 All ER 283, CA. The dicta of Hamilton J in *American Surety Co of New York v Wrightson* above and of Kitto J in *Albion Insurance Co v Government Insurance Office of New South Wales* above were cited with approval in *Eagle Star Insurance Co Ltd v Provincial Insurance plc* [1994] 1 AC 130 at 138–139, [1993] 3 All ER 1 at 6, PC.

8 *Reynolds v Wheeler* (1861) 10 CBNS 561.

9 *Stimpson v Smith* [1999] Ch 340, [1999] 2 All ER 833, CA.

10 See TORT vol 45(2) (Reissue) PARA 348 et seq.

11 *Barclays Bank plc v Miller (Frank, third party)* [1990] 1 All ER 1040, [1990] 1 WLR 343, CA.

12 See *Hampton v Minns* [2002] 1 All ER (Comm) 481 at 505, [2002] 1 WLR 1 at 26 (PARA 91) per Kevin Garnett QC, sitting as a deputy judge of the High Court. *Barclays Bank plc v Miller (Frank, third party)* [1990] 1 All ER 1040, [1990] 1 WLR 343, CA was referred to in the skeleton arguments but was not cited in the judgment in *Hampton v Minns* above.

1166. When there is no right to contribution. Where parties are not liable to a common demand there is no right of contribution between them[1], and there is

no principle of law which requires a person to contribute to another's payment merely because he has derived a material benefit from it[2].

There is no right of contribution when guarantors are bound by different instruments for equal portions of a debt due from the same principal debtor, the guarantee entered into by each being a separate and distinct transaction[3], nor where it is expressly arranged by contract that each is to be individually answerable only for a given portion of one sum of money due from the principal debtor[4].

Where co-defendants are decreed to pay the costs of a claim, it seems that one co-defendant cannot, by an independent claim, obtain contribution in respect of those costs against the other[5].

1 *Hunter v Hunt* (1845) 1 CB 300; *Johnson v Wild* (1890) 44 ChD 146; *American Surety Co of New York v Wrightson* (1910) 103 LT 663 at 665 per Hamilton J.

2 *Ruabon Steamship Co v London Assurance* [1900] AC 6, HL; and see *Falcke v Scottish Imperial Insurance Co* (1886) 34 ChD 234, CA; *Sharpe v Cummings* (1844) 2 Dow & L 504. So one tenant in common of a house who expends money on ordinary repairs, not being necessary to prevent the house from going to ruin, has no right of action against his co-tenant for contribution: *Leigh v Dickeson* (1883) 12 QBD 194; affd (1884) 15 QBD 60, CA. Cf *Owen v Tate* [1976] QB 402, [1975] 2 All ER 129, CA.

3 *Coope v Twynam* (1823) Turn & R 426; and see *Ward v National Bank of New Zealand* (1883) 8 App Cas 755, PC.

4 *Pendlebury v Walker* (1841) 4 Y & C Ex 424. An agreement by co-guarantors to share liability equally was held not to be binding because the settlement in consideration of which it was made could not be effected: *Arcedeckne v Lord Howard* (1875) 45 LJCh 622, HL. Two out of three persons jointly and severally bound in a bond of indemnity to a sheriff in a matter in which they are severally interested have, after having paid the whole sum secured by the bond, several claims, and not a joint claim, against the third obligee for contribution: *Kelby and Vernon v Steel* (1805) 5 Esp 194.

5 *Dearsley v Middleweek* (1881) 18 ChD 236; but see *Newry Salt Works Co v Macdonnell* [1903] 2 IR 454, where one co-defendant who had paid the entire costs was held entitled to recover contribution by an order in the original action. As to the caution to be exercised in applying pre-CPR authorities see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 60.

1167. Exceptions to right to contribution. There is, it seems, no right of contribution against a person who became co-guarantor with another person either at the request of that other person[1] or on the promise and undertaking of that other person to indemnify him from loss[2], where there are circumstances from which it can be inferred that, as between the two, one only was to be liable for the guaranteed debt. Nor is there any right of contribution where the surrounding circumstances and the language of the instrument under which several persons are bound indicate that there is a joint liability but no co-guarantee[3]. A sub-guarantor, that is to say a person standing guarantor for a principal guarantor, is not liable for contribution at the instance of a principal guarantor[4].

There can be no contribution if the co-guarantor is not liable under his guarantee, either because liability has not yet attached[5] or because his guarantee has been avoided[6]. So, there is no right of contribution against a person who agreed to become guarantor on condition that another person would sign as a co-guarantor, if that condition has not been fulfilled[7]. Similarly, there can be no right to contribution if the person seeking to enforce it has been guilty of misrepresentation or non-disclosure amounting to misrepresentation[8].

1 *Turner v Davies* (1796) 2 Esp 478 (which does not seem to be well reported), where the guarantor seeking to enforce contribution had received security from the principal in respect of his guarantee liability. If this security had been given in pursuance of an arrangement that the

guarantor should be discharged by it, then certainly he would have no claim for contribution against his co-guarantor: *Done v Walley* (1848) 2 Exch 198.

2 *Rae v Rae* (1857) 6 I Ch R 490. Oral evidence is admissible to prove the existence of such an indemnity: *Rae v Rae*.

3 *Re Denton's Estate, Licenses Insurance Corpn and Guarantee Fund Ltd v Denton* [1904] 2 Ch 178, CA; and see *Re Gervais' Estate* [1903] 1 IR 172.

4 *Craythorne v Swinburne* (1807) 14 Ves 160, where oral evidence was admitted to show whether the defendant was a co-guarantor with the plaintiffs for the principal debtor, and as such bound to contribute, or was a guarantor for both the principal debtor and the plaintiffs, and therefore under no such liability; and see *Re Denton's Estate, Licenses Insurance Corpn and Guarantee Fund Ltd v Denton* [1904] 2 Ch 178, CA; *Scholefield Goodman & Sons Ltd v Zyngier* [1986] AC 562, [1985] 3 All ER 105, PC.

5 Any express or implied conditions precedent to the guarantor's liability must be fulfilled before recourse can be had to him: see PARA 1106.

6 *Barry v Moroney* (1873) IR 8 CL 554, Ex Ch; *Mackreth v Walmesley* (1884) 51 LT 19. Cf *Eagle Star Insurance Co Ltd v Provincial Insurance plc* [1994] 1 AC 130 at 141–142, [1993] 3 All ER 1 at 8–9, PC; and see INSURANCE vol 25 (2003 Reissue) PARA 211. For factors which vitiate contracts of guarantee see PARA 1033 et seq.

7 *Barry v Moroney* (1873) IR 8 CL 554, Ex Ch.

8 See *Mackreth v Walmesley* (1884) 51 LT 19 at 30 per Kay J. A guarantor is not under any greater obligation in this respect to his co-guarantor than the creditor is under to them: *Mackreth v Walmesley*. For the creditor's duties of disclosure and liabilities in respect of misrepresentation see PARA 1035 et seq.

B. WHEN RIGHT TO CONTRIBUTION ARISES

1168. Relief before payment. A guarantor's right to contribution from his co-guarantors may arise before he has made payment under his guarantee[1].

Where the creditor has obtained judgment, or something equivalent to judgment, against the guarantor, the guarantor may bring a claim against his co-guarantors to compel them to contribute to the common liability[2]. In such a claim, the guarantor may obtain a declaration of his right to contribution[3].

A guarantor who holds an indemnity bond from a third person in respect of the guarantee liability may, after he has been called upon to pay, but before he has done so, maintain a claim against the third person's executors for administration, payment of the guaranteed debt and an indemnity[4].

1 *Craythorne v Swinburne* (1807) 14 Ves 160 at 164; *Re Snowdon, ex p Snowdon* (1881) 17 ChD 44 at 47, CA; *Wolmershausen v Gullick* [1893] 2 Ch 514 at 520. There is very little authority to show the precise extent of the relief to which the guarantor is entitled where he seeks to enforce that right before he has paid more than his share of the guaranteed liability: *Wolmershausen v Gullick* at 520.

2 *Wolmershausen v Gullick* [1893] 2 Ch 514.

3 See *Wolmershausen v Gullick* [1893] 2 Ch 514 at 528–529 (distinguished, as regards the existence of power to order payment to a creditor not a party, in *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401 at 405, a case of proceedings by a guarantor to enforce payment by the principal debtor: see PARA 1151). For a form of order, where there were four co-guarantors, making provision for the possible default of any of them, see *Kent v Abrahams* [1928] WN 266.

4 *Wooldridge v Norris* (1868) LR 6 Eq 410.

1169. Relief after payment. In general, a guarantor's right to contribution from his co-guarantors after payment does not arise until the guarantor has paid more than his total proportion or share of the common liability[1]. He may not, therefore, sue his co-guarantors for a rateable proportion of what he has paid as soon as he has paid any part of the debt[2]. However, where the guaranteed debt is payable by instalments, and each instalment is to be regarded as a separate debt,

a guarantor who has paid the whole of one instalment may, it seems, be entitled to recover contribution from his co-guarantors in respect of such payment to the common creditor[3].

A guarantor may also claim contribution if the creditor has accepted his payment, even though not exceeding the guarantor's share of the liability guaranteed, in full and final settlement of the guaranteed liability. In those circumstances, the guarantor has paid all that he can ever be called upon to pay, and there is then an equitable debt for contribution upon which even a bankruptcy petition can be founded[4].

A guarantor who has paid his full share of the guaranteed debt has a right of action against his co-guarantors whenever he pays anything further[5].

1 *Ex p Gifford* (1802) 6 Ves 805; *Davies v Humphreys* (1840) 6 M & W 153; *Re Snowdon, ex p Snowdon* (1881) 17 ChD 44 at 47, CA; *Lever v Pearce* [1888] WN 105; *Gardner v Brooke* [1897] 2 IR 6, CA.

2 *Davies v Humphreys* (1840) 6 M & W 153 at 168–169 per Parke B, quoted with approval by Warrington J in *Stirling v Burdett* [1911] 2 Ch 418 at 423–424; and see *Ex p Gifford* (1802) 6 Ves 805.

3 *Re Macdonald, ex p Grant* [1888] WN 130, CA, as explained in *Stirling v Burdett* [1911] 2 Ch 418 at 429. It appears from an examination of the record in *Lawson v Wright* (1786) 1 Cox Eq Cas 275 (which has been treated as an authority for the proposition that if the debt is payable by instalments a guarantor who pays the whole of an instalment may recover contribution from his co-guarantor) that the amount paid by the guarantor who was claiming contribution was the whole of the money which was or could become due under the contract guaranteed by the co-guarantors, and was not merely the payment of one instalment of a debt of which further instalments remained to be paid (see *Stirling v Burdett* above at 427). In *Stirling v Burdett* it was held that although a certain number of guarantors had paid more than their share of interest on a mortgage debt and premiums on a life policy due at the time when the payment was made, their right to contribution had not arisen, as the principal, interest and premiums together constituted one debt, of which entire debt their due proportion had not been paid. It seems, therefore, that the proposition laid down in *Craythorne v Swinburne* (1807) 14 Ves 160 at 164 that a guarantor has a right to call upon his co-guarantor for contribution, if called upon by the creditor to pay the principal debt or any part of it, must be read subject to the qualifications (1) that the guarantor has paid more than his proper proportion of the sums recoverable from the debtor; and (2) that, where the debt is payable by instalments, each instalment can properly be regarded as a separate debt.

4 See *Re Snowdon, ex p Snowdon* (1881) 17 ChD 44 at 47, CA, per James LJ; and see *Lawson v Wright* (1786) 1 Cox Eq Cas 275.

5 *Davies v Humphreys* (1840) 6 M & W 153; *Lawson v Wright* (1786) 1 Cox Eq Cas 275.

1170. What amounts to payment of the guaranteed debt. The payment made by a guarantor under his guarantee is not treated as a payment made by him voluntarily[1], and in order to be entitled to recover contribution he need not show that he abstained from paying the creditor until the creditor compelled him to pay[2]. The payment in respect of which contribution is claimed must, however, have been made by the guarantor in part at least out of his own money[3] or its equivalent[4].

When a guarantor pays with the assistance of a stranger to whom securities for the guaranteed debt are thereupon assigned by the creditor, both will be treated as one person, and therefore the claim for contribution will be allowed only after the guarantor has brought into account money received by the stranger in respect of the securities[5].

The guarantor should pay the money due to the person legally entitled to receive it[6]. Otherwise the payment may not operate to relieve him from liability under his guarantee, nor entitle him to claim contribution[7].

1 *Pitt v Purssord* (1841) 8 M & W 538; *Davies v Humphreys* (1840) 6 M & W 153. As to voluntary payments in respect of which there is no contribution see *Leigh v Dickeson* (1884) 15 QBD 60 at 64, CA; and PARA 1148.

2 *Pitt v Purssord* (1841) 8 M & W 538.

3 *Geopel v Swinden* (1844) 13 LJQB 113; and see *Lucas v Wilkinson* (1856) 1 H & N 420.

4 See *Fahey v Frawley* (1890) 26 LR Ir 78, where the court treated the transfer by a guarantor of a mortgage security held by him as equivalent to a money payment. If a party gives a promissory note for another's debt, and the creditor accepts the note in payment, it operates as a payment to the party's use and may be received as such: *Barclay v Gooch* (1797) 2 Esp 571.

5 *Re Arcedeckne, Atkins v Arcedeckne* (1883) 24 ChD 709.

6 *Mann v Stennett* (1845) 8 Beav 189.

7 As to what amounts to payment see PARA 1157; and *Pattison v Belford Union Guardians* (1856) 1 H & N 523, Ex Ch; *Stewart v Aberdein* (1838) 4 M & W 211; *Kaye v Brett* (1850) 5 Exch 269; *Underwood v Nicholls* (1855) 17 CB 239; *Bartlett v Pentland* (1830) 10 B & C 760; *Howard v Chapman* (1831) 4 C & P 508; *Todd v Reid* (1821) 4 B & Ald 210; *Russell v Bangley* (1821) 4 B & Ald 395.

C. WHAT IS RECOVERABLE FROM A CO-GUARANTOR BY WAY OF CONTRIBUTION

1171. Amount recoverable from co-guarantor. The amount recoverable by a guarantor from each co-guarantor is always[1] regulated by the number of solvent guarantors[2].

Where each guarantor is liable for an equal amount, all contribute equally towards the common debt, and, if not equally liable, then proportionately to the amount for which each is liable[3]. Where guarantors are bound by separate deeds and in unequal amounts, no one of them can be called upon to contribute beyond the sum for which he is liable under his own particular deed[4].

Interest is recoverable by a guarantor on the sum due to him for contribution from the date when he paid the common creditor[5].

1 Ie subject to any adjustment under the Civil Liability (Contribution) Act 1978 s 2. As to whether that Act applies to claims for contribution between co-guarantors see PARA 1165. See generally TORT vol 45(2) (Reissue) PARA 349 et seq.

2 At law, a guarantor who had paid the whole debt could recover from each of his co-guarantors only an aliquot part according to the whole number of guarantors. If one was insolvent, he had no further right against the rest: *Cowell v Edwards* (1800) 2 Bos & P 268; *Browne v Lee* (1827) 6 B & C 689. In equity, however, he could make the solvent guarantors contribute rateably to the entire debt: *Peter v Rich* (1629) 1 Rep Ch 34; *Hole v Harrison* (1673) 1 Cas in Ch 246; *Hitchman v Stewart* (1855) 3 Drew 271. The equitable rule now prevails: see *Lowe v Dixon* (1885) 16 QBD 455 at 458 per Lopes J. See also *Ramskill v Edwards* (1885) 31 ChD 100; *Re Fox, Walker & Co, ex p Bishop* (1880) 15 ChD 400, CA; *Buchanan v Main* (1900) 3 F 215, Ct of Sess; and EQUITY vol 16(2) (Reissue) PARA 459.

3 *Pendlebury v Walker* (1841) 4 Y & C Ex 424 at 441 per Alderson B; *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75; and see *Coope v Twynam* (1823) Turn & R 426; *Collins v Prosser* (1823) 1 B & C 682; *Re Macdonaghs* (1876) IR 10 Eq 269. It is sometimes difficult to determine in what proportions the common liability is to be borne: *Re Ennis, Coles v Peyton* [1893] 3 Ch 238, CA; *American Surety Co of New York v Wrightson* (1910) 103 LT 663.

4 See *Craythorne v Swinburne* (1807) 14 Ves 160; *Deering v Earl of Winchelsea* (1787) 2 Bos & P 270.

5 *Hitchman v Stewart* (1855) 3 Drew 271; *Swain v Wall* (1641) 1 Rep Ch 149; *Lawson v Wright* (1786) 1 Cox Eq Cas 275 at 277; *Petre v Duncombe* (1851) 2 LM & P 107; and see *Re Hunt, Harvey's Claim* (1902) 86 LT 504; *Re Swan's Estate* (1869) IR 4 Eq 209, CA. It appears that formerly interest was not recoverable by a guarantor claiming contribution: *Onge v Truelock* (1828) 2 Mol 31 at 44; *Salkeld v Abbott* (1832) Hayes & Jo 110; *Bell v Free* (1818) 1 Swan 90. As to interest on the common debt payable primarily by the principal debtor see PARA 1099; and as to the guarantor's right to recover interest from the principal debtor see PARA 1160. As to the courts' power to award interest on debts and damages see the Supreme Court Act 1981 s 35A; the County Courts Act 1984 s 69; and DAMAGES vol 12(1) (Reissue) PARA 848; ENFORCEMENT vol 17(1) (Reissue) PARA 25; PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 1227.

1172. Costs. The costs of a claim defended by a guarantor cannot, as a rule, be recovered by him as part of his claim for contribution against his co-guarantors unless he was authorised by them to defend[1], or it is established that in defending the claim he adopted a prudent and reasonable course[2]. Thus, costs incurred in proceedings by which the common creditor's claim was reduced may be included in ascertaining the amount of contribution payable by one co-guarantor to another co-guarantor[3].

When claiming contribution the guarantor must give credit for all that he has received from the principal debtor or by means of a counter-security given by way of indemnity[4].

1 *Knight v Hughes* (1828) 3 C & P 467; *Roach v Thompson* (1830) Mood & M 487; *Blyth v Smith* (1843) 5 Man & G 405; *Tindall v Bell* (1843) 11 M & W 228. As to when costs are recoverable by a person claiming indemnity against another see generally PARA 1265. As to a guarantor's right to recover costs from the principal debtor see PARA 1161.
2 *Tindall v Bell* (1843) 11 M & W 228; *Broom v Hall* (1859) 7 CBNS 503.
3 *Wolmershausen v Gullick* [1893] 2 Ch 514. See also *Kemp v Finden* (1844) 12 M & W 421, where a share of the costs of executing a warrant of attorney (now obsolete) was recoverable from a co-guarantor.
4 *Knight v Hughes* (1828) Mood & M 247; *Steel v Dixon* (1881) 17 ChD 825; *Re Arcedeckne, Atkins v Arcedeckne* (1883) 24 ChD 709; and see *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75; *Berridge v Berridge* (1890) 44 ChD 168.

D. ENFORCEMENT OF RIGHT TO CONTRIBUTION

1173. Claim for contribution. A guarantor who wishes to enforce his right to contribution from his co-guarantors may bring a claim either in the High Court or in a county court[1]. The claim is for money paid to the use of the co-guarantor sued, unless there is a covenant for payment, in which case the claim should be brought on that covenant[2]. A claim for money paid, however, is not available unless the claimant has actually paid money or its equivalent and the proportion of contribution recoverable has been ascertained[3]. Consequently proceedings to ascertain the amount may have to be taken. Particulars of demand are, moreover, required from a guarantor claiming from a co-guarantor payment of a definite sum by way of contribution, and not merely an account[4].

The guarantor may claim a contribution from the principal debtor by bringing a Part 20 claim[5] against him, whether or not the guarantor and the principal debtor are sued in the same claim by the creditor[6].

The amount of contribution recoverable from each of several co-guarantors is governed[7] by the number of solvent guarantors[8].

1 Subject to certain exceptions, a county court now has unlimited jurisdiction to hear and determine any claim founded on contract: see the County Courts Act 1984 s 15; and COURTS vol 10 (Reissue) PARAS 712, 722. The remedy of the guarantor may be barred by the running of time: see PARA 1183 et seq.
2 *Crafts v Tritton* (1818) 2 Moore CP 411.
3 *Sharpe v Cummings* (1844) 2 Dow & L 504; *Bates v Townley* (1848) 2 Exch 152.
4 *Blackie v Osmaston* (1884) 28 ChD 119, CA.
5 Ie a claim under CPR Pt 20: see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 684 et seq.
6 See CPR 20.2(1)(b); and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 684. As to filing a notice containing a statement of claim for a contribution against another party see CPR 20.6; and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 688. As to whether a Part 20 claim should be dealt with separately from the main claim see CPR 20.9; and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 690. As to the limited relief available to a guarantor before he has paid more than his rateable share of the guaranteed liability see PARA 1168. Under the former civil procedure, it was held that where the guarantor availed himself of the procedure for serving a third party notice in order to enforce an express contract by a co-guarantor to pay

contribution, he could sign judgment against the co-guarantor before anything had been paid under the guarantee: cf *English and Scottish Trust Co v Flatau* (1887) 36 WR 238. As to the caution to be exercised in applying pre-CPR authorities see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 60.

7 Ie subject to any adjustment under the Civil Liability (Contribution) Act 1978 s 2. As to whether that Act applies to claims for contribution between co-guarantors see PARA 1165. See generally TORT vol 45(2) (Reissue) PARA 349 et seq.

8 See PARA 1171.

1174. Parties to claim for contribution. In a claim by a guarantor for contribution from his co-guarantors the principal debtor and each of the co-guarantors (or their personal representatives) should all be made parties unless the fact of their insolvency is admitted or clearly proved[1]. Even in such a case the claimant has, apparently, the right to elect whether he will bring the insolvent co-obligor or his representative before the court[2].

In case of the death of a co-guarantor his representatives are liable to contribute, to the extent of his assets, what was due from him under his guarantee[3].

1 *Hay v Carter* [1935] Ch 397, CA. Where the principal debtor is a party to the claim, his insolvency need not be proved (*Cowell v Edwards* (1800) 2 Bos & P 268; *Lawson v Wright* (1786) 1 Cox Eq Cas 275), although possibly such proof may be required where he is not a party to the claim (*Lawson v Wright*, cited by Lord Hanworth MR in *Hay v Carter* above at 403). As to the caution to be exercised in applying pre-CPR authorities see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 60.

2 1 Daniell's Chancery Practice (8th Edn) 195; and see *Wolmershausen v Gullick* [1893] 2 Ch 514; *Hole v Harrison* (1673) Cas temp Finch 15. However, the right to begin or continue proceedings against a company in administration or liquidation or against an individual who is subject to an interim order or a bankruptcy order is restricted by statute: see the Insolvency Act 1986 s 8, Sch B1 paras 43, 44, s 130(2); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARAS 224, 490; s 252(2)(b), s 285(3); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 83, 218.

3 *Primrose v Bromley* (1739) 1 Atk 89; *Simpson v Vaughan* (1739) 2 Atk 31; *Batard v Hawes* (1853) 2 E & B 287; and see *Ashby v Ashby* (1827) 7 B & C 444 at 449 per Bayley J.

1175. Set-off or counterclaim. In an appropriate case, a co-guarantor who has a money claim against another co-guarantor may be able to rely upon that claim as a total or partial defence by way of set-off to the other co-guarantor's claim for contribution. Similarly, in an appropriate case, a co-guarantor may set up his claim for contribution as a defence to a money claim against him by another co-guarantor[1]. Where there is an express agreement for contribution and all parties are solvent[2], the right of set-off may be excluded by the terms of that agreement[3].

Where one or both of the co-guarantors is insolvent, the right of set-off is statutory[4]. Parties may not increase[5] or diminish[6] by contract the extent of the rights of set-off conferred in bankruptcy and liquidation.

A guarantor who has not paid the liability guaranteed cannot set off his contingent claim for contribution from the insolvent co-guarantor against a cross-claim which he owes that co-guarantor[7]. However, a guarantor who pays the whole debt to the creditor can take over the creditor's proof for the whole debt in the insolvency of the co-guarantor, although he cannot receive a dividend of more than the co-guarantor's share[8]. Where the creditor has not proved in the insolvency of the co-guarantor, the solvent guarantor who pays the debt can only prove for the insolvent co-guarantor's share[9].

1 See *Jones v Mossop* (1843) 3 Hare 568; *Ribblesdale v Forbes* (1916) 140 LT Jo 483, CA. These were cases between guarantor and principal debtor, but the principles are equally applicable. As to set-off see generally SET-OFF AND COUNTERCLAIM.

2 As to set-off in bankruptcy and company liquidation see the text and note 4.
3 See *Continental Illinois National Bank and Trust Co of Chicago v Papanicolaou, The Fedora, The Takana and The Eretrea II* [1986] 2 Lloyd's Rep 441; *Hongkong and Shanghai Banking Corpn v Kloeckner & Co AG* [1990] 2 QB 514, [1989] 3 All ER 513, CA. However, where the one party deals as consumer or the agreement is in the other party's standard form, provisions excluding the right of set-off must satisfy the requirement of reasonableness imposed by the Unfair Contract Terms Act 1977 in order to be effective: cf *Stewart Gill Ltd v Horatio Myer Ltd* [1992] QB 600, [1992] 2 All ER 257, CA. See also *Quadrant Visual Communications Ltd v Hutchison Telephone (UK) Ltd* [1993] BCLC 442, CA.
4 See the Insolvency Act 1986 s 323 in relation to bankruptcy; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 547 et seq; the Insolvency Rules 1986, SI 1986/1925, r 4.90 in the case of company liquidation; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 792. As to insurers see the Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2002, SI 2002/1242, art 5; and PARA 1126 note 6; and see also PARA 492.
5 *British Eagle International Air Lines Ltd v Cie Nationale Air France* [1975] 2 All ER 390, [1975] 1 WLR 758, HL.
6 *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL.
7 *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85, CA; *Re a Debtor (No 66 of 1955), ex p the Debtor v Trustee of the Property of Waite* [1956] 3 All ER 225 at 229–230, [1956] 1 WLR 1226 at 1233–1234, CA, per Lord Evershed MR. The reason is that the rule against double proof prevents both the creditor and the guarantor proving in the co-guarantor's insolvency for the same debt. See *Re Oriental Commercial Bank, ex p Oriental Bank* (1871) 7 Ch App 99; *Barclays Bank Ltd v TOSG Trust Fund Ltd* [1984] AC 626, [1984] 1 All ER 1060, HL. It follows that the guarantor will be able to prove, and so to set off, if the creditor renounces his right to prove: *Re Fenton* above.
8 *Re Clark, ex p Stokes and Goodman* (1848) De G 618; *Re Parker, Morgan v Hill* [1894] 3 Ch 400. As to rights of set-off between insolvent co-guarantors see also *Brown v Cork* [1985] BCLC 363 at 369, CA, per Oliver LJ.
9 *Re Parker, Morgan v Hill* [1894] 3 Ch 400.

1176. Defences by co-guarantor to claim for contribution. A counterclaim against the creditor for damages for breach of warranty is not available as a defence in proceedings between co-guarantors, at least without bringing in the principal debtor whose claim it really is[1].

A guarantor's right to recover contribution from a co-guarantor is not affected by the fact that the creditor has given time to the guarantor seeking to enforce contribution[2]. However, an agreement by one co-guarantor to give time to the principal debtor[3], or to release him[4], may have the effect of discharging the other co-guarantor from his obligation to contribute[5].

Where one of two guarantors who holds an indemnity from a third person in respect of the guarantee liability discharges the other guarantor from his liability to pay contribution, to that extent he relieves the third person from his liability to indemnify[6].

1 *Wilson v Mitchell* [1939] 2 KB 869, [1939] 2 All ER 869.
2 *Dunn v Slee* (1817) 1 Moore CP 2.
3 *Way v Hearn* (1862) 11 CBNS 774 at 782 per Erle CJ.
4 *Griffith v Wade* (1966) 60 DLR (2d) 62, Alta SC. See also *Fletcher v Grover* (1840) 11 New Hampshire Reports 368; *Sword v Victoria Super Service Ltd* (1958) 15 DLR (2d) 217, BC SC.
5 The reason for this rule is that the giving of time or the release affects the co-guarantor's right of indemnity against the principal debtor: see *Griffith v Wade* (1966) 60 DLR (2d) 62 at 67 per Johnson JA, Alta SC. Compare the effect of similar actions by the creditor, as to which see PARA 1224 et seq. It follows that there is no release where the co-guarantor's acts are obviously incapable of affecting the other co-guarantor's rights against the principal debtor. A clause which deems the co-guarantors to be principal debtors as between themselves and the creditor will prevent a co-guarantor from relying upon this principle to release him from liability to another co-guarantor who has paid off the debt and so stands in the place of the creditor: *Greenwood v Francis* [1899] 1 QB 312, CA. See also *Hodgson v Hodgson* (1837) 2 Keen 704;

Vorley v Barrett (1856) 1 CBNS 225; *Re Gervais' Estate* [1903] 1 IR 172. In *Greenwood v Francis* above at 320, AL Smith LJ stated that the co-guarantor's defences to a claim for contribution were limited to those which one principal debtor could raise against another. However, the guarantee considered in that case made both guarantors liable as principal debtors, and *Way v Hearn* (1862) 11 CBNS 774 was not cited.

6 *Hodgson v Hodgson* (1837) 2 Keen 704; and see *Way v Hearn* (1862) 11 CBNS 774; *Re Gervais' Estate* [1903] 1 IR 172.

(ii) Guarantor's Rights to Securities held by the Creditor or Co-guarantor

1177. Guarantor's right to securities. A guarantor who has made payment of more than his due proportion of the common liability is entitled to have assigned to him all the creditor's rights and securities, whether satisfied or not, for the purpose of obtaining contribution[1] including, apparently, securities received by the creditor from co-guarantors[2], and he may recover contribution by means of those securities[3].

He is similarly entitled to the benefit of all securities which have been taken by any other co-guarantor to indemnify himself against the common liability, and also of a judgment obtained by the creditor against the principal debtor and his guarantors[4], and for the purposes of proof against an insolvent estate may stand in the shoes of the judgment creditor, whether the judgment has actually been assigned or not[5].

1 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 19, HL, per Lord Blackburn. If several persons are indebted and one makes the payment, the creditor is bound in conscience (if not by contract) to give the party paying the debt all his remedies against the other debtors: *Stirling v Forrester* (1821) 3 Bligh 575 at 590, HL, per Lord Redesdale.

2 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL.

3 Mercantile Law Amendment Act 1856 s 5 (see also PARA 1141); *Re Parker, Morgan v Hill* [1894] 3 Ch 400, CA; *Ex p Crisp* (1744) 1 Atk 133 at 135; *Greenside v Benson* (1745) 3 Atk 248; *Aldrich v Cooper* (1803) 8 Ves 382 at 389 per Lord Eldon LC; and see *Dale v Powell* (1911) 105 LT 291 at 294.

4 *Done v Walley* (1848) 2 Exch 198; *Re Albert Life Assurance Co, ex p Western Life Assurance Society* (1870) LR 11 Eq 164 at 177; *Re Parker, Morgan v Hill* [1894] 3 Ch 400, CA; *Re Clark, ex p Stokes and Goodman* (1848) De G 618 at 621; Story s 499.

5 *Re M'Myn, Lightbown v M'Myn* (1886) 33 ChD 575.

1178. Marshalling of securities. As between co-guarantors who have given security for the payment of the principal debt, a guarantor who pays more than his share of the guaranteed liability[1] is entitled to have the securities marshalled so as to ensure that each co-guarantor pays his due proportion and no more, without taking into account any rights of set-off that might otherwise exist as between the co-guarantors[2]. This is so, even though one or more of the co-guarantors is insolvent[3].

1 As to the assessment of each guarantor's proportion of the guaranteed liability see PARA 1171.

2 *Brown v Cork* [1985] BCLC 363, CA. Whether 'marshalling' is strictly the right description of the process may be open to doubt, but the principle is clear: *Brown v Cork* at 374 per Oliver LJ. See also *Smith v Wood* [1929] 1 Ch 14, CA.

3 *Brown v Cork* [1985] BCLC 363, CA.

1179. Hotchpot of counter-security. A co-guarantor must bring into hotchpot whatever he receives from any counter-security obtained by him from the principal debtor, even though he consented to become a guarantor only on condition of receiving such counter-security, and although the other co-guarantors were ignorant of this when they themselves became guarantors[1].

When by means of a counter-security the guarantor has been repaid what he has paid on account of the guaranteed debt, and has shared the amount thus received by him with his co-guarantors, he will again be entitled to recover out of the counter-security the amount so handed over by him to them, whereupon their right to participate will again arise, and so on until the whole of the payments made by the co-guarantors on account of the guaranteed debt have been refunded or the value of the counter-security has been exhausted[2].

1 *Steel v Dixon* (1881) 17 ChD 825; and see *Re Arcedeckne, Atkins v Arcedeckne* (1883) 24 ChD 709; *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75.

2 *Berridge v Berridge* (1890) 44 ChD 168.

(6) LIMITATION PERIODS

(i) Creditor's Claims

1180. Claims by the creditor. The creditor's claim against the guarantor under a guarantee is a claim in contract[1]. Where the guarantee is not made by deed[2], a claim to enforce the guarantee may therefore not be brought after the expiration of six years from the date on which the cause of action accrued[3]. Where the guarantee is made by deed[4], the period is 12 years from the accrual of the cause of action[5].

1 See PARA 1013.

2 The Limitation Act 1980 s 5 in fact refers to actions founded on 'simple contract', as to the meaning of which see 2 Bl Com 465–466; and CONTRACT vol 9(1) (Reissue) PARA 618.

3 Limitation Act 1980 s 5. See LIMITATION OF ACTIONS vol 28 (Reissue) PARA 862. As to the accrual of the cause of action see PARA 1181.

4 Strictly, the Limitation Act 1980 s 8(1) refers to actions (now 'claims') founded on a 'specialty', as to the meaning of which see *Leivers v Barber, Walker & Co Ltd* [1943] 1 KB 385 at 398, [1943] 1 All ER 386 at 397, CA, per Goddard LJ; and LIMITATION OF ACTIONS vol 28 (Reissue) PARA 882. See also note 2.

5 Limitation Act 1980 s 8(1). See LIMITATION OF ACTIONS vol 28 (Reissue) PARA 881. As to the accrual of the cause of action see PARA 1181.

1181. Accrual of the creditor's cause of action. The creditor's cause of action accrues, and time begins to run against him and in favour of the guarantor, when the guarantor becomes liable to make payment under the guarantee[1]. When that liability accrues depends upon the terms of the guarantee[2]. The secondary nature of a contract of guarantee[3] means that the guarantor will generally[4] not be liable unless the principal debtor is liable[5]. However, the terms of the guarantee often prescribe conditions in addition to the liability of the principal debtor which must be satisfied before the guarantor also becomes liable.

For example where, on the true construction of the guarantee, a valid demand upon the guarantor is a necessary ingredient of the creditor's cause of action against the guarantor[6], time will not begin to run until such a demand has been made[7]. Similarly, where the guarantee is for the safety of investments, time only runs from the date that they become unsafe[8]. Where the guarantee is expressed to be a continuing guarantee and to apply to the balance from time to time owing by the principal debtor to the creditor, time runs only from the date each such balance is constituted by the excess of total debits over total credits, not from the date each advance is made to the principal debtor[9]. If, however, the balance of indebtedness under the guarantee has accrued due and become

payable in consequence of a demand, the creditor cannot start the limitation period running again by including that sum as part of a larger sum which is the subject of a fresh demand[10].

Where no demand is necessary, and no other pre-conditions to the guarantor's liability are imposed by the terms of the guarantee, time will run from the moment that the cause of action against the principal debtor is complete, or the moment that the guarantee comes into effect[11], if later[12].

1 *Colvin v Buckle* (1841) 8 M & W 680; *Holl v Hadley* (1835) 2 Ad & El 758. As to the accrual of the cause of action in contract claims generally see *Lynn v Bamber* [1930] 2 KB 72; and LIMITATION OF ACTIONS vol 28 (Reissue) PARA 864. As to the extension of the limitation period in cases of disability see the Limitation Act 1980 s 28; and LIMITATION OF ACTIONS vol 28 (Reissue) PARA 1068 et seq. As to the postponement of the running of time in cases of concealment see the Limitation Act 1980 s 32 et seq; and LIMITATION OF ACTIONS vol 28 (Reissue) PARA 1125 et seq. For the effect of an acknowledgment or part payment on the running of time see ss 29–31; and LIMITATION OF ACTIONS vol 28 PARA 1080 et seq; and see eg *UCB Corporate Services Ltd v Kohli* [2004] EWHC 1126 (Ch), [2004] 2 All ER (Comm) 422, [2004] All ER (D) 205 (May) (where, however, the payments relied on by the claimant did not constitute payments by the company as the person liable for the debt or its agent for the purposes of the Limitation Act 1980 ss 29(5), 30(2) and had not caused the period of limitation to start afresh).

2 See *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 129, CA, per Atkin LJ; *Wright v New Zealand Farmers' Co-operative Association of Canterbury Ltd* [1939] AC 439 at 448–449, [1939] 2 All ER 701 at 705–706, PC; *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425 at 447, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769 at 785, CA, per Dillon LJ.

3 See PARAS 1014, 1090.

4 Modern standard forms of 'guarantee' sometimes make the guarantor liable irrespective of the liability of the principal debtor, but this is not a true guarantee: see *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255 at 258 per Lloyd J, cited in PARA 1090 note 5.

5 See PARA 1103.

6 See PARA 1105.

7 *Re Brown's Estate, Brown v Brown* [1893] 2 Ch 300; *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA; *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 3 All ER 358, [1975] 1 WLR 1474. For the effect of the inclusion of a clause in the guarantee making the guarantor liable as if he were a principal debtor see *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* at 366–367 and at 1483 per Walton J; *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769, CA; and cf *Tate v Crewdson* [1938] Ch 869, [1938] 3 All ER 43.

8 *Sheers v Thimbleby & Son* (1897) 76 LT 709 at 711, CA.

9 *Wright v New Zealand Farmers' Co-operative Association of Canterbury Ltd* [1939] AC 439, [1939] 2 All ER 701, PC.

10 *Bank of Baroda v Patel* [1996] 1 Lloyd's Rep 391.

11 As eg where the guarantee is given for a present debt already payable: see *Birks v Tripett* (1666) 1 Wms Saund 28, 32.

12 *Belford Union Guardians v Pattison* (1856) 11 Exch 623; affd sub nom *Pattison v Belford Union Guardians* (1856) 1 H & N 523, Ex Ch; *Parr's Banking Co Ltd v Yates* [1898] 2 QB 460, CA. In such a case time will run concurrently in favour of the guarantor and the principal debtor. See also PARA 1104.

1182. Principal debt statute-barred. A guarantor cannot rely upon the provisions of the Limitation Act 1980 to defeat a claim by the creditor until the period of limitation applicable to claims under the guarantee[1] has itself expired. It is no defence for the guarantor simply to show that the creditor's claim against the principal debtor is time-barred, unless the claim under the guarantee is also thereby barred[2].

Prima facie, the fact that the guaranteed debt was, as against the principal debtor, statute-barred at the time when he paid it will not prevent the guarantor from recovering an indemnity from the principal debtor[3].

1 See PARAS 1180–1181.
2 *Carter v White* (1883) 25 ChD 666, CA (where the underlying claim was barred by the equitable doctrine of laches: see EQUITY vol 16(2) (Reissue) PARA 910 et seq). Cf *Curwen v Milburn* (1889) 42 ChD 424, CA (lien for statute-barred debts).
3 See *Wolmershausen v Gullick* [1893] 2 Ch 514. Cf *Alexander v Vane* (1836) 1 M & W 511; *Re Chetwynd's Estate, Dunn's Trust Ltd v Brown* [1938] Ch 13; *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289, CA. In all of these cases, the guarantor was held entitled to an indemnity from the principal debtor despite the unenforceability of the principal obligation. Contrast *Re Morris, Coneys v Morris* [1922] 1 IR 81, affd [1922] 1 IR 136, where it was held that a guarantor who had paid a statute-barred debt was not entitled to an indemnity.

(ii) Guarantor's Claims against Principal Debtor

1183. Express indemnity. In cases where the principal debtor has entered into an express agreement to indemnify the guarantor, there is no implied indemnity[1]. The guarantor must found his claim for an indemnity upon the express agreement[2]. The period of limitation will therefore be that appropriate to the indemnity contract concerned. Where the indemnity is not made by deed[3], a claim to enforce it may therefore not be brought after the expiration of six years from the date on which the cause of action accrued[4]. Where the indemnity is made by deed[5], the period is 12 years from the accrual of the cause of action[6].

1 See PARA 1147.
2 See PARA 1163.
3 See PARA 1180 note 2.
4 Limitation Act 1980 s 5. See LIMITATION OF ACTIONS vol 28 (Reissue) PARA 862. As to the accrual of the cause of action under an express indemnity see PARA 1184.
5 See PARA 1180 note 4.
6 Limitation Act 1980 s 8(1). See LIMITATION OF ACTIONS vol 28 (Reissue) PARA 881. As to the accrual of the cause of action under an express indemnity see PARA 1184.

1184. When time runs under an express indemnity. The extent of the indemnity afforded by an express contract of indemnity and the time at which the cause of action under that indemnity arises will depend upon the terms of the contract[1].

If the indemnity is a simple indemnity against liability, the cause of action will come into existence when the person indemnified incurs the liability[2]. In certain circumstances, a liability may be incurred for this purpose when the liability is still merely contingent[3]. So, where the directors of a housebuilding company agreed to indemnify the National House-Building Council against all losses which might be incurred by the council by reason of the company's failure to perform its obligations under the scheme, their obligation to indemnify the council arose when defective houses were built, not when the company failed to honour the award obtained by the house-owners[4].

However, if the indemnity is a general indemnity, time will not begin to run until that liability has been established and ascertained by judgment, an arbitration award, or agreement[5]. The terms of the indemnity may prescribe additional conditions which must be satisfied before the indemnifier becomes liable[6].

1 See eg *Bosma v Larsen* [1966] 1 Lloyd's Rep 22 at 27 per McNair J; *Telfair Shipping Corpn v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243 at 253, [1985] 1 WLR 553 at 566 per Neill J; *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 AC 1 at

41, [1990] 2 All ER 705 at 722, HL, per Lord Jauncey of Tullichettle. Cf the cases cited in PARA 1181 note 2. As to the extension of the limitation period in cases of disability see the Limitation Act 1980 s 28; and LIMITATION OF ACTIONS vol 28 (Reissue) PARA 1068 et seq. As to the postponement of the running of time in cases of concealment see the Limitation Act 1980 s 32 et seq; and LIMITATION OF ACTIONS vol 28 (Reissue) PARA 1125 et seq. As to the effect of an acknowledgment or part payment on the running of time see ss 29–31; and LIMITATION OF ACTIONS vol 28 (Reissue) PARA 1080 et seq.

2 *Telfair Shipping Corpn v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243 at 253, [1985] 1 WLR 553 at 566 per Neill J.

3 *Telfair Shipping Corpn v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243 at 253, [1985] 1 WLR 553 at 566 per Neill J, citing *Forster v Outred & Co* [1982] 2 All ER 753, [1982] 1 WLR 86, CA. See also *Dove v Banhams Patent Locks Ltd* [1983] 2 All ER 833, [1983] 1 WLR 1436; *UBAF Ltd v European American Banking Corpn* [1984] QB 713, [1984] 2 All ER 226, CA; *DW Moore & Co Ltd v Ferrier* [1988] 1 All ER 400, [1988] 1 WLR 267, CA; *Iron Trade Mutual Insurance Co Ltd v JK Buckenham Ltd* [1990] 1 All ER 808, [1989] 2 Lloyd's Rep 85; *Islander Trucking Ltd (in liquidation) v Hogg Robinson and Gardner Mountain (Marine) Ltd* [1990] 1 All ER 826; *Bell v Peter Browne & Co* [1990] 2 QB 495, [1990] 3 All ER 124, CA.

4 *National House-Building Council v Fraser* [1983] 1 All ER 1090, 22 BLR 43.

5 *R & H Green and Silley Weir Ltd v British Railways Board (Kavanagh, third party)* [1985] 1 All ER 237, [1985] 1 WLR 570n; *Telfair Shipping Corpn v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243 at 253, [1985] 1 WLR 553 at 566 per Neill J. Cf *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957, [1989] 1 All ER 961, HL, where the same principle was applied to cases of indemnity insurance.

6 See *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 AC 1, [1990] 2 All ER 705, HL, where it was held that the 'pay to be paid' provisions in the club rules made payment to the third party by the club member a condition precedent to the member's right to indemnity from the club.

1185. Implied indemnity. Where there is no express agreement, the guarantor's cause of action for indemnification against the principal debtor is for money paid to the debtor's use at his request[1]. Such a claim is treated as one founded on a simple contract[2], and so the period applicable is one of six years from the date on which the cause of action accrued[3].

1 See PARA 1163.

2 See *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 514, [1948] 2 All ER 318 at 343, CA (affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL); and LIMITATION OF ACTIONS vol 28 (Reissue) PARA 863.

3 Limitation Act 1980 s 5. See LIMITATION OF ACTIONS vol 28 (Reissue) PARA 862. As to the accrual of the cause of action under an implied indemnity see PARA 1186.

1186. When time runs under an implied indemnity. The implied indemnity which arises when a guarantor enters into a guarantee at the request of the principal debtor is a general indemnity[1]. Although other relief is available under such an implied indemnity prior to the indemnified person making payment[2], the guarantor's cause of action against the principal debtor for payment by way of indemnity does not arise until the guarantor has himself paid the creditor[3]. Time therefore does not begin to run against the guarantor until that moment[4].

1 *Telfair Shipping Corpn v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243 at 253, [1985] 1 WLR 553 at 566–567 per Neill J.

2 See PARAS 1151 et seq, 1266 et seq.

3 See *Davies v Humphreys* (1840) 6 M & W 153; *Brittain v Lloyd* (1845) 14 M & W 762 at 773 per Pollock CB; *Re Richardson, ex p Governors of St Thomas' Hospital* [1911] 2 KB 705 at 712, CA, per Fletcher-Moulton LJ; *Re Mitchell, Freelove v Mitchell* [1913] 1 Ch 201 at 206 per Parker J; *Re Beavan, Davies, Banks & Co v Beavan* [1913] 2 Ch 595; *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85, CA; *Re a Debtor (No 627 of 1936)* [1937] Ch 156 at 163–164, [1937] 1 All ER 1 at 8, CA, per Greene LJ; *Telfair Shipping Corpn v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243 at 253, [1985] 1 WLR 553 at 566–567 per Neill J; and

PARA 1158. See also *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957, [1989] 1 All ER 961, HL; *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 AC 1, [1990] 2 All ER 705, HL.

4 *Collinge v Heywood* (1839) 9 Ad & El 633; *Re Mitchell, Freelove v Mitchell* [1913] 1 Ch 201. See also the other cases cited in note 3. If the guarantor pays only part of the debt, time runs in respect of that part only: *Davies v Humphreys* (1840) 6 M & W 153. As to the extension of the limitation period in cases of disability see the Limitation Act 1980 s 28; and LIMITATION OF ACTIONS vol 28 (Reissue) PARA 1068 et seq. As to the postponement of the running of time in cases of concealment see the Limitation Act s 32 et seq; and LIMITATION OF ACTIONS vol 28 (Reissue) PARA 1125 et seq. As to the effect of an acknowledgment or part payment on the running of time see ss 29–31; and LIMITATION OF ACTIONS vol 28 (Reissue) PARA 1080 et seq.

(iii) Contribution between Co-guarantors

1187. Express agreement. Where there is an express agreement for contribution between co-guarantors, the claim to contribution should be brought under that agreement[1]; and the accrual of the cause of action and the appropriate period of limitation will depend upon the terms of the agreement[2].

1 See PARA 1173 text and note 2.

2 Cf PARAS 1183–1184, where the accrual of the cause of action and the appropriate period of limitation under an express indemnity are discussed.

1188. Implied rights of contribution. Where there is no express agreement, the guarantor's primary cause of action against a co-guarantor for contribution is for money paid to the debtor's use at his request[1]. Such a claim is treated as one founded on a simple contract[2], and so the period applicable is one of six years from the date on which the cause of action accrued[3].

In general, a guarantor's right of action against a co-guarantor for payment to him of contribution does not arise until the guarantor has paid more than his proportion of the common liability[4]. Time will begin to run against him from that moment[5].

It is not entirely clear whether the Civil Liability (Contribution) Act 1978[6] applies to claims for contribution between co-guarantors[7]. It seems that if the guarantor's promise is that a third party will perform specified obligations, then any failure by the third party to do so will mean that the guarantor becomes liable in damages for breach of his promise and the 1978 Act will apply[8]. In such a case the period of limitation applicable will be a period of two years from the date of any judgment or award against the guarantor seeking contribution, or if there is no judgment or award, the earliest date on which the amount to be paid by him is agreed between him and the creditor[9]. If, on the other hand, the guarantor's promise is that in certain events he will pay a sum of money, he becomes liable in debt once those events have happened, the 1978 Act does not apply[10] and the period of limitation applicable will be six years[11].

1 See PARA 1173.

2 See *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 514, [1948] 2 All ER 318 at 343, CA (affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL); and LIMITATION OF ACTIONS vol 28 (Reissue) PARA 863.

3 Limitation Act 1980 s 5. See LIMITATION OF ACTIONS vol 28 (Reissue) PARA 862.

4 See PARA 1169.

5 *Ex p Gifford* (1802) 6 Ves 805; *Davies v Humphreys* (1840) 6 M & W 153; *Re Snowdon, ex p Snowdon* (1881) 17 ChD 44, CA; *Gardner v Brooke* [1897] 2 IR 6, CA. As to the extension of the limitation period in cases of disability see the Limitation Act 1980 s 28; and LIMITATION OF ACTIONS vol 28 (Reissue) PARA 1068 et seq. As to the postponement of the running of time in cases of concealment see the Limitation Act 1980 s 32 et seq; and

LIMITATION OF ACTIONS vol 28 (Reissue) PARA 1125 et seq. As to the effect of an acknowledgment or part payment on the running of time see ss 29–31; and LIMITATION OF ACTIONS vol 28 (Reissue) PARA 1080 et seq.

6 Ie the Civil Liability (Contribution) Act 1978 s 1. See TORT vol 45(2) (Reissue) PARA 349 et seq.

7 See *Barclays Bank plc v Miller (Frank, third party)* [1990] 1 All ER 1040, [1990] 1 WLR 343, CA.

8 See *Hampton v Minns* [2002] 1 All ER (Comm) 481 at 505, [2002] 1 WLR 1 at 26 (para 91) per Kevin Garnett QC, sitting as a deputy judge of the High Court. *Barclays Bank plc v Miller (Frank, third party)* [1990] 1 All ER 1040, [1990] 1 WLR 343, CA was referred to in the skeleton arguments but was not cited in the judgment in *Hampton v Minns* above.

9 See the Limitation Act 1980 s 10; and LIMITATION OF ACTIONS vol 28 (Reissue) PARA 912.

10 See *Hampton v Minns* [2002] 1 All ER (Comm) 481, [2002] 1 WLR 1, where it was held that the Limitation Act 1980 s 10 did not apply.

11 See notes 3, 10.

(7) DISCHARGE OF THE GUARANTEE

(i) Fulfilment of Purpose of the Guarantee

1189. Discharge by performance of principal obligation. The secondary nature of the contract of guarantee[1] means that the guarantor is not liable unless the principal debtor is liable[2]. So, if the principal obligation is discharged by performance[3], the guarantee is also thereby discharged[4].

1 See PARAS 1014, 1090.

2 See PARA 1103. Modern standard forms of 'guarantee' usually make the guarantor liable irrespective of the liability of the principal debtor, but this is not a true guarantee: see *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255 at 258 per Lloyd J, cited in PARA 1090 note 5.

3 Generally, the guarantor will also be discharged where the creditor releases the principal debtor from liability: see PARA 1218 et seq.

4 See *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255 at 258; and PARA 1090. In *Western Credit Ltd v Alberry* [1964] 2 All ER 938, [1964] 1 WLR 945, CA, the principal debtor exercised a right given to him by the terms of the principal contract to terminate the hiring by returning the car to the creditor and paying the amount necessary to bring the payments made by him up to three-quarters of the total hire-purchase price. The creditor's claim against the guarantor for its further loss of profit failed, because the principal debtor had fully performed his obligations in one of the ways contemplated by the principal contract. As to the discharge of contractual obligations by performance see generally CONTRACT vol 9(1) (Reissue) PARA 921 et seq.

Under many building contracts, however, the contractor's obligation to complete the work is not fulfilled until: (1) the work is complete in fact; and (2) the architect or engineer has issued a certificate that the work has been completed to his satisfaction. A surety is not discharged where the works have only been substantially completed: see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 187.

1190. Payment by the principal debtor. The most common example of performance by the principal debtor discharging the guarantee by discharging the principal obligation is where the principal debtor pays the creditor the full amount of the guaranteed debt. Such a payment will normally[1] discharge the guarantor[2].

Whether any particular payment discharges the principal contract depends upon the terms of the principal contract[3] and the circumstances of the payment. For example, if the creditor accepts a promissory note which, by its terms, constitutes a full discharge of the guaranteed debt[4], this is a good payment discharging the guarantor from his guarantee. Whether a payment of less than the full amount discharges the guaranteed debt may turn on the question whether the agreement to take less is supported by consideration[5], or is binding

by virtue of a promissory estoppel[6]. In certain circumstances, it may depend upon the form of receipt given[7]. The mere fact of there being a balance, equal in amount to the guaranteed debt, due and owing from the creditor to the principal debtor in respect of other transactions outside the scope of the guarantee will not operate as a payment so as to discharge the guarantor[8]. However, where such a balance is set off[9], for example on the insolvency of the principal debtor[10], that will amount to a payment discharging the guarantor[11].

To have the effect of discharging the guarantee, the payment must be a valid payment under the principal contract. So it was held that a payment which was liable to be avoided as a fraudulent preference did not discharge the guarantee[12].

The guarantor will be discharged to the extent of the sum received by the creditor from the principal debtor attributable to the principal contract, whether the principal debtor pays the guaranteed debt voluntarily[13] or under compulsion[14].

1 For a particular example where guarantors were not discharged see *Re O'Callaghan* (1837) 1 I Eq R 448n.

2 *Re Parrott, ex p Whittaker* (1891) 63 LT 777, DC.

3 See eg *Western Credit Ltd v Alberry* [1964] 2 All ER 938, [1964] 1 WLR 945, CA, cited in PARA 1189 note 4.

4 *M'Clure v Fraser* (1840) 9 LJQB 60. Cf *Lichfield Union Guardians v Greene* (1857) 1 H & N 884, where the creditor accepted payment from a bank in country banker's own notes which were subsequently dishonoured.

5 See eg *D and C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA; and CONTRACT vol 9(1) (Reissue) PARA 1019 et seq.

6 See *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corpn of India, The Kanchenjunga* [1990] 1 Lloyd's Rep 391, HL; *Youell v Bland Welch & Co Ltd (The 'Superhulls Cover' Case) (No 2)* [1990] 2 Lloyd's Rep 431; and ESTOPPEL vol 16(2) (Reissue) PARA 1082 et seq.

7 *Field v Robins* (1838) 8 Ad & El 90.

8 *Harrison v Nettleship* (1833) 2 My & K 423; but see *Ex p Hanson* (1806) 12 Ves 346.

9 As to set-off see generally SET-OFF AND COUNTERCLAIM.

10 As to rights of set-off in bankruptcy see generally BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 547 et seq; and as to rights of set-off in company liquidation see generally COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 737 et seq.

11 Cf *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769, CA, where the automatic set-off of mutual credits and debits between the creditor and the guarantor on the creditor's insolvency was held to give rise to a discharge, pro tanto, of the principal obligation. As to the guarantor's right to rely upon any set-off available to the principal debtor see PARA 1135.

12 *Petty v Cooke* (1871) LR 6 QB 790; *Pritchard v Hitchcock* (1843) 6 Man & G 151; *Re Conley, ex p Trustee v Barclays Bank Ltd, Re Conley, ex p Trustee v Lloyds Bank Ltd* [1938] 2 All ER 127, CA. The concept of fraudulent preference in insolvency has been replaced by the wider statutory concept of voidable preference: see the Insolvency Act 1986 ss 239, 340. The court may order any surety or guarantor whose obligations were released in whole or in part under a transaction at an undervalue or by the giving of a voidable preference to be under such new or revived obligations as the court thinks fit: s 241(1)(e) (company liquidation), s 342(1)(e) (bankruptcy). See also s 425(1)(e), which makes similar provisions for reviving the obligations of a guarantor where the court reverses the effect of a transaction defrauding creditors. In view of these specific statutory provisions, the cases cited above may have to be reconsidered. A guarantor of a payment challenged as a preference (or, probably, as a transaction at an undervalue or a fraud on creditors) should be joined as a party to the application: *Re Idenden (a bankrupt), ex p Trustee of the Property of the Bankrupt v Bateman & Co Ltd* [1970] 2 All ER 387n, [1970] 1 WLR 1015. As to the avoidance of preferences in insolvency see generally BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 656 et seq; and COMPANY AND PARTNERSHIP INSOLVENCY.

13 The guarantor is also entitled to the benefits of payments voluntarily made by an agent of the principal debtor: *Williamson v Goold* (1823) 1 Bing 171.

14 *Pearl v Deacon* (1857) as reported in 26 LJCh 761. See also *Kinnaird v Webster* (1878) 10 ChD 139; *Taylor v Bank of New South Wales* (1886) 11 App Cas 596 at 603, PC.

1191. Appropriation. In the absence of express contract[1] the mere fact that there is a guarantee does not take away from the principal debtor or the creditor any powers which they would otherwise possess of appropriating payment[2].

In general, a debtor has the right when he makes a payment to appropriate the money to any debt which he chooses, and the creditor is bound, if he takes the money, to apply it in the manner directed by the debtor[3]. So, where the principal debtor owes money to the creditor on two accounts of which only one is guaranteed, he may appropriate a payment made by him to either of the accounts[4]. The debtor need not make his appropriation expressly, provided that his intention to appropriate can be inferred[5]. Where, therefore, there is evidence of an intention that payments made by a principal debtor are to be applied in relief of the guarantor's liability, they will be so applied[6], but not otherwise[7].

If the principal debtor makes no appropriation the creditor may usually do so[8], and may do so at any time up to the very last moment, that is, until he has finally exercised the right or something has happened which would render it inequitable for him to exercise it[9]. So, the creditor may apply payments made by the principal debtor to a separate debt which was already in existence when the guarantee was given, whether or not the guarantor knew of that pre-existing debt when he became bound[10].

Where neither debtor nor creditor exercises the option to appropriate payments, and no evidence is forthcoming from which a contrary intention is to be inferred[11], the law appropriates them to the earliest debt or item of debit[12]. Although in the case of appropriation of payments interest is presumed to be paid before capital, this rule does not apply to the case of interest on an overdrawn account, which, according to banking practice, has been from time to time converted into principal[13].

1 *Commercial Bank of Australia v John Wilson & Co's Estate (Official Assignee)* [1893] AC 181, PC; *Edwards v Hood-Barrs* [1905] 1 Ch 20; *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA; *Williams v Rawlinson* (1825) 3 Bing 71. As to appropriation by the guarantor see PARA 1194.

2 *Kirby v Duke of Marlborough* (1813) 2 M & S 18; *Williams v Rawlinson* (1825) 3 Bing 71; *Re Mayor, ex p Whitworth* (1841) 2 Mont D & De G 164; *Hollond v Teed* (1848) 7 Hare 50; *A-G of Jamaica v Manderson* (1848) 12 Jur 383, PC; *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA. As to appropriation when a bank account is guaranteed see PARA 865 et seq. See also CONTRACT vol 9(1) (Reissue) PARA 960.

3 *Peters v Anderson* (1814) 5 Taunt 596; *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 529, 572 at 608; *Simson v Ingham* (1823) 2 B & C 65; *Croft v Lumley* (1858) 6 HL Cas 672; *Cory Bros & Co v Mecca, Turkish Steamship (Owners), The Mecca* [1897] AC 286, HL.

4 See *Kinnaird v Webster* (1878) 10 ChD 139 at 145.

5 *Leeson v Leeson* [1936] 2 KB 156, [1936] 2 All ER 133, CA; *Stepney Corpn v Osofsky* [1937] 3 All ER 289, CA. It may be inferred where the nature of the transaction or the circumstances of the case are such as to show that there was an intention to appropriate: see CONTRACT vol 9(1) (Reissue) PARA 956.

6 *Marryatts v White* (1817) 2 Stark 101; *Browning v Baldwin* (1879) 40 LT 248; *Kinnaird v Webster* (1878) 10 ChD 139; *Field v Carr* (1828) 5 Bing 13; *Toulmin v Copland* (1836) 3 Y & C Ex 625; affd sub nom *Copland v Toulmin* (1840) 7 Cl & Fin 349, HL; *Royal Bank of Scotland v Christie* (1841) 8 Cl & Fin 214, HL; *City Discount Co Ltd v McLean* (1874) LR 9 CP 692; *Young v English* (1843) 7 Beav 10.

7 *Plomer v Long* (1816) 1 Stark 153 at 154 note (a); *Williams v Rawlinson* (1825) 3 Bing 71; *Kirby v Duke of Marlborough* (1813) 2 M & S 18; *Wright v Hickling* (1866) LR 2 CP 199; *York City and County Banking Co v Bainbridge* (1880) 43 LT 732; *Browning v Baldwin* (1879) 40 LT 248; *Henniker v Wigg* (1843) 4 QB 792, followed in *City Discount Co Ltd v McLean* (1874) LR 9 CP 692.

8 *City Discount Co Ltd v McLean* (1874) LR 9 CP 692 at 700 per Blackburn J; *Kinnaird v Webster* (1878) 10 ChD 139 at 145 per Bacon V-C; and see *Simson v Ingham* (1823) 2 B & C 65; *Mills v Fowkes* (1839) 5 Bing NC 455. As to the restrictions upon the creditor's right of appropriation see PARA 1192.

9 *Cory Bros & Co v Mecca, Turkish Steamship (Owners), The Mecca* [1897] AC 286, HL; *Smith v Betty* [1903] 2 KB 317, CA; *Seymour v Pickett* [1905] 1 KB 715, CA (where the right to appropriate was exercised in the course of the trial).

10 *Kirby v Duke of Marlborough* (1813) 2 M & S 18; *Williams v Rawlinson* (1825) 3 Bing 71. It has been held in the United States of America that where credit is extended after a limited guarantee has expired all unappropriated payments must thereafter be applied by the creditor to the secured indebtedness: *Phipps v Willis* (1895) 32 South Western Reporter 801; and see *Shaw v Picton* (1825) 7 Dow & Ry KB 201.

11 *Lysaght v Walker* (1831) 5 Bli NS 1, HL; *City Discount Co Ltd v McLean* (1874) LR 9 CP 692; *Browning v Baldwin* (1879) 40 LT 248.

12 *Kinnaird v Webster* (1878) 10 ChD 139 at 144–145 per Bacon V-C; *Bodenham v Purchas* (1818) 2 B & Ald 39; *Henniker v Wigg* (1843) 4 QB 792.

13 *Parr's Banking Co Ltd v Yates* [1898] 2 QB 460, CA.

1192. Restrictions on the creditor's right of appropriation. Prima facie, the creditor's right of appropriation does not apply where there is one entire account into which all receipts and payments are carried in order of date, so that all sums paid in form one blended fund[1]. In such a case, the presumption is that the first item on the debit side of the account is intended to be discharged or reduced by the first item on the credit side, and the various items are appropriated in the order in which the receipts and payments are set against each other in the account[2]. This presumption may, however, be rebutted by evidence of an agreement to the contrary or of circumstances from which a contrary intention is to be inferred[3].

There are limits to the extent to which a banker may appropriate payments made by a customer to the prejudice of a guarantor for that customer's account[4]. Where the guarantee is a continuing one, the guarantor has no right, in the absence of special agreement, to control the appropriation of payments into the principal debtor's account[5], so long as the banker deals with the accounts in the ordinary way of business[6]. However, while the account is unbroken, a guarantor should not be prejudiced by any departure from the rule of appropriation of items in order of date, unless he has expressly consented to such departure, or his consent may be implied from the character of his engagement[7]. So, where the guarantor has guaranteed the balance on an existing account, the banker cannot (unless the guarantee provides otherwise) open a new account for the customer during the currency of the guarantee and appropriate all payments in to the new account[8]. On the other hand, if the guarantee is terminated the banker may break the account and carry all payments in to the new, unsecured, account[9].

Where it is evident from the terms of the guarantee that a guarantor for advances by a bank to its customer is only to be liable if the customer does not pay enough money into his account, then all subsequent payments from time to time made by the customer must be appropriated to the guaranteed debt[10].

1 *Field v Carr* (1828) 5 Bing 13; *Bodenham v Purchas* (1818) 2 B & Ald 39 at 45 per Bayley J; *Hooper v Keay* (1875) 1 QBD 178; *City Discount Co Ltd v McLean* (1874) LR 9 CP 692.

2 *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 529, 572: and see the other cases cited in CONTRACT vol 9(1) (Reissue) PARA 958 note 2. The principle in *Devaynes v Noble, Clayton's Case* only applies to a current account: *Cory Bros & Co v Mecca, Turkish Steamship (Owners), The Mecca* [1897] AC 286, HL; *Hay & Co v Torbet* 1908 SC 781.

3 See CONTRACT vol 9(1) (Reissue) PARA 958.

4 As to the banker's right of appropriation see *Simson v Ingham* (1823) 2 B & C 65; and PARA 865.

5 *Williams v Rawlinson* (1825) 3 Bing 71; *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA.

6 *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA.

7 *Cory Bros & Co v Mecca, Turkish Steamship (Owners), The Mecca* [1897] AC 286, HL. Cf *City Discount Co Ltd v McLean* (1874) LR 9 CP 692; *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA; *Mutton v Peat* [1900] 2 Ch 79 at 85, CA (where it was said that the method of book-keeping was not to prejudice the real rights of the guarantor).

8 *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692 at 706, CA, per Cotton LJ. Cf *National Bank of Nigeria v Awolesi* [1964] 1 WLR 1311, [1965] 2 Lloyd's Rep 289, PC (where a guarantee for an existing balance was held to be discharged by the opening of a new account, which permitted subsequent transactions to be carried out without the reduction which would otherwise have taken place in the liability guaranteed).

9 *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA. If the bank does not break the account, payments in will discharge the earliest debits, and so will pay off the secured portion of the debt before the later, unsecured, portion: *Deeley v Lloyds Bank Ltd* [1912] AC 756, HL. Bank guarantees often contain a provision entitling the bank to continue the customer's account but to treat it as if it had been broken. The efficacy of such clauses was upheld in *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60.

10 *Kinnaird v Webster* (1878) 10 ChD 139; *Browning v Baldwin* (1879) 40 LT 248 at 249 per Bacon V-C.

1193. Appropriation in insolvency. On the insolvency of the principal debtor, the guarantor for a debt payable by instalments is not entitled, by virtue of the doctrine of appropriation of payments, to have the dividend received by the creditor in respect of the whole debt applied in discharge of one instalment of it, as that dividend must be applied rateably in part payment of each instalment as it becomes due[1].

Where, at the time of a guarantee of a current account with the bank, the bank but not the guarantor knew that the debtor had already committed an act of bankruptcy, it was held that the guarantor's payments should be appropriated to that part of the debt which had been secured before the act of bankruptcy and so was provable[2].

1 *Martin v Brecknell* (1813) 2 M & S 39.

2 *Re Mason, ex p Sharp* (1844) 3 Mont D & De G 490. The doctrine of relation back to the earliest available act of bankruptcy was abolished by the Insolvency Act 1986. The equivalent situation under the 1986 Act would be where the bank, but not the guarantor, knew of the presentation of a bankruptcy petition: see the Insolvency Act 1986 s 284; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 217, 504.

1194. Payment by the guarantor. Payment to the creditor by the guarantor of the guaranteed debt discharges the guarantor[1]. Where the guarantor has other liabilities to the creditor apart from the guarantee, he should make it clear when making any payment to the creditor whether the payment is to be applied to the guarantee liability or not[2]. If the guarantor does not expressly or impliedly appropriate the payment to the guarantee liability, the creditor may exercise his right of appropriation[3].

Payments made by a guarantor under his guarantee must, unless the guarantee provides otherwise[4], be set against the liability of the principal debtor. The creditor cannot sue the principal debtor for an amount of the debt which the creditor has already received from a guarantor[5].

1 As to what constitutes payment by a guarantor see PARAS 1157, 1170.

2 *Waugh v Wren* (1862) 11 WR 244; *Commercial Bank of Australia v John Wilson & Co's Estate (Official Assignee)* [1893] AC 181, PC.

3 For the principles governing the right to appropriate payments see PARAS 1191–1192.

4 Modern standard forms of guarantee often contain provisions which entitle the creditor to place payments made by the guarantor in a 'suspense', or 'securities realised' account. However, the payment which occurs as a result of the automatic set-off which takes place on the insolvency of the creditor or the guarantor is not something that the creditor can, as it were, place in a suspense account. It operates to reduce or extinguish the liability of the guarantor and necessarily therefore operates as in effect a payment by him to be set against the liability of the principal debtor: *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425 at 447, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769 at 785, CA, per Dillon LJ.

5 *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425 at 447, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769 at 785, CA, per Dillon LJ.

(ii) Discharge by Agreement

A. EXPRESS AGREEMENT

1195. Discharge by express agreement. A guarantee, like any other contract, may be discharged by a subsequent agreement[1]. Where only the creditor and the guarantor are parties to the contract of guarantee, and the contract was entered into before 11 May 2000[2], the mere fact that the guarantee is for the benefit of the principal debtor will not prevent the creditor and the guarantor agreeing without the principal debtor's concurrence to discharge the guarantee[3]. Where, however, the contract is entered into on or after that date, it is not exempted from the provisions of the Contracts (Rights of Third Parties) Act 1999[4]; the principal debtor's consent may thus be required if the statutory tests are met so that he has a right to enforce a term of the contract purporting to confer a benefit on him[5].

In order to operate as a discharge of the guarantee, the subsequent agreement must[6] itself possess the characteristics of a valid contract. Thus, there must be an agreement made between parties intending to affect their legal relations and having the capacity to contract[7], and that agreement must either be made as a deed or be supported by sufficient consideration[8].

1 See eg *Barclays Bank Ltd v Thomas* [1979] 2 Lloyd's Rep 505, where the defence that the guarantee had been released by express agreement failed on the facts. See also *Shaw v Royce Ltd* [1911] 1 Ch 138, where resolutions passed by the necessary majority of debenture holders which released the guarantor of the debentures were held to be binding on all the debenture holders, including those who were not parties to the release and objected to it. As to the discharge of contractual obligations by subsequent agreement see generally CONTRACT vol 9(1) (Reissue) PARA 1013 et seq.

2 See the Contracts (Rights of Third Parties) Act 1999 s 10(2).

3 See CONTRACT vol 9(1) (Reissue) PARA 1014.

4 Ie by the Contracts (Rights of Third Parties) Act 1999 s 6: see CONTRACT.

5 See the Contracts (Rights of Third Parties) Act 1999 ss 1, 2, 10(2); and CONTRACT.

6 As to the effect of the doctrine of promissory estoppel see PARA 1196.

7 A release by a life tenant of a guarantor's liability for interest on a debt owing to the settlement is effective only to the extent of the life interest: *Coates v Coates* (1864) 33 Beav 249.

8 See CONTRACT vol 9(1) (Reissue) PARA 1016. Cf PARA 1013. 'A debt can only be truly released and extinguished by agreement for valuable consideration or under seal': *Stamp Duties Comr v Bone* [1977] AC 511 at 519, [1976] 2 All ER 354 at 360, PC. As to what amounts to sufficient consideration see PARA 1196.

1196. Consideration for release. Where the contract of guarantee is still executory on both sides, sufficient consideration for the release of the guarantor will always be present, for it will be found in the guarantor's own release of his right to performance or further performance of the contract of guarantee by the

creditor[1]. Where, however, the creditor has already fully performed his obligations under the contract of guarantee, his mere promise to release the guarantor will not bind him, unless it is made by deed or supported by some further consideration moving from the guarantor[2].

A promise to release a guarantee, although not made by deed or supported by consideration, may prevent the creditor from claiming under the guarantee if the promise is enforceable against the creditor under the doctrine of promissory estoppel[3].

1 See *Foster v Dawber* (1851) 6 Exch 839 at 851 per Parke B; and CONTRACT vol 9(1) (Reissue) PARA 1016.

2 *Cross v Sprigg* (1849) 6 Hare 552; on appeal (1850) 2 Mac & G 113. A promise to release not supported by consideration may, however, be effective under the doctrine of promissory estoppel: see the text and note 3.

3 As to the requirements of the doctrine of promissory estoppel and its effect on contractual obligations see eg *Yeomans v Williams* (1865) LR 1 Eq 184; *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corpn of India, The Kanchenjunga* [1990] 1 Lloyd's Rep 391, HL; *Youell v Bland Welch & Co Ltd (The 'Superhulls Cover' Case) (No 2)* [1990] 2 Lloyd's Rep 431; and ESTOPPEL vol 16(2) (Reissue) PARA 1082 et seq. See also *Bank of Baroda v Shah (Dilip)* (30 July 1999, unreported), CA.

1197. Form of the release. An agreement releasing a guarantor from his guarantee does not have to be in any particular form, provided that it is sufficiently clear and certain to amount to a contract or other enforceable promise[1]. Even though a guarantee must itself be in writing or be evidenced in writing to be enforceable[2], it may be released as effectually by a subsequent agreement made orally or by conduct as by a subsequent written agreement[3]. This is so even if the original guarantee was made by deed[4]. However, a mere variation of a guarantee must be in writing or evidenced in writing[5] to be effective[6].

Sometimes[7] the creditor physically delivers up the guarantee to the guarantor. In the absence of evidence of a contrary intention, the inference from this action is that the guarantee has been treated between the creditor and the guarantor as at an end[8]. However, physical delivery up of a written guarantee is not an essential element of an effective release[9].

1 See generally the cases cited in notes 3–9. At common law a contract under seal could only be rescinded by an agreement under seal (*Kaye v Waghorn* (1809) 1 Taunt 428) but this rule was not recognised in equity (*Webb v Hewitt* (1857) 3 K & J 438) and the equitable rule now prevails: see the Supreme Court Act 1981 s 49(1). As from a day to be appointed, the Supreme Court Act 1981 is to be renamed as the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed. As to the requirements for an effective release see PARAS 1195–1196.

2 Statute of Frauds (1677) s 4: see PARAS 1013, 1052 et seq.

3 *Taylor v Hilary* (1853) 1 Cr M & R 741. See also *Goman v Salisbury* (1684) 1 Vern 240; *Price v Dyer* (1810) 17 Ves 356; *Robinson v Page* (1826) 3 Russ 114; *Goss v Lord Nugent* (1833) 5 B & Ad 58; *King v Gillett* (1840) 7 M & W 55; *Sanderson v Graves* (1875) LR 10 Exch 234; *Vezey v Rashleigh* [1904] 1 Ch 634; *Morris v Baron & Co* [1918] AC 1, HL; *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] AC 48, HL. If the release takes the form of a new and inconsistent guarantee, it will be effective as a release even though the new guarantee is itself unenforceable for want of writing: see *Morris v Baron & Co* above (a case on the Sale of Goods Act 1893 s 4 (now repealed)). Cf *Barclays Bank Ltd v Thomas* [1979] 2 Lloyd's Rep 505, where the replacement guarantee was delivered in escrow only and so did not discharge the earlier guarantee. As to implied release by subsequent inconsistent agreement see PARA 1198.

4 *Ward v Livesey* (1887) 5 RPC 102; *Steeds v Steeds* (1889) 22 QBD 537, DC; *Berry v Berry* [1929] 2 KB 316; *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 at 133, [1956] 1 All ER 256n at 258 per Denning J. See also note 1.

5 Statute of Frauds (1677) s 4: see PARA 1052 et seq.
6 *Emmet v Dewhurst* (1851) 3 Mac & G 587; and see *Sanderson v Graves* (1875) LR 10 Exch 234; *Noble v Ward* (1867) LR 2 Exch 135; *Morris v Baron & Co* [1918] AC 1, HL.
7 Usually, but not exclusively, on payment of the guaranteed amount by the guarantor or the principal debtor.
8 *MacKinnon's Trustee v Bank of Scotland* 1915 SC 411 at 418, Ct of Sess; *Simpson v Jack* 1948 SLT (Notes) 415, Ct of Sess. A subsisting guarantee given up by its holder to the principal debtor, his intention being clearly to waive all rights under it and rely in future on some other security in lieu of the original one, is not thereafter enforceable: *Re Lorymer, ex p Powell* (1836) 2 Mont & A 533.
9 See the cases cited in notes 1–4.

B. IMPLIED AGREEMENT AND MERGER

1198. Implied release. Where there is no express agreement to release a guarantee, a release may be implied if the parties have entered into a new contract inconsistent with the previous one[1]. So, for example, a subsequent limited guarantee will impliedly discharge an earlier unlimited guarantee between the same parties for the same indebtedness[2]. However, the implication that the parties intended to release the earlier guarantee may not be justified where the parties to the earlier and later guarantees are not identical[3]; and the express terms of the later guarantee may prevent any implication that the earlier guarantee is released from arising.

1 See eg *Taylor v Hilary* (1835) 1 Cr M & R 741. Cf *Sanderson v Graves* (1875) LR 10 Exch 234; *Morris v Baron & Co* [1918] AC 1, HL; *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] AC 48 at 68, HL, per Lord Sumner.
2 *Galloway v Bank of New Zealand* (25 February 1991, unreported), NZ CA.
3 See eg *Mahoney v McManus* (1981) 36 ALR 545, Aust HC. See also *Samuels Finance Group plc v Beechmanor Ltd (t/a Hurstwood Developments)* (1993) 67 P & CR 282, CA.

1199. Merger. On general principles, where a creditor takes from his debtor a security of a higher nature than that which he already possesses (for example if he takes a bond or covenant made by deed) his remedies on the minor security or cause of action are normally merged in the higher remedy by operation of law and are extinguished[1]. So, if the creditor takes from the guarantor a further security such as a deed of charge by way of legal mortgage in lieu of the original simple contract guarantee the original guarantee is thereby discharged[2].

Since merger depends upon the intention of the parties[3], it will only occur where the higher security appears to be intended to be taken in lieu of the lower, and not where the parties intended it to be additional or collateral[4]. Whether a particular security was taken in lieu of the original one is mainly a question of fact[5], to be ascertained from the documents concerned[6] and the surrounding circumstances[7].

Whether the original security is merged is a question of law[8]. No merger takes place where the securities are of equal degree[9]. Nor will there be a merger unless the higher security is made between the same parties in respect of the same obligation[10]. Where security is given for the amounts due and to become due on a running account, it is doubtful whether there can be any merger of the securities in so far as they apply to future indebtedness[11].

1 *Owen v Homan* (1851) 3 Mac & G 378; *Price v Moulton* (1851) 10 CB 561; *Bell v Banks* (1841) 3 Man & G 258; *Marker v Kenrick* (1853) 13 CB 188. As to the doctrine of merger see generally CONTRACT vol 9(1) (Reissue) PARA 1062 et seq; EQUITY vol 16(2) (Reissue) PARA 764 et seq.
2 *Clarke v Henty* (1838) 3 Y & C Ex 187; *Boaler v Mayor* (1865) 19 CBNS 76.

3 *Barclays Bank Ltd v Beck* [1952] 2 QB 47, [1952] 1 All ER 549, CA.
4 *Twopenny v Young* (1824) 3 B & C 208; *Yates v Aston* (1843) 4 QB 182; *Holmes v Bell* (1841) 3 Man & G 213; *Norfolk Rly Co v M'Namara* (1849) 3 Exch 628; *Stamps Comr v Hope* [1891] AC 476, PC; *Barclays Bank Ltd v Beck* [1952] 2 QB 47, [1952] 1 All ER 549, CA. Where a bond given by two guarantors expressly provided that a fresh bond should be given on the death of either of them, it was held that the deceased guarantor's estate remained liable to contribute towards payment of the guaranteed debt even after a fresh bond had been given by the surviving guarantor and a new guarantor: *Re Ennis, Coles v Peyton* [1893] 3 Ch 238, CA.
5 *Clarke v Henty* (1838) 3 Y & C Ex 187; *Gordon v Calvert* (1828) 4 Russ 581; *Eyre v Everett* (1826) 2 Russ 381; *Twopenny v Young* (1824) 3 B & C 208 at 210. Where, before the guarantee was due for payment, the creditor took a bill of exchange from the guarantor for the guaranteed debt, but afterwards destroyed the bill in the guarantor's presence, there was held to be no waiver of the guarantee: *Collins v Owen* (1866) 15 LT 327.
6 Modern standard forms often include a clause excluding waiver.
7 *Barclays Bank Ltd v Beck* [1952] 2 QB 47 at 53, [1952] 1 All ER 549 at 552, CA, per Denning LJ.
8 *Boaler v Mayor* (1865) 19 CBNS 76.
9 See CONTRACT vol 9(1) (Reissue) PARA 603.
10 See CONTRACT vol 9(1) (Reissue) PARA 603. See also *Boaler v Mayor* (1865) 19 CBNS 76; and see *Clarke v Henty* (1838) 3 Y & C Ex p 187; *Bain v Cooper* (1841) 1 Dowl NS 11 at 14.
11 *Barclays Bank Ltd v Beck* [1952] 2 QB 47 at 53–54, [1952] 1 All ER 549 at 552, CA, per Denning LJ: 'The reason is because merger can only apply to existing debts. Future debts do not merge; they take their colour from the circumstances in which they arise'.

C. REVOCATION

1200. Revocation of continuing guarantees. When a guarantee[1] does not expressly provide for its revocation by notice, the question whether it can be so determined mainly depends upon whether the consideration for the guarantor's promise is in its nature entire or divisible[2]. If the consideration is entire, no effectual notice of revocation can be given by the guarantor without the creditor's agreement[3].

However, in the case of a continuing guarantee, where the consideration is not an entire consideration but the guarantee is given in respect of a continuing indebtedness such as a bank overdraft which may be changed from time to time by increases or decreases in that indebtedness, then in the absence of a provision as to notice the guarantor may terminate the guarantee at any time. If he does so, then he remains responsible for any sums incurred by the principal debtor which are the subject of the guarantee up to the time the notice was given, but he can by giving notice prevent himself from incurring further liability after the date of the notice[4].

1 Depending upon the circumstances, a 'guarantee' form signed only by the guarantor may amount in law to no more than an offer to guarantee until the creditor, by accepting it, turns it into a contract of guarantee: see PARA 1023 et seq. Such an offer may be revoked at any time before it has been accepted, provided that the revocation is communicated to the creditor: see PARA 1025.
2 *Lloyd's v Harper* (1880) 16 ChD 290 at 319–320, CA; *Re Crace, Balfour v Crace* [1902] 1 Ch 733 at 737–738.
3 *Lloyd's v Harper* (1880) 16 ChD 290, CA; and see *Calvert v Gordon* (1828) 3 Man & Ry KB 124; *Burgess v Eve* (1872) LR 13 Eq 450 at 457 per Malins V-C. See also *Re Consolidated Land Co Ltd, Ellerby's Claim* (1872) 20 WR 855 at 856 per Malins V-C. It was once considered that a guarantee made by deed was irrevocable: *Hassell v Long* (1814) 2 M & S 363 at 370–371 per Lord Ellenborough CJ; *Gordon v Calvert* (1828) 2 Sim 253; affd 4 Russ 581; contra *Hough v Warr* (1824) 1 C & P 151; *Shepherd v Beecher* (1725) 2 P Wms 288. However, this view no longer obtains: see the cases cited in note 4.
4 *National Westminster Bank Ltd v French* (20 October 1977, unreported), ChD. See also *Bastow v Bennett* (1812) 3 Camp 220; *Coulthart v Clementson* (1879) 5 QBD 42 at 46; *Lloyd's v Harper* (1880) 16 ChD 290 at 319–320, CA; *Ascherson v Tredegar Dry Dock and*

Wharf Co Ltd [1909] 2 Ch 401; *Wingfield v De St Croix* (1919) 35 TLR 432; *Silverburn Finance (UK) Ltd v Salt* [2001] EWCA Civ 279, [2001] 2 All ER (Comm) 438 (termination of legal relationship on which continuing guarantee was based revoking guarantee).

1201. Notice provisions. Guarantees given for continuing indebtedness such as a bank overdraft or other running account often expressly provide that they are revocable or determinable only upon the giving of a prescribed period of notice[1].

In such a case, the guarantor's notice of termination of liability does not take effect until the expiry of the notice period. If during the notice period the principal debtor incurs any further indebtedness which falls within the scope of the guarantee, the guarantor remains responsible and is only released from any further liability upon the expiry of the notice period[2].

The effect of the expiration of such a notice by the guarantor is merely to prevent future liability accruing under the guarantee. It does not release the guarantor from liability already accrued[3]. However, where the guarantee is only payable on demand and states that the expiration of the notice is not to relieve the guarantor from liability for amounts due under the guarantee at the termination, the guarantor will not be liable unless demand is made prior to expiration of the notice, because nothing is due prior to demand[4].

1 *Solvency Mutual Guarantee Co v Froane* (1861) 7 H & N 5; *Boyd v Robins and Langlands* (1859) 5 CBNS 597, Ex Ch; *Morrison v Barking Chemicals Co Ltd* [1919] 2 Ch 325; *Westminster Bank Ltd v Sassoon* (1926) 5 Legal Decisions Affecting Bankers 19; *Thomas v Nottingham Incorporated Football Club Ltd* [1972] Ch 596, [1972] 1 All ER 1176; *National Westminster Bank Ltd v French* (20 October 1977, unreported), ChD; *National House-Building Council v Fraser* [1983] 1 All ER 1090; *National Westminster Bank plc v Hardman* [1988] FLR 302, CA. A guarantee given by more than one guarantor and expressed to be subject to notice by them has been held enforceable against all until each has given notice: *Egbert v National Crown Bank* [1918] AC 903, PC.

2 *National Westminster Bank Ltd v French* (20 October 1977, unreported), ChD. See also *Westminster Bank Ltd v Sassoon* (1926) 5 Legal Decisions Affecting Bankers 19; *Thomas v Nottingham Incorporated Football Club Ltd* [1972] Ch 596 at 600, [1972] 1 All ER 1176 at 1177 per Goff J; *National House-Building Council v Fraser* [1983] 1 All ER 1090, 22 BLR 43.

3 See the cases cited in note 2. See also *Bank of Credit and Commerce International SA v Simjee* [1997] CLC 135, CA.

4 *National Westminster Bank plc v Hardman* [1988] FLR 302, CA. For the cases where a valid demand is a necessary element of the creditor's cause of action see PARA 1105. In many standard form guarantees, the language is broader than that considered in *National Westminster Bank plc v Hardman*, and some forms state expressly that the guarantor's contingent liability in respect of advances made to the debtor prior to the expiry of the notice of termination shall not be affected: see Goode, 'Guarantees—rights, rites and rewrites' [1988] JBL 264, cited with approval by Hobhouse LJ in *Bank of Credit and Commerce International SA v Simjee* [1997] CLC 135, CA. A widely drafted clause making the guarantor liable as if he were a principal debtor may also have the effect of making the guarantor liable irrespective of demand: see *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 3 All ER 358 at 366–367, [1975] 1 WLR 1474 per Walton J; *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425 at 447, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769 at 785, CA, per Dillon LJ; and cf *Tate v Crewdson* [1938] Ch 869, [1938] 3 All ER 43.

(iii) Death of Parties

1202. Death of principal debtor. Where the principal's obligation ceases upon his death, the death of the principal debtor before he has committed any default will operate to discharge the guarantor from liability under his guarantee[1].

However, the death of the principal debtor will not usually discharge his estate from liability for debts contracted prior to his death, and so will not usually discharge a guarantor for those debts[2].

1 *Sparrow v Sowgate* (1621) W Jo 29. Cf PARA 1189.
2 See CONTRACT vol 9(1) (Reissue) PARA 1078.

1203. Death of guarantor. The death of a guarantor of which the creditor has no notice does not of itself determine the guarantee[1].

Where the consideration for a guarantee is entire so that the guarantee is from its nature not revocable by the guarantor[2] then, if there is no express stipulation that it may be revoked, notice of the guarantor's death will not terminate the guarantee[3]. Where there is an express stipulation that a period of notice must be given to determine the guarantee, not confined to a notice to be given by the guarantor while still alive, that notice must be given[4], and mere notice of death will not terminate the guarantee[5].

In the case of a continuing guarantee, where the consideration is not an entire consideration but the guarantee is given in respect of a continuing indebtedness such as a bank overdraft, the guarantee is from its nature revocable at any time by the guarantor[6]. If such a guarantee does not expressly stipulate that it can only be revoked on notice, or if the stipulated notice can only be given by the guarantor in his lifetime, the guarantee will be revoked as to future transactions under it by notice of his death[7].

If the stipulated notice can be given by the guarantor's executor, it may in certain cases be treated as given by him at once; for instance, if the principal debtor is the executor and the creditor knows that it is his duty to the estate to terminate the guarantee[8]; but the mere fact that there is notice of death and of the existence of a will does not raise a presumption that there is a breach of trust if the executor fails to give the required notice[9].

Where notice of the surety's death revokes the guarantee it does not relieve his estate from liability in respect of previous transactions[10].

1 *Ashby v Day* (1885) 33 WR 631; affd on appeal (1886) 54 LT 408, CA; *Harriss v Fawcett* (1873) 8 Ch App 866 at 869 per Mellish LJ; *Bradbury v Morgan* (1862) 1 H & C 249 at 256; *Coulthart v Clementson* (1879) 5 QBD 42 at 46 per Bowen J; and see *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401 at 406. Quaere as to the position if the guarantee is not acted upon at all or nothing else has occurred to make it a binding contract until after the guarantor's death. The dictum of Bramwell B in *Bradbury v Morgan* above to the effect that even so the guarantor's estate would be liable is not easy to reconcile with the principle of the decision in *Offord v Davies* (1862) 12 CBNS 748, coupled with the general rule that an offeror's death, although unknown to the offeree, revokes the offer.
2 See PARA 1200.
3 *Lloyd's v Harper* (1880) 16 ChD 290 at 317, CA, where a guarantee for the performance of the covenants in a lease and guarantee of the fidelity of a person to be taken into another's employment were cited as instances of such a guarantee. As to the application of the principle to a fidelity guarantee see *Calvert v Gordon* (1828) 3 Man & Ry KB 124; *Re Crace, Balfour v Crace* [1902] 1 Ch 733.
4 As to the effect of such a notice see PARA 1201.
5 See *Egbert v National Crown Bank* [1918] AC 903, PC; *Re Silvester, Midland Rly Co v Silvester* [1895] 1 Ch 573.
6 See PARA 1200.
7 *Coulthart v Clementson* (1879) 5 QBD 42; *Re Whelan, Dodd v Whelan* [1897] 1 IR 575; and see *Harriss v Fawcett* (1873) LR 15 Eq 311; affd on different grounds 8 Ch App 866; *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401 at 406. The reasoning of Bowen J in *Coulthart v Clementson* above, although approved in *Lloyd's v Harper* (1880) 16 ChD 290 at 319–320, CA, per Lush LJ, and followed in *Re Whelan, Dodd v Whelan* above, has been criticised by Romer J in *Re Silvester, Midland Rly Co v Silvester* [1895] 1 Ch 573, and by Joyce J

in *Re Crace, Balfour v Crace* [1902] 1 Ch 733, in so far as Bowen J expressed the view that notice of death is constructive notice of the determination of the guarantee: see the text and note 9. It is to be observed also that the point whether notice of death terminates the guarantee was treated as an open one by Lord Selborne LC and Lord Coleridge CJ in *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692 at 703, 705, CA. As to the guarantor becoming mentally disordered see *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA.

8 *Harriss v Fawcett* (1873) 8 Ch App 866.

9 *Re Silvester, Midland Rly Co v Silvester* [1895] 1 Ch 573 at 577; *Re Crace, Balfour v Crace* [1902] 1 Ch 733 at 739, criticising the view expressed in *Coulthart v Clemenston* (1879) 5 QBD 42 at 47 per Bowen J.

10 Cf PARA 1200 text and note 4.

1204. Death of co-guarantor. Where a guarantee is joint and several, the death of one co-guarantor does not terminate the liability of the survivors[1]. On the death of a guarantor bound jointly with the principal debtor[2], or with other guarantors, his estate ceases to be liable, even for the principal debtor's existing debts[3]. Similarly, on the death of the principal debtor, before the guarantor with whom he is jointly liable, his assets are no longer liable, but the liability survives to the guarantor[4].

1 *Beckett v Addyman* (1882) 9 QBD 783, CA.

2 Ie where one of two joint debtors is, by agreement, guarantor for the other: see PARAS 1015 note 6, 1130.

3 *Rawstone v Parr* (1827) 3 Russ 539; *Jones v Beach* (1852) 2 De GM & G 886; *Other v Iveson* (1855) 3 Drew 177; and see *Ashby v Day* (1885) 33 WR 631; affd on appeal (1886) 54 LT 408, CA.

4 *Richardson v Horton* (1843) 6 Beav 185.

(iv) Change of Parties

1205. Change of status of principal debtor. The question whether a change in the status or constitution of the principal debtor discharges a guarantee as to future transactions between the creditor and the principal debtor is primarily a question of construction of the guarantee[1].

A guarantee which by its terms applies only to the debts of a named individual will not usually be construed to secure debts incurred after that individual enters into a partnership[2]. However, partnership debts may be secured by such a guarantee, if it is clear from the surrounding circumstances that that is what the parties intended[3].

Where the principal debtor is a partnership, in the absence of agreement to the contrary a continuing guarantee is revoked as to future transactions by any change in the constitution of the partnership[4].

A guarantee for the debts of a named individual or partnership will not usually be construed to secure debts incurred by a company to which that business is transferred, even if that company is owned and controlled by the original principal debtors: for the company is a separate legal entity from its members, and its debts are not theirs[5]. Nor will a guarantee for the debts of one company normally be construed so as to extend to cover the debts of its parent, subsidiary or sister companies to which its business is transferred on a reconstruction or amalgamation[6]. However, such liabilities may be covered if it is clear that that is what the parties intended[7]. On the same principle that the company and its members are separate legal entities[8], changes in the ownership or control of a company will not generally determine a continuing guarantee[9].

1 For the principles to be applied in construing a guarantee see PARA 1083 et seq. As to the application in the context of guarantees of the doctrine of estoppel by convention see PARA 1078.

2 *Bellairs v Ebsworth* (1811) 3 Camp 53; *Montefiore v Lloyd* (1863) 15 CBNS 203. See also *Royal Bank of Scotland v Christie* (1840) 8 Cl & Fin 214, HL.

3 *Leatherley v Spyer* (1870) LR 5 CP 595; see also *Bank of British North America v Cuvillier* (1861) 4 LT 159, PC. Knowledge by the guarantor that the principal debtor proposed to enter into the partnership is a significant consideration (*Leatherley v Spyer*), but not the only factor to be taken into account: see *Montefiore v Lloyd* (1863) 15 CBNS 203. Modern standard forms of guarantee usually expressly extend to cover the liability of the principal 'in respect of any transaction whatsoever, either solely or jointly with any other person firm or company'. As to the use of surrounding circumstances in construing a guarantee see PARA 1084.

4 Partnership Act 1890 s 18. Cf *Backhouse v Hall* (1865) 6 B & S 507 at 520 per Blackburn J; *Barclay v Lucas* (1783) 3 Doug KB 321 at 326 note (d); *First National Finance Corpn Ltd v Goodman* [1983] BCLC 203, CA. Modern standard forms of guarantee usually expressly provide that the guarantee is 'to remain in full force and effect notwithstanding any change in the constitution of the principal'. See *Pemberton v Oakes* (1827) 4 Russ 154; *Cambridge University v Baldwin* (1839) 5 M & W 580.

5 For the principle that a company and its members are separate legal entities see *A Salomon & Co v Saloman* [1897] AC 22, HL; and COMPANIES vol 7(1) (2004 Reissue) PARAS 401, 402. 'Save in cases which turn on the words of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v Salomon & Co* merely because it considers that justice so requires': *Adams v Cape Industries plc* [1990] Ch 433 at 536, [1991] 1 All ER 929 at 1019, CA. Cf the cases cited in notes 2–3.

6 See *First National Finance Corpn Ltd v Goodman* [1983] BCLC 203 at 209 et seq, CA, per Stephenson LJ. There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that each company in a group of companies is a separate legal entity possessed of separate rights and liabilities: *Adams v Cape Industries plc* [1990] Ch 433 at 532, [1991] 1 All ER 929 at 1016, CA, citing *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 807, [1975] 3 All ER 21 at 28, CA, per Roskill LJ (decision revsd on appeal [1977] AC 774 at 840 et seq, [1976] 3 All ER 129, HL).

7 See eg *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84, [1981] 3 All ER 577, CA, discussed in PARA 1084. See also *First National Finance Corpn Ltd v Goodman* [1983] BCLC 203, CA.

8 See the text and note 5.

9 So eg in *First National Finance Corpn Ltd v Goodman* [1983] BCLC 203, CA, the guarantor was held liable for advances made to the principal debtor company after he had ceased to be either a director of it or a shareholder in it.

1206. Change of creditor's status. The question whether a change in the status or constitution of the creditor discharges a guarantee as to future transactions between the creditor and the principal debtor is primarily a question of construction of the guarantee[1].

Unless the parties have agreed otherwise, any change in the identity of the creditor terminates the liability of a guarantor under a continuing guarantee in respect of future transactions[2]. So, for example, where the creditor is a partnership, in the absence of agreement to the contrary a continuing guarantee is revoked as to future transactions by any change in the constitution of the partnership[3]. Similarly, the subsequent incorporation of a voluntary society or private partnership to which a guarantee is given will generally terminate the guarantor's liability as to future transactions under it[4]: and except where an amalgamation or consolidation of two companies is effected by a statute which expressly or impliedly preserves rights against a guarantor[5], a guarantee given to either of those companies is generally invalidated as to future transactions by that amalgamation or consolidation[6].

However, it is open to the parties to agree otherwise. So a guarantee expressed to be in favour of a bank, its successors and assigns and any company with

which it may amalgamate, will cover advances made by a successor bank with which it has amalgamated and to which its assets and undertaking have been transferred[7]. Even where there is no express agreement, guarantors may become estopped from denying their continuing liability following a reconstruction of the creditor company[8].

A mere change in the name of the creditor company by which the rights of the creditor and the obligations of the guarantor are not altered will not release the guarantor from liability[9].

1 For the principles to be applied in construing a guarantee see PARA 1083 et seq. As to the application in the context of guarantees of the doctrine of estoppel by convention see PARA 1078.
2 *First National Finance Corpn Ltd v Goodman* [1983] BCLC 203 at 209, CA.
3 Partnership Act 1890 s 18; and see PARA 1205 note 4.
4 *Dance v Girdler* (1804) 1 Bos & PNR 34, where the guarantee was given to named persons as governors of a society and their successors.
5 *London, Brighton and South Coast Rly Co v Goodwin* (1849) 3 Exch 320, where the consolidation did not affect the responsibility of the principal for whose fidelity the guarantor had agreed to become liable. See also *Eastern Union Rly Co v Cochrane* (1853) 9 Exch 197. Where an amalgamation takes place of the firm to which a guarantee was given with some other body, rendering the guarantee inoperative as to future transactions under it, the guarantor's liability under the guarantee in respect of past transactions must be enforced by the persons to whom the guarantee was originally given, unless the cause of action has been assigned to the new body: *Lloyd's v Harper* (1880) 16 ChD 290, CA; *Moller v Lambert* (1810) 2 Camp 548; and see PARA 1124.
6 See *First National Finance Corpn Ltd v Goodman* [1983] BCLC 203 at 211, CA, where the principle stated in the text, as set out in similar terms in an earlier edition of this title, was approved, subject to the proviso to the effect that the guarantee may expressly provide to the contrary.
7 *First National Finance Corpn Ltd v Goodman* [1983] BCLC 203, CA.
8 *Ashby v Day* (1885) 33 WR 631; affd (1886) 34 WR 312, CA. See also PARA 1078.
9 *Wilson v Craven* (1841) 8 M & W 584; *Groux's Improved Soap Co Ltd v Cooper* (1860) 8 CBNS 800. See also *Capital and Counties Bank v Bank of England* (1889) 61 LT 516, and *Prescott, Dimsdale, Cave, Tugwell & Co v Bank of England* [1894] 1 QB 351, CA; these two cases do not involve guarantees, but were decided under the Bank Charter Act 1844 ss 23, 24 (repealed), to which similar principles applied.

(v) The Consumer Credit Act 1974

1207. Ineffective securities. Where a regulated agreement[1] under the Consumer Credit Act 1974 is cancelled[2] by the debtor[3] or hirer[4] under that Act, or is terminated because the creditor has recovered the goods in contravention of the provisions of that Act[5], or an application for an order permitting enforcement of an agreement which would otherwise be unenforceable under that Act is refused otherwise than on technical grounds only[6], or the agreement is declared unenforceable[7], any security[8] provided in relation to that agreement is treated as never having effect, any property lodged with the creditor or owner solely for the purposes of that security must be returned, and the creditor or owner must cancel any entries in any register relating to the security, and must repay to the guarantor any money received on realisation of the security[9].

1 Ie a consumer credit agreement or consumer hire agreement: see further PARA 1104 note 13.
2 Ie cancelled by notice served within the statutory 'cooling-off period' under the Consumer Credit Act 1974 s 69: see CONSUMER CREDIT vol 9(1) (Reissue) PARA 183 et seq.
3 As to the meaning of 'debtor' see the Consumer Credit Act 1974 s 189(1); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 81 note 3.
4 As to the meaning of 'hirer' see the Consumer Credit Act 1974 s 189(1); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 82 note 3.

5 Ie under the Consumer Credit Act 1974 s 91: see CONSUMER CREDIT vol 9(1) (Reissue) PARA 265.
6 Ie under the Consumer Credit Act 1974 s 40, s 65(1), s 124(1) or s 149(2): see CONSUMER CREDIT vol 9(1) (Reissue) PARAS 125, 169, 221, 278.
7 Ie under the Consumer Credit Act 1974 s 142(1): see CONSUMER CREDIT vol 9(1) (Reissue) PARA 291.
8 'Security' includes inter alia an indemnity or guarantee: see PARA 1057 note 1. As to the full definition of 'security' see CONSUMER CREDIT vol 9(1) (Reissue) PARA 200 note 1.
9 Consumer Credit Act 1974 s 113(3), applying s 106; see CONSUMER CREDIT vol 9(1) (Reissue) PARA 221.

1208. Evasion by security prohibited. Where a security[1] is provided in relation to an actual or prospective regulated agreement[2] under the Consumer Credit Act 1974, that security cannot be enforced so as to benefit the creditor[3] or owner[4], directly or indirectly, to a greater extent than would be the case if the obligations of the debtor[5] or hirer[6] were carried out to the extent (if any) to which they would be enforced under the Act[7].

Where the security is provided in relation to a prospective agreement or transaction, the security is only enforceable when the agreement is made; and until that time, the person providing the security may by notice to the creditor or owner require the security to be treated as never having effect, any property lodged with the creditor or owner solely for the purposes of that security to be returned, the creditor or owner to cancel any entries in any register relating to the security, and the repayment to the surety[8] of any money received on realisation of the security[9].

1 As to the meaning of 'security' see PARA 1057 note 1.
2 As to the meaning of 'regulated agreement' see PARA 1104 note 13.
3 As to the meaning of 'creditor' see the Consumer Credit Act 1974 s 189(1); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 81 note 2.
4 As to the meaning of 'owner' see the Consumer Credit Act 1974 s 189(1); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 82 note 1.
5 As to the meaning of 'debtor' see the Consumer Credit Act 1974 s 189(1); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 81 note 3.
6 As to the meaning of 'hirer' see the Consumer Credit Act 1974 s 189(1); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 82 note 3.
7 See the Consumer Credit Act 1974 s 113(1); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 221.
8 'Surety' means the person by whom any security (defined so as to include inter alia an indemnity or guarantee) is provided, or the person to whom his rights and duties in relation to the security have passed by assignment or operation of law: Consumer Credit Act 1974 s 189(1). As to the meanings of 'surety' and 'guarantor' otherwise than in the Consumer Credit Act 1974 see PARA 1017 note 3.
9 See the Consumer Credit Act 1974 s 113(6) (which permits the application of s 106 in the circumstances described in the text); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 221.

1209. Relief where creditor/debtor relationship unfair. If the court determines that the relationship between the creditor and debtor arising out of a credit agreement[1], or such agreement taken with any related agreement[2], is unfair to the debtor because of any terms of the agreement or related agreement, the way in which the creditor has exercised or enforced any of his rights under the agreement or related agreement or any other thing done or not done by or on behalf of the creditor either before or after the making of the agreement or related agreement[3], it may make an appropriate order in connection with the agreement[4]. Such an order may be made only on an application made by the debtor or by a surety[5], at the instance of the debtor or a surety in any proceedings in any court to which the debtor and the creditor are parties, being

proceedings to enforce the agreement or any related agreement, or at the instance of the debtor or a surety in any other proceedings in any court where the amount paid or payable under the agreement or any related agreement is relevant[6]. Such an order may be made notwithstanding that its effect is to place on the creditor, or any associate or former associate of his, a burden in respect of an advantage enjoyed by another person[7].

Provisions in the Insolvency Act 1986 enable a trustee in bankruptcy to seek relief from the court in respect of extortionate credit transactions entered into by the bankrupt not more than three years before the commencement of the bankruptcy[8].

1 In the context of the provisions relating to unfair relationships, 'credit agreement' means an agreement between an individual (the 'debtor') and any other person (the 'creditor'), by which the creditor provides the debtor with credit of any amount: see the Consumer Credit Act 1974 s 140C(1) (ss 140A–140C added by the Consumer Credit Act 2006 ss 19–21); and CONSUMER CREDIT. As to references to the creditor or debtor under a credit agreement see the Consumer Credit Act 1974 s 140C(2) (as so added); and CONSUMER CREDIT. As to the definition of 'individual' for this purpose see s 189(1) (definition as substituted); and CONSUMER CREDIT. As to the computation of the total charge for credit see s 20(1); the Consumer Credit (Total Charge for Credit) Regulations 1980, SI 1980/51; and CONSUMER CREDIT vol 9(1) (Reissue) PARAS 224–225.

2 As to references to an agreement related to a credit agreement see the Consumer Credit Act 1974 s 140C(4), (5), (7), (8) (as added: see note 1); and CONSUMER CREDIT.

3 See the Consumer Credit Act 1974 s 140A(1) (as added: see note 1); and CONSUMER CREDIT. In deciding whether to make such a determination the court must have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor): see s 140A(2) (as so added). For these purposes the court must (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor: see s 140A(3) (as so added). Such a determination may be made in relation to a relationship notwithstanding that the relationship may have ended: see s 140A(4) (as so added). An order under s 140B must not be made in connection with a credit agreement which is an exempt agreement by virtue of s 16(6C): see s 140A(5) (as so added). See generally CONSUMER CREDIT.

4 See the Consumer Credit Act 1974 s 140B (as added: see note 1); and CONSUMER CREDIT. Such an order may include doing one or more of the following: (1) requiring the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person); (2) requiring the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement; (3) reducing or discharging any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement; (4) directing the return to a surety of any property provided by him for the purposes of a security; (5) otherwise setting aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement; (6) altering the terms of the agreement or of any related agreement: see s 140B(1)(a)–(f) (as so added); and CONSUMER CREDIT. As to the meaning of 'surety' for these purposes see PARA 1208 note 8, but see also s 140C(6) (as added: see note 1).

As to the limited equitable jurisdiction to set aside harsh and unconscionable bargains see *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, [1978] 2 All ER 489; *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA; *Hart v O'Connor* [1985] AC 1000, [1985] 2 All ER 880, PC; and EQUITY vol 16(2) (Reissue) PARA 429.

5 See note 4.

6 See the Consumer Credit Act 1974 s 140B(2) (as added: see note 1); and CONSUMER CREDIT. A party to any such proceedings is entitled, in accordance with rules of court, to have any person who might be the subject of such an order made a party to the proceedings: see s 140B(8) (as so added); and CONSUMER CREDIT. The application may only be made in England and Wales to the county court: see ss 140B(4), 140C(3) (as so added). If, in any such proceedings, the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary: see s 140B(9) (as so added); and CONSUMER CREDIT.

7 See the Consumer Credit Act 1974 s 140B(3) (as added: see note 1); and CONSUMER CREDIT.
8 See the Insolvency Act 1986 s 343; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 672 et seq.

1210. Restrictions on enforcement of security. The creditor under a regulated agreement[1] under the Consumer Credit Act 1974 is obliged, subject to certain conditions including the payment of a small fee, to provide the surety[2] under any security[3] given for that agreement upon written request with a copy of the executed agreement, a copy of the security instrument[4], and details of the state of accounts between the creditor and the debtor[5]. If the creditor or owner fails to comply with this obligation, he is not entitled while the default continues to enforce the security[6].

Where the creditor or owner serves a default notice[7] under the Consumer Credit Act 1974 on the debtor or hirer, he must also serve a copy on any surety[8]. If the creditor or owner fails to comply with this obligation, he may only enforce his security against the guarantor on an order of the court[9].

1 As to the meaning of 'regulated agreement' see PARA 1104 note 13.
2 As to the meaning of 'surety' for these purposes see PARA 1208 note 8.
3 As to the meaning of 'security' for these purposes see PARA 1057 note 1.
4 As to the meaning of 'security instrument' see the Consumer Credit Act 1974 ss 105, 189(1); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 200.
5 See the Consumer Credit Act 1974 ss 107–109 (amended by SI 1998/997, setting the fee referred to in the text at £1); and CONSUMER CREDIT vol 9(1) (Reissue) PARAS 202–204.
6 See the Consumer Credit Act 1974 ss 107(4)(a), 108(4)(a), 109(3)(a); and CONSUMER CREDIT vol 9(1) (Reissue) PARAS 202–204.
7 Or a notice under the Consumer Credit Act 1974 s 76(1) (notice required for demand for early payment, recovery of possession of goods, or termination or restriction of any right), or s 98(1) (notice of termination of agreement otherwise than in default cases): s 111(1). As to default notices see CONSUMER CREDIT vol 9(1) (Reissue) PARA 263.
8 Consumer Credit Act 1974 s 111(1).
9 Consumer Credit Act 1974 s 111(2).

(vi) Discharge by Operation of Law

1211. Failure of consideration. Total failure of the consideration[1] for the guarantor's promise of guarantee will discharge him, and affords a good defence to a claim by the creditor against the guarantor. Thus, for example, a guarantor will be discharged where the consideration for his guarantee is a postponement, with the consent of the execution creditor, of a sheriff's sale, and notwithstanding such consent the sale takes place[2]. So also a guarantor for payment of a composition to creditors will be discharged where the debtor is made bankrupt and the composition annulled[3]; or where the composition is expressed to require the assent of all creditors and this is not forthcoming[4].

By contrast, it was held that where a bank issued a letter of credit permitting a company to draw bills upon it in consideration of the company's undertaking to do certain things with a view to providing means for the meeting of the bills when they became due, guarantors for the fulfilment of the undertaking were not discharged from liability under their guarantee on the ground of failure of consideration where, owing to the subsequent failure of the bank, after accepting the bills, the company wrongfully refused to carry out its undertaking and the bills were, partly in consequence of the refusal, not met at maturity[5].

1 As to the consideration for a contract of guarantee see PARA 1047 et seq; and as to what constitutes total failure of consideration and its effects in relation to contracts generally see CONTRACT vol 9(1) (Reissue) PARA 992. It may be more accurate to say that the guarantor was not bound by the guarantee in the first place.

2 *Cooper v Joel* (1859) 1 De GF & J 240; *Pavy v Smith* (1901) 17 TLR 471.
3 *Walton v Cook* (1888) 40 ChD 325.
4 *Latter v White* (1870) LR 5 QB 622 at 641 per Cockburn CJ (revsd on another point (1871) LR 6 QB 474, Ex Ch; reversal affd (1872) LR 5 HL 578); and see *Weighton v Cuthbert & Son* (1906) 14 SLT 251. As to compositions see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 863.
5 *Re Barber & Co, ex p Agra Bank* (1870) LR 9 Eq 725. The aspects of this decision which bear on the law of letters of credit may perhaps require reconsideration in the light of *Sale Continuation Ltd v Austin Taylor & Co Ltd* [1968] 2 QB 849, [1967] 2 All ER 1092: see PARA 929.

1212. Material alteration of guarantee. An immaterial alteration, such as the correction of an innocent misdescription of the principal debtor or the insertion of details of the guarantor's service agent, will not prevent the guarantee being enforceable, even if the alteration is made after signature and the guarantor does not assent to the alteration being made[1].

However, a material alteration, not approved by all the parties to the original document, will avoid the guarantee[2]. A material alteration is one which has an effect on some contract or right contained in or arising out of the instrument itself[3]. So a guarantee could be discharged by its conversion into a deed[4], or by the striking out of the names of persons who are co-guarantors[5], or by the addition, after its execution, of words reducing to a less amount the liability of one of several joint and several guarantors for a given sum each[6].

Even if the unauthorised alterations were made by a stranger, they will invalidate the guarantee if they were made while the altered document was in the creditor's custody, for, so long as it is in the creditor's possession, he is bound to preserve it in its original state[7].

1 *Raiffeisen Zentralbank Osterreich AG v Crosseas Shipping Ltd* [2000] 3 All ER 274, [2000] 1 WLR 1135, CA, applied in *Bank of Scotland v Henry Butcher & Co* [2003] EWCA Civ 67, [2003] 2 All ER (Comm) 557, [2003] 1 BCLC 575; *Lombard Finance Ltd v Brookplain Trading Ltd* [1991] 2 All ER 762, [1991] 1 WLR 271, CA, applying *Aldous v Cornwell* (1868) LR 3 QB 573; *Re Howgate and Osborn's Contract* [1902] 1 Ch 451; *Bishop of Crediton v Bishop of Exeter* [1905] 2 Ch 455. See also *Andrews v Lawrence* (1865) 19 CBNS 768; and see PARA 1077.
2 *Lombard Finance Ltd v Brookplain Trading Ltd* [1991] 2 All ER 762, [1991] 1 WLR 271, CA. See also *Pigot's Case* (1614) 11 Co Rep 26b, and the cases cited in notes 3–7. See also generally DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 81 et seq.
3 *Caldwell v Parker* (1869) IR 3 Eq 519 at 526 per Walsh MR.
4 *Davidson v Cooper* (1844) 13 M & W 343 at 352, Ex Ch (affixing seals opposite guarantors' signatures); but see *Barnes v Richards* (1902) 71 LJKB 341 at 345. The removal of the seal from the name of one of the obligors of a several bond did not discharge the other obligors: *Collins v Prosser* (1823) 1 B & C 682. As to the present formal requirements of deeds see PARA 1056. As to cancellation of deeds generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 76 et seq.
5 *Bank of Hindostan, China and Japan v Smith* (1867) 36 LJCP 241; and see *Suffell v Bank of England* (1882) 9 QBD 555, CA.
6 *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75; see also *Bank of Hindostan, China and Japan v Smith* (1867) 36 LJCP 241; *Gardner v Walsh* (1855) 5 E & B 83. The addition of a third party to a note originally issued as a joint and several promissory note by two persons is a material alteration of the note: *Gardner v Walsh*, overruling *Catton v Simpson* (1838) 8 Ad & El 136.
7 *Davidson v Cooper* (1844) 13 M & W 343 at 352, Ex Ch, per Denman CJ; *Bank of Hindostan, China and Japan v Smith* (1867) 36 LJCP 241. See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 160.

1213. Effect of foreign law discharging guarantor. The question whether a contract such as a contract of guarantee has been validly discharged is determined by the proper law of the contract[1]. In the case of most contracts

made after 1 April 1991 the question of which law is to govern the obligations of the parties will be answered by the rules of the Rome Convention signed by the United Kingdom on 7 December 1981[2].

It follows that the provisions of a foreign law relieving a guarantor from obligations under a contract of guarantee governed by English law cannot be relied upon in the English courts so as to enable him to avoid those obligations[3].

1 Where a reference is made to the 'proper law of the contract' this means the law which governs the contract as it is determined by the provisions of the Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980; Cmnd 8449) (the 'Rome Convention'), as introduced into the United Kingdom by the Contracts (Applicable Law) Act 1989. As to the meaning of 'United Kingdom' see PARA 2 note 3. For this reason, it is now common to use the expression 'applicable law' instead of 'proper law'. See CONFLICT OF LAWS vol 8(3) (Reissue) PARA 349 note 7.

2 See further CONFLICT OF LAWS vol 8(3) (Reissue) PARA 349 et seq. See also note 1.

3 *National Bank of Greece and Athens SA v Metliss* [1958] AC 509, [1957] 3 All ER 608, HL; *Adams v National Bank of Greece SA* [1961] AC 255, [1960] 2 All ER 421, HL.

(vii) Discharge by Conduct of Creditor

A. EQUITABLE PROTECTION OF THE GUARANTOR

1214. The principle. Equity intervenes to protect a guarantor[1]. To protect the guarantor's right to pay the guaranteed debt and after paying it to sue the principal debtor in the name of the creditor[2], a guarantor is discharged if the creditor, without his consent, either releases the principal debtor[3] or enters into a binding arrangement with him to give him time without reserving his rights against the guarantor[4]. Since, by virtue of the guarantee, a guarantor is as much concerned in every transaction with the principal debtor affecting the guaranteed liability as the creditor, any variation of the principal contract made without his consent discharges him from his guarantee, unless the variation is clearly insubstantial or obviously cannot prejudice him[5].

To protect the guarantor's right on paying the guaranteed debt to have the benefit of all the securities which the creditor had[6], a guarantor is discharged[7] if the creditor without the guarantor's consent fails to make that security properly available to the guarantor[8]. To protect the guarantor's right to contribution from co-guarantors[9], the guarantor is discharged[10] if the creditor without the guarantor's consent releases any co-guarantor[11].

A guarantor will also be discharged if the creditor acts in bad faith towards him[12], or connives at the default by the principal debtor in respect of which the guarantee is given[13]. However, there is no general principle that merely irregular conduct on the part of the creditor, even if prejudicial to the interest of the guarantor, discharges the guarantor[14].

1 *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536 at 544, [1989] 3 All ER 839 at 841, PC. See also PARA 1215.

2 *Holme v Brunskill* (1878) 3 QBD 495 at 505, CA, per Cotton LJ. See also *Samuell v Howarth* (1817) 3 Mer 272 at 279 per Lord Eldon LC; *Swire v Redman and Holt* (1876) 1 QBD 536 at 541–542; *Polak v Everett* (1876) 1 QBD 669 at 674, CA, per Blackburn J; *Rouse v Bradford Banking Co* [1894] 2 Ch 32 at 75, CA, per AL Smith LJ; affd [1894] AC 586, HL; *Mahant Singh v U Ba Yi* [1939] AC 601 at 606–607, PC; *Moschi v Lep Air Services Ltd* [1973] AC 331 at 348, [1972] 2 All ER 393 at 401, HL, per Lord Diplock; and see eg *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2005] EWCA Civ 395, [2005] 2 All ER (Comm) 289, [2005] 1 WLR 2497 (refinancing agreements between the claimant creditor and the principal debtor discharged the guarantor); and PARAS 1218, 1224. For these rights of the guarantor see PARAS 1132, 1138 et seq.

3 *Mahant Singh v U Ba Yi* [1939] AC 601 at 606, PC. See also *Burke's Case* (circa 1780) cited in 2 Bos & P 62; *Law v East India Co* (1799) 4 Ves 824; *Webb v Hewitt* (1857) 3 K & J 438; *Re Natal Investment Co, Nevill's Case* (1870) 6 Ch App 43; *Cragoe v Jones* (1873) LR 8 Exch 81; *Lowes v Maughan and Fearon* (1884) Cab & El 340; *Commercial Bank of Tasmania v Jones* [1893] AC 313, PC; *Perry v National Provincial Bank of England* [1910] 1 Ch 464, CA. See generally PARA 1218 et seq.

4 *Samuell v Howarth* (1817) 3 Mer 272 at 278 per Lord Eldon LC; *Creighton v Rankin* (1840) 7 Cl & Fin 325 at 346, HL; *Webb v Hewitt* (1857) 3 K & J 438; *Swire v Redman and Holt* (1876) 1 QBD 536. See PARA 1224 et seq. In *Polak v Everett* (1876) 1 QBD 669 at 673, CA, Blackburn J said that these principles of equity had been 'established for a very long time, beginning with *Rees v Berrington* (1795) 2 Ves 540 to the present day, without a single case going to the contrary'.

5 *Rees v Berrington* (1795) 2 Ves 540 at 543 per Lord Loughborough LC, cited in *Holme v Brunskill* (1878) 3 QBD 495 at 505, CA, per Cotton LJ; *Egbert v National Crown Bank* [1918] AC 903 at 908–909, PC. See *Lloyds TSB Bank plc v Shorney* [2001] EWCA Civ 1161, [2002] 1 FCR 673, [2002] 1 FLR 81 (bank had duty to disclose variation of guarantee to co-surety); *Howard de Walden Estates Ltd v Pasta Place Ltd* [1995] 1 EGLR 79, [1995] 22 EG 143 (progressive release of use provision in lease; sureties not parties to variations); *Bank of Baroda v Patel* [1996] 1 Lloyd's Rep 391 (bank made facility available to principal debtor to be covered by ECGD cover; operated facility without such cover being in place; held that this amounted to a variation in the terms of the facility which seriously prejudiced the surety). As to ECGD cover see PARA 1013 note 24. As to the effect of a clause in a guarantee stating that it is not to be affected by 'any variation' in the underlying contract see eg *Samuels Finance Group plc v Beechmanor Ltd (t/a Hurstwood Developments)* (1993) 67 P & CR 282 at 285, CA, per Lloyd LJ ('any variation' does not mean 'any minor variation' and will be widely construed; but 'variation' does not extend to a novation and changes falling short of a novation may be so fundamental that they could not properly be described as a variation at all); *Melvin International SA v Poseidon Schiffahrt GmbH, The Kalma* [1999] 2 All ER (Comm) 761, [1999] 2 Lloyd's Rep 374 (scope of the variation clause in a charterparty guarantee). See also *Triodos Bank NV v Dobbs (No 2)* [2005] EWCA Civ 630, (2005) Times, 30 May (agreement purporting to be variation was in fact new agreement). As to the effect on the guarantor's liability of any variation of the principal contract see further PARA 1235 et seq. As to the effect of any departure by the creditor from the contract of guarantee or any breach of the principal contract see PARAS 1242–1243.

6 As to these rights see PARA 1138.

7 The guarantor will be wholly discharged if the release or other dealing with the security constitutes a variation of the principal obligation (see eg *Polak v Everett* (1876) 1 QBD 669, CA) or if the maintenance of the security is a condition of the guarantee (see eg *Carter v White* (1883) 25 ChD 666, CA; *Byblos Bank SAL v Al-Khudhairy* [1987] BCLC 232, CA; *TCB Ltd v Gray* [1987] Ch 458n, [1988] 1 All ER 108, CA; and cf *Ward v National Bank of New Zealand* (1883) 8 App Cas 755, PC). In any other case, the guarantor will be released pro tanto to the extent that his rights have been impaired: *Carter v White* above at 670 per Cotton LJ. See PARA 1244.

8 *Wulff v Jay* (1872) LR 7 QB 756 at 762 per Cockburn CJ, cited in *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536, [1989] 3 All ER 839, PC; *Pledge v Buss* (1860) John 663. See PARAS 1244–1245.

9 See PARA 1165 et seq.

10 A release of one of two or more joint guarantors or joint and several guarantors will wholly release the others: *Mercantile Bank of Sydney v Taylor* [1893] AC 317, PC. Where the co-guarantors are only severally bound, the release of one will discharge the others pro tanto to the extent that their rights of contribution are affected: *Ward v National Bank of New Zealand* (1883) 8 App Cas 755, PC. See PARAS 1246–1247.

11 *Ward v National Bank of New Zealand* (1883) 8 App Cas 755, PC; *Mercantile Bank of Sydney v Taylor* [1893] AC 317, PC. See PARAS 1246–1247.

12 *Bank of India v Trans Continental Commodity Merchants Ltd and Patel* [1982] 1 Lloyd's Rep 506 at 515 per Bingham J; affd [1983] 2 Lloyd's Rep 298 at 301–302, CA, per Robert Goff LJ. Cf *Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295, PC. Where a mortgagee breaches his duty to obtain the current market value of a property he sells, a guarantor, although not discharged entirely, has his liability reduced pro tanto: *Skipton Building Society v Stott* [2001] QB 261, [2000] 2 All ER 779, CA. As to unequivocal information that the guarantor received independent legal advice as a defence to a plea of the absence of good faith see *Broadway v Clydesdale Bank plc* (2000) Times, 12 September, Ct of Sess; and see EQUITY vol 16(2) (Reissue) PARAS 422–424.

13 *Bank of India v Trans Continental Commodity Merchants Ltd and Patel* [1982] 1 Lloyd's Rep 506 at 515 per Bingham J; affd [1983] 2 Lloyd's Rep 298 at 301–302, CA, per Robert Goff LJ.

14 *Bank of India v Trans Continental Commodity Merchants Ltd and Patel* [1983] 2 Lloyd's Rep 298 at 302, CA, per Robert Goff LJ. See also *Lloyds Bank plc v Croad* [1998] All ER (D) 705, CA; and see PARA 1248.

1215. The nature of the guarantor's rights. The obligations of the guarantor arise out of contract. The rights of the guarantor, in general, are the creatures of equity[1]. Equity protects the guarantor by providing him in certain circumstances with a defence in whole or part to the creditor's claims against him under the guarantee[2]; and, in that sense, it confers upon the guarantor certain rights and imposes upon the creditor certain duties. But it does not provide the guarantor with an independent cause of action against the creditor for damages for infringement of the rights or breach of the duties thereby conferred[3]. Moreover, the existence of these equitable rights and duties is inconsistent with the existence between the creditor and the guarantor of a general duty of care actionable in the tort of negligence[4].

Nevertheless, these equitable principles only supplement, and do not replace, the contractual rights which the guarantor would in any event have at law. So, for example, a guarantor will also be discharged where the creditor commits a repudiatory breach of the contract of guarantee[5], or fails to observe a non-promissory condition of the contract[6]. It follows that a guarantor may claim damages against the creditor for any breach of the express or implied terms of the guarantee[7].

1 See *City of London v New Hampshire Insurance Co* (18 January 1991, unreported), QBD, but summarised at (1991) 3 JIBFL 144; revsd without affecting this point sub nom *Mercers Co v New Hampshire Insurance Co* [1992] 3 All ER 57n, sub nom *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 1 WLR 792n, [1992] 2 Lloyd's Rep 365, CA. See also *Watts v Shuttleworth* (1860) 5 H & N 235 at 248 per Pollock CB ('The rights of a guarantor depend rather upon principles of equity than upon the actual contract between him and the creditor'); and see *Rees v Berrington* (1795) 2 Ves 540 at 543 per Lord Loughborough LC ('a breach of the obligation in conscience and honesty ... the clearest and most evident equity'); *Swire v Redman and Holt* (1876) 1 QBD 536 at 542 ('there is an equity'); *Polak v Everett* (1876) 1 QBD 669 at 673, CA, per Blackburn J ('on the principles of equity'); *Holme v Brunskill* (1878) 3 QBD 495 at 505, CA; *Bolton v Salmon* [1891] 2 Ch 48 at 54 per Chitty J; *Rouse v Bradford Banking Co* [1894] AC 586 at 590, HL ('the general principle of equity'); *Egbert v National Crown Bank* [1918] AC 903 at 908–909, PC; *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536 at 544, [1989] 3 All ER 839 at 841–842, PC. See also eg *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2005] EWCA Civ 395, [2005] 2 All ER (Comm) 289, [2005] 1 WLR 2497; *Van Der Merwe v IIG Capital LLC* [2007] EWHC 2631 (Ch), [2007] All ER (D) 214 (Nov).

2 See PARA 1214.

3 See further Goode *Legal Problems of Credit and Security* (2nd Edn) pp 192–193, where the nature of the rights and duties is explained in Hohfeldian terms.

4 The tort of negligence has not yet subsumed all torts and does not supplant the principles of equity or contradict contractual promises or complement the remedy of judicial review or supplement statutory rights: *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536 at 543–544, [1989] 3 All ER 839 at 841, PC. Cf also *O'Hara v Allied Irish Banks* [1985] BCLC 52; *Shamji v Johnson Matthey Bankers Ltd* [1986] BCLC 278, 2 BCC 98, 910, CA; *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363, [1988] FLR 166; *Barclays Bank plc v Khaira* [1992] 1 WLR 623, [1993] 1 FLR 343; *National Bank of Greece SA v Pinios Shipping Co, The Maira* [1990] 1 AC 637, [1989] 1 All ER 213, CA; revsd on a different point [1990] 1 AC 637, [1990] 1 All ER 78, HL; *Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295 at 315, PC. A creditor owed a duty to a guarantor to take reasonable care to ensure a proper price is obtained for any security: *Barclays Bank plc v Kingston* [2006] EWHC 533 (QB), [2006] 1 All ER (Comm) 519.

5 *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 70 ALR 641, Aust HC. As to the discharge of contracts by acceptance of a repudiatory breach see generally CONTRACT vol 9(1) (Reissue) PARA 1014 et seq.

6 See PARA 1214 text and note 7. As to the release of contractual obligations by non-performance of non-promissory conditions see generally CONTRACT vol 9(1) (Reissue) PARA 991.

7 As to the right to damages for breach of contract see CONTRACT vol 9(1) (Reissue) PARA 1012; and see generally DAMAGES.

B. EXCLUSION OF THE GUARANTOR'S RIGHTS

1216. Terms of the guarantee. Contracts of guarantee often contain provisions which entitle the creditor to vary the principal contract, give time to or release the principal debtor, release security or other guarantors, or otherwise act in a way which would discharge the guarantor in equity[1], while nevertheless preserving the guarantor's liability under the guarantee. Such provisions, if on their true construction they cover the events which have happened[2], are effective to preserve the guarantor's liability to the creditor[3].

Provisions of this kind in a contract of guarantee, which merely negate the equitable protections that the guarantor would otherwise enjoy, are probably outside the ambit of the Unfair Contract Terms Act 1977[4]. However, to the extent that the terms of the guarantee go further and seek to exclude the creditor's liability for a breach of contract[5] or of a common law duty[6], they will be subject to the 1977 Act[7].

1 See PARA 1214.

2 Eg in *Dowling v Ditanda Ltd* (1975) 236 Estates Gazette 485, Oliver J held that the terms of the guarantee preserving the guarantor's liability were (arguably) not wide enough to cover a surrender of the leasehold interest which formed the security for the principal debt, where the guarantee also contained an express provision for the transfer of the charge to the guarantor if he paid the money outstanding under the charge and the surrender constituted a breach of that term. In *Burnes v Trade Credits Ltd* [1981] 2 All ER 122, [1981] 1 WLR 805, PC, clauses extending the guarantee to cover 'any further advance' and entitling the creditor to grant time 'or any other indulgence or consideration' to the principal debtor, were held not to permit an increase in the rate of interest granted as the price of an extension of time for payment of the principal sum. Cf *Croydon Commercial Gas Co v Dickinson* (1876) 1 CPD 707; on appeal (1876) 2 CPD 46, CA, where a clause permitting the creditor to extend a 14–day period of credit was held not to authorise an extension granted after the 14–day period had already expired; and *Trade Indemnity Co Ltd v Workington Harbour and Dock Board* [1937] AC 1 at 21, [1936] 1 All ER 454 at 463, HL, per Lord Atkin, where a clause authorising 'alteration' was held not to permit fundamental changes to the nature or location of the guaranteed works.

3 *Perry v National Provincial Bank of England* [1910] 1 Ch 464, CA. See also *Cowper v Smith* (1838) 4 M & W 519; *Kearsley v Cole* (1846) 16 M & W 128; *Union Bank of Manchester Ltd v Beech* (1865) 3 H & C 672; *Ward v National Bank of New Zealand* (1883) 8 App Cas 755 at 762–763, PC; *Yates v Evans* (1892) 61 LJQB 446 at 448; *Rouse v Bradford Banking Co* [1894] 2 Ch 32, CA; affd [1894] AC 586, HL; *Metropolitan Bank of England and Wales v Coppee* (1895) 12 TLR 129; on appeal (1896) 12 TLR 258, CA; *British Motor Trust Co Ltd v Hyams* (1934) 50 TLR 230; and *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536 at 542–543, [1989] 3 All ER 839 at 840, PC, where Lord Templeman, having set out the provisions of the guarantee which provided that the guarantor's liability should not be affected by conduct of this kind on the part of the creditor, observed that 'the guarantor does not and cannot impugn the validity of the provisions of the guarantee'. If the clause preserving the guarantor's liability itself contains any conditions (such as notification to the guarantor), the clause will be ineffective unless those conditions are complied with: *Midland Counties Motor Finance Co Ltd v Slade* [1951] 1 KB 346, [1950] 2 All ER 821, CA.

4 Ie the Unfair Contract Terms Act 1977 ss 2, 3. The creditor commits no breach of contract or breach of a common law duty of care merely by acting in such a way as to discharge the guarantor in equity: see PARA 1215. See also Goode *Legal Problems of Credit and Security* (2nd Edn) pp 193–194; and CONTRACT.

5 Eg where it is a condition of the guarantee that there are to be other guarantors or other security, and the creditor in breach of that term releases those other guarantors or that other security: see eg the terms contended for by the guarantors in *Byblos Bank SAL v Al-Khudhairy* [1987] BCLC 232, CA, and *TCB Ltd v Gray* [1987] Ch 458n, [1988] 1 All ER 108, CA. However, an express term entitling the creditor to release security at will may have the effect of preventing the implication of an inconsistent term requiring the maintenance of that security: *TCB Ltd v Gray*.

6 See eg *Standard Chartered Bank Ltd v Walker* [1982] 3 All ER 938, [1982] 1 WLR 1410, CA.

7 *Standard Chartered Bank v Walker* [1982] 3 All ER 938 at 943, [1982] 1 WLR 1410 at 1416, CA, per Lord Denning MR. See Goode *Legal Problems of Credit and Security* (2nd Edn) pp 193–194.

1217. Principal debtor clauses. Guarantees also often contain a provision constituting the guarantor a principal debtor[1]. This may sometimes be in the form of a clause stating that the creditor is to be at liberty to act as though the guarantor were a principal debtor, for the purpose of waiving such of guarantor's rights as would be inconsistent with that status[2]. Sometimes, the clause states that any money not recoverable from the guarantor as a guarantor shall nevertheless be recoverable from him as sole or principal debtor in respect of it, for the purpose of preserving the guarantor's liability should the principal obligation be void or unenforceable for any reason[3].

A principal debtor clause of the first type will, if appropriately worded, be effective to preserve the liability of the guarantor in circumstances where the guarantor would otherwise have been discharged in equity[4]. Such a clause will not usually convert what is in reality a guarantee into an indemnity, so as to preserve the guarantor's liability in the event that the principal obligation is void or unenforceable[5]. However, depending upon its wording, it may do so, either generally or upon the happening of certain events[6].

1 As to the potential effect of the inclusion of such a clause on such matters as the need for a demand (see PARA 1105), set-off in insolvency (see PARA 1126), and the accrual of the cause of action for the purposes of limitation (see PARA 1181) see *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 3 All ER 358 at 366–367, [1975] 1 WLR 1474 at 1483 per Walton J; *National Westminster Bank plc v Skelton* [1993] 1 All ER 242 at 251, [1993] 1 WLR 72n at 80, CA, per Slade LJ; *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769, CA; and cf *Tate v Crewdson* [1938] Ch 869, [1938] 3 All ER 43.

2 For an example see the clause considered in *National Westminster Bank plc v Riley* [1986] BCLC 268 at 274, CA.

3 For an example see the clause recited in *Byblos Bank SAL v Al-Khudhairy* [1987] BCLC 232 at 238, CA.

4 See *Greenwood v Francis* [1899] 1 QB 312, CA; *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255; *National Westminster Bank plc v Riley* [1986] BCLC 268, CA.

5 *Heald v O'Connor* [1971] 2 All ER 1105 at 1110, [1971] 1 WLR 497 at 503 per Fisher J. Cf *Coutts & Co v Browne-Lecky* [1947] KB 104, [1946] 2 All ER 207. The actual decision in *Coutts & Co v Browne-Lecky* has now been reversed by statute: see the Minors' Contracts Act 1987 s 2; and PARA 1030. See also *Coutts & Co v Stock* [2000] 2 All ER 56 at 64–65, obiter per Lightman J (the clearest language is required to impose on a guarantor liabilities of the principal debtor in cases where statute has decreed that the liabilities of the principal debtor are to be void).

6 See *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255, where Lloyd J held that a short clause declaring that 'my/our liability hereunder shall be as that of principal debtors' had the effect of turning the signatory into a principal debtor, not from the start, but in certain events, such as the principal debtor ceasing to be liable, and stated that although a principal debtor clause did not automatically convert every guarantee into an indemnity, its operation was not to be confined to the consequences of giving time or other indulgence to the principal debtor.

C. RELEASE OF THE PRINCIPAL DEBTOR

1218. The principle. A guarantor is discharged if the creditor, without his consent[1], unconditionally[2] releases the principal debtor[3]. The reason for this principle is sometimes stated to be simply that the release extinguishes the principal obligation[4]. It is also sometimes put on the basis that the guarantor's right to pay the guaranteed debt and after paying it to sue the principal debtor in the name of the creditor[5] is thereby interfered with[6]. Another, perhaps inconsistent, reason sometimes given for the rule is that it would be a fraud on the principal debtor for the creditor to release him from liability if the creditor were then able to proceed against the guarantor, who, in his turn, might sue the principal debtor and thus render the alleged release nugatory[7].

The creditor's acceptance of the principal debtor's repudiatory breach of the principal contract, although it has the effect of discharging the principal debtor from his primary obligation further to perform the principal contract, is not a release of the principal debtor for the purposes of this principle: for there is substituted by law a secondary obligation upon the principal debtor, also arising from the principal contract, to pay to the creditor a sum of money to compensate him for the loss which he has sustained as a result of the failure to perform the primary obligation[8].

1 The guarantee will often contain provisions designed to preserve the liability of the guarantor in these circumstances. Such provisions, if appropriately worded, are effective: see PARAS 1216–1217.

2 The guarantor may not be released if the 'release' of the principal debtor takes the form of a mere covenant not to sue, or is made subject to the creditor's express reservation of his rights against the guarantor: see PARA 1222.

3 *Mahant Singh v U Ba Yi* [1939] AC 601 at 606, PC. See also *Burke's Case* (circa 1780) cited in 2 Bos & P 62; *Law v East India Co* (1799) 4 Ves 824; *Webb v Hewitt* (1857) 3 K & J 438; *Re Natal Investment Co, Nevill's Case* (1870) 6 Ch App 43; *Cragoe v Jones* (1873) LR 8 Exch 81; *Lowes v Maughan and Fearon* (1884) Cab & El 340; *Commercial Bank of Tasmania v Jones* [1893] AC 313, PC; *Perry v National Provincial Bank of England* [1910] 1 Ch 464, CA.

4 See eg *Commercial Bank of Tasmania v Jones* [1893] AC 313 at 316, PC.

5 As to these rights see PARAS 1132, 1138 et seq.

6 *Holme v Brunskill* (1878) 3 QBD 495 at 505, CA, per Cotton LJ. Cf *Samuell v Howarth* (1817) 3 Mer 272 at 279 per Lord Eldon LC; *Polak v Everett* (1876) 1 QBD 669 at 674, CA, per Blackburn J; *Mahant Singh v U Ba Yi* [1939] AC 601 at 606–607, PC. See also *Moschi v Lep Air Services Ltd* [1973] AC 331 at 348, [1972] 2 All ER 393 at 401, HL, where Lord Diplock states that the reason for the rule is to prevent the guarantor being deprived of his right in equity to compel the debtor to perform his own obligation to the creditor.

7 *Re Natal Investment Co, Nevill's Case* (1870) 6 Ch App 43 at 47 per Mellish LJ. See also *Mahant Singh v U Ba Yi* [1939] AC 601 at 607, PC.

8 *Moschi v Lep Air Services Ltd* [1973] AC 331, [1972] 2 All ER 393, HL.

1219. Express release. A guarantor is discharged where a release to the principal debtor is executed, even by one only of two partners to whom the guarantee is given, if it is in pursuance of an agreement with the principal debtor entered into by both partners[1]. A voluntary deed releasing the principal debtor in like manner as if he had obtained his discharge in bankruptcy frees the guarantor[2], as does also the execution by the creditor, as a trustee, of a deed of assignment releasing the principal debtor[3], unless (1) the guarantee otherwise provides[4]; or (2) the deed releasing the principal debtor itself contains a reservation of remedies against the guarantor[5], thereby reducing it to a mere covenant not to sue[6].

A guarantor for payment of a composition to creditors is discharged from liability to a particular creditor who, without his knowledge or consent, obtains

from the compounding debtor an agreement binding the compounding debtor to pay the creditor's debt in full, as such a transaction avoids both the original debt and the composition[7].

1 *Hawkshaw v Parkins* (1819) 2 Swan 539.
2 *Cragoe v Jones* (1873) LR 8 Exch 81; and see *Mayhew v Boyes* (1910) 103 LT 1, CA, and the cases there cited. Contrast *Browne v Carr* (1831) 7 Bing 508.
3 *Teede v Johnson* (1856) 11 Exch 840.
4 See PARAS 1216–1217.
5 *Kearsley v Cole* (1846) 16 M & W 128; *Keyes v Elkins* (1864) 5 B & S 240; *Bateson v Gosling* (1871) LR 7 CP 9; *Davidson v M'Gregor* (1841) 8 M & W 755; *Boultbee v Stubbs* (1811) 18 Ves 20 at 22; *Re Slade, ex p Carstairs* (1820) Buck 560; *Re Renton, ex p Glendinning* (1819) Buck 517 at 520.
6 *Maltby v Carstairs* (1828) 1 Man & Ry KB 549; *North v Wakefield* (1849) 13 QB 536; *Nichols v Norris* (1831) 3 B & Ad 41; *Re Whitehouse, Whitehouse v Edwards* (1887) 37 ChD 683 at 694 per Stirling J; *Lindsay v Lord Downes* (1840) 2 I Eq R 307; *Green v Wynn* (1869) 4 Ch App 204 at 206 per Lord Hatherley LC; *Currey v Armitage* (1858) 6 WR 516 (Lord Campbell CJ); *Bateson v Gosling* (1871) LR 7 CP 9; *Webb v Hewitt* (1857) 3 K & J 438; *Kearsley v Cole* (1846) 16 M & W 128; *Vorley v Barrett* (1856) 1 CBNS 225; *Jones & Co v Whitaker* (1887) 57 LT 216, CA; *Muir v Crawford* (1875) LR 2 Sc & Div 456, HL. See PARA 1222.
7 *Mayhew v Boyes* (1910) 103 LT 1, CA. As to compositions see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 863.

1220. Fraud. When the release of the principal debtor by the creditor is accomplished by means of a fraud on the part of the principal debtor[1], the guarantor, if he has given no consideration, is not discharged even though he is no party to the fraud, upon the general principle that a volunteer cannot avail himself of what has been obtained by the fraud of another[2].

1 *Scholefield v Templer* (1859) 4 De G & J 429; affg on this point the decision of Page Wood V-C, as reported in 28 LJCh 452.
2 *Scholefield v Templer* (1859) 4 De G & J 429 at 433–434; and see *Huguenin v Baseley* (1807) 14 Ves 273; *Re McCallum, McCallum v McCallum* [1901] 1 Ch 143, CA.

1221. Release may be implied. A guarantor is also discharged from liability where the release of the principal debtor is not express, but results as a legal consequence from some transaction. Thus, a guarantor for payment of instalments under a hire purchase agreement is discharged if, before having recourse to him, the creditor seizes the goods and thereby determines the agreement[1]. He is also discharged by the acceptance by the creditor of a second security in discharge of the original one[2], or by the substitution of a security for the personal liability of the principal debtor[3]. However, the mere acceptance of additional security from the principal debtor will not have this effect[4] unless there is an agreement to give time or the intention of the parties is manifestly that the original security is not to remain in force[5].

1 *Hewison v Ricketts* (1894) 63 LJQB 711; and see *Midland Motor Showrooms Ltd v Newman* [1929] 2 KB 256, CA; *Unity Finance Ltd v Woodcock* [1963] 2 All ER 270, [1963] 1 WLR 455. See CONSUMER CREDIT vol 9(1) (Reissue) PARA 36.
2 *Clarke v Henty* (1838) 3 Y & C Ex 187; and see *Tatum v Evans* (1885) 54 LT 336; *Boaler v Mayor* (1865) 19 CBNS 76. An agreement between a bond debtor and his creditor that the creditor takes all the debtor's property and pays the other creditors so much in the pound operates as a satisfaction of the bond debt: *Webb v Hewitt* (1857) 3 K & J 438. See also *Skip v Edwards* (1744) 9 Mod Rep 438.
3 *Lowes v Maughan and Fearon* (1884) Cab & El 340.
4 *Twopenny v Young* (1824) 3 B & C 208; *Eyre v Everett* (1826) 2 Russ 381; *Wyke v Rogers* (1852) 1 De GM & G 408; and see *Pearl v Deacon* (1857) as reported in 26 LJCh 761.

5 *Overend, Gurney & Co (liquidators) v Oriental Financial Corpn (liquidators)* (1874) LR 7 HL 348 at 361 per Lord Cairns LC; *Twopenny v Young* (1824) 3 B & C 208 at 211 per Bayley J; *Munster and Leinster Bank v France* (1889) 24 LR Ir 82, CA. Where, therefore, a principal and guarantor are indebted on the same bond, a dealing with the principal by considering him as a debtor in another sum of money, or on another security, will not discharge the guarantor in the first obligation: *Eyre v Everett* (1826) 2 Russ 381 at 384 per Lord Eldon LC; cf *Pearl v Deacon* (1857) as reported in 26 LJCh 761.

1222. Covenant not to sue principal debtor. A mere covenant not to sue the principal debtor will not discharge the guarantor, especially if it is qualified by an express reservation of remedies against the guarantor[1]. But there can be no effectual reservation of rights against a guarantor where the transaction between the creditor and the principal debtor amounts to a novation[2] or satisfaction of the debt guaranteed, and is accompanied by a release to the principal debtor from further liability, whether past or future[3].

1 *Price v Barker* (1855) 4 E & B 760; see *Re Natal Investment Co, Nevill's Case* (1870) 6 Ch App 43 at 47 per Mellish LJ; *Green v Wynn* (1869) 4 Ch App 204; *Bateson v Gosling* (1871) LR 7 CP 9; *Keyes v Elkins* (1864) 5 B & S 240; *North v Wakefield* (1849) 13 QB 536. Such a reservation should appear on the face of the instrument, and oral evidence of such a reservation is not in general admissible (*Cocks v Nash* (1832) 9 Bing 341; *Mercantile Bank of Sydney v Taylor* [1893] AC 317, PC; *Re Renton, ex p Glendinning* (1819) Buck 517 at 520), although the rule is not without exceptions (*Re Blakely, ex p Harvey, ex p Springfield* (1854) 4 De GM & G 881; *Wyke v Rogers* (1852) 1 De GM & G 408; *Norman v Bolt* (1883) Cab & El 77); and see the text and notes 2–3.

2 *Commercial Bank of Tasmania v Jones* [1893] AC 313, PC. As regards releases of contractual rights and covenants not to sue see CONTRACT vol 9(1) (Reissue) PARA 1053.

3 *Webb v Hewitt* (1857) 3 K & J 438 at 445; *Mahant Singh v U Ba Yi* [1939] AC 601 at 607, PC. See also *Cheetham v Ward* (1797) 1 Bos & P 630; *Nicholson v Revill* (1836) 4 Ad & El 675; *Kearsley v Cole* (1846) 16 M & W 128 at 136, explaining *Ex p Gifford* (1802) 6 Ves 805 at 807 et seq per Lord Eldon LC; *Green v Wynn* (1868) LR 7 Eq 28 at 32; on appeal (1869) 4 Ch App 204 at 207; *Bateson v Gosling* (1871) LR 7 CP 9 at 14 per Willes J; *Muir v Crawford* (1875) LR 2 Sc & Div 456, HL.

1223. When guarantor is not discharged by release of principal debtor. A release of the principal debtor by the creditor will not discharge the guarantor if he has ceased to be a guarantor and become himself a principal debtor[1], or has previously paid part of the debt and given a security for the remainder[2], or has, in consideration of an extension of time to himself by the creditor, bound himself without the principal debtor's concurrence, to pay the whole sum for which he was originally guarantor only[3], or has expressly agreed to remain liable, so that there is then no ground for the presumption that he is impliedly discharged[4].

Moreover, where the whole guaranteed debt has not been discharged the guarantor may, where the guarantee is appropriately drafted, remain liable in respect of the undischarged balance even though the principal debtor has, to that extent, been released by the creditor[5].

1 *Reade v Lowndes* (1857) 23 Beav 361; affd 30 LTOS 110, CA.

2 *Hall v Hutchons* (1833) 3 My & K 426.

3 *Defries v Smith* (1862) 10 WR 189.

4 *Cowper v Smith* (1838) 4 M & W 519; *Union Bank of Manchester Ltd v Beech* (1865) 3 H & C 672; *Metropolitan Bank of England and Wales v Coppee* (1896) 12 TLR 258, CA; *Perry v National Provincial Bank of England* [1910] 1 Ch 464, CA.

5 *Perry v National Provincial Bank of England* [1910] 1 Ch 464 at 478, CA, per Buckley LJ, where by the instrument under which the guarantee arose the creditors had full powers to vary, exchange or release securities held by them, and to give time to compound and make any arrangement with the principal debtor without discharging the guarantor. See PARAS 1216–1217.

D. GIVING TIME TO THE PRINCIPAL DEBTOR

1224. The principle. A guarantor is discharged if the creditor, without his consent[1], and without expressly reserving his rights against the guarantor[2], enters into a binding arrangement[3] with the principal debtor to give him time to perform the principal obligation[4]. Different reasons, given by different judges, may be found for this principle[5]. The main reason is usually stated to be that the guarantor's right at any time to require the creditor to call upon the principal debtor to pay off the guaranteed debt[6], or himself to pay the debt and after paying it to sue the principal debtor in the name of the creditor[7], is thereby interfered with[8]. Another, though inconsistent, reason sometimes given for the rule is that it would be a fraud on the principal debtor if the creditor, after making such an agreement, were able to sue the guarantor because the guarantor could then claim from the principal debtor in breach of the agreement to give time[9].

Under this principle, the guarantor is released whether or not he is prejudiced by the giving of time[10]. The release extends not only to the guarantor's personal liability but also to any security he has given[11].

1 The guarantee will often expressly authorise the creditor to give time to the principal debtor without discharging the guarantor. Such provisions, if appropriately worded, are effective to preserve the guarantor's liability: see PARAS 1216–1217.

2 See PARA 1231.

3 *Clarke v Birley* (1889) 41 ChD 422; *Samuell v Howarth* (1817) 3 Mer 272 at 278 per Lord Eldon LC; and see *Creighton v Rankin* (1840) 7 Cl & Fin 325, HL.

4 *Mahant Singh v U Ba Yi* [1939] AC 601 at 606, PC. See also *Burke's Case* (circa 1780) cited in 2 Bos & P 62; *Nisbet v Smith* (1789) 2 Bro CC 579; *Rees v Berrington* (1795) 2 Ves 540; *Wright v Simpson* (1802) 6 Ves 714 at 734; *Samuell v Howarth* (1817) 3 Mer 272 at 278 per Lord Eldon LC; *Eyre v Bartrop* (1818) 3 Madd 221; *Governor & Co of Bank of Ireland v Beresford* (1818) 6 Dow 233, HL; *Hawkshaw v Parkins* (1819) 2 Swan 539 at 546 per Lord Eldon LC; *Lewis v Jones* (1825) 4 B & C 506 at 515; *Archer v Hale* (1828) 4 Bing 464; *Browne v Carr* (1831) 7 Bing 508 at 515 per Tindal CJ; *Combe v Woolf* (1832) 8 Bing 156; *Howell v Jones* (1834) 1 Cr M & R 97; *Blake v White* (1835) 1 Y & C Ex 420; *Oakeley v Pasheller* (1836) 10 Bli NS 548, HL; *Clarke v Henty* (1838) 3 Y & C Ex 187; *Creighton v Rankin* (1840) 7 Cl & Fin 325 at 346; *Isaac v Daniel* (1846) 8 QB 500; *Moss v Hall* (1850) 5 Exch 46; *Newton v Chorlton* (1853) 2 Drew 333 at 338; *Davies v Stainbank* (1855) 6 De GM & G 679; *Pooley v Harradine* (1857) 7 E & B 431; *Greenough v McClelland* (1860) 2 E & E 429, Ex Ch; *Bailey v Edwards* (1864) 4 B & S 761; *Ewin v Lancaster* (1865) 12 LT 632 at 633; *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corpn Ltd (liquidators)* (1874) LR 7 HL 348; *Swire v Redman and Holt* (1876) 1 QBD 536 at 541–542; *Croydon Commercial Gas Co v Dickinson* (1876) 2 CPD 46; *Polak v Everett* (1876) 1 QBD 669 at 673, CA; *Holme v Brunskill* (1878) 3 QBD 495 at 504–506 per Blackburn J; *Ward v National Bank of New Zealand* (1893) 8 App Cas 755 at 763, PC; *Rouse v Bradford Banking Co* [1894] AC 586 at 590, HL, per Lord Herschell LC; *Bolton v Buckenham* [1891] 1 QB 278, CA; *Moschi v Lep Air Services Ltd* [1973] AC 331 at 348, [1972] 2 All ER 393 at 401, HL, per Lord Diplock; *Unigate Ltd v Bentley* [1986] CA Transcript 1055.

5 *Rouse v Bradford Banking Co* [1894] 2 Ch 32 at 75, CA, per AL Smith LJ; affd [1894] AC 586, HL.

6 As to this right see PARA 1131.

7 As to these rights see PARAS 1132, 1138 et seq.

8 *Rouse v Bradford Banking Co* [1894] 2 Ch 32 at 75, CA, per AL Smith LJ; affd [1894] AC 586, HL. See also *Samuell v Howarth* (1817) 3 Mer 272 at 279 per Lord Eldon LC; *Browne v Carr* (1831) 7 Bing 508 at 515 per Tindal CJ ('his remedy against the principal may become more uncertain by postponement'); *Swire v Redman and Holt* (1876) 1 QBD 536 at 541–542; *Polak v Everett* (1876) 1 QBD 669 at 674, CA, per Blackburn J; *Holme v Brunskill* (1878) 3 QBD 495 at 505, CA, per Cotton LJ; *Mahant Singh v U Ba Yi* [1939] AC 601 at 606–607, PC; *Moschi v Lep Air Services Ltd* [1973] AC 331 at 348, [1972] 2 All ER 393 at 401, HL, per Lord Diplock.

9 *Mahant Singh v U Ba Yi* [1939] AC 601 at 607, PC. See also *Newton v Chorlton* (1853) 2 Drew 333 at 338 per Page Wood V-C; *Oakeley v Pasheller* (1856) 10 Bli NS 548, HL; *Re Natal*

Investment Co, Nevill's Case (1870) 6 Ch App 43 at 47 per Mellish LJ; *Oriental Financial Corpn v Overend, Gurney & Co* (1871) 7 Ch App 142 at 150 per Lord Hatherley LC; affd sub nom *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corpn Ltd (liquidators)* (1874) LR 7 HL 348.

10 'If this right be suspended for a day or an hour, not injuring the guarantor to the value of one farthing, and even positively benefiting him, nevertheless, by the principles of equity, he is discharged': *Polak v Everett* (1876) 1 QBD 669 at 674, CA, per Blackburn J. See also *Ex p Gifford* (1802) 6 Ves 805 at 806; *Ex p Wilson* (1805) 11 Ves 410 at 411; *Samuell v Howarth* (1817) 3 Mer 272 at 279 ('even though manifestly for the benefit of the guarantor'); *Re Renton, ex p Glendinning* (1819) Buck 517 at 519 per Lord Eldon LC; *Blest v Brown* (1862) 4 De GF & J 367; *Petty v Cooke* (1871) LR 6 QB 790 at 795; *Swire v Redman and Holt* (1876) 1 QBD 536 at 541–542; *Holme v Brunskill* (1878) 3 QBD 495, CA; *Greenwood v Francis* [1899] 1 QB 312 at 320, CA, per AL Smith LJ; *R v Herron and Montgomery* [1903] 2 IR 474. The absolute nature of this principle has been the subject of some judicial criticism: see eg *Petty v Cooke* above at 795; *Polak v Everett* above at 674. There are dicta in *Croydon Commercial Gas Co v Dickinson* (1876) 2 CPD 46 at 51, CA, per Amphlett JA, which suggest that the ordinary rule concerning variations (that they will not discharge the guarantor where they are clearly insubstantial or obviously cannot prejudice him: see PARA 1235 text and note 8) can be applied to cases of giving time. However, the consensus of authority is to the effect that the rule regarding the giving of time is absolute: 'though this seems, if it may be permitted to speak in such terms of the doctrine sanctioned by very great lawyers, consistent neither with justice nor common sense, it has been long so firmly established that it can only be altered by the legislature': *Swire v Redman and Holt* above at 542.

11 *Bolton v Salmon* [1891] 2 Ch 48; *Smith v Wood* [1929] 1 Ch 14 at 23–24, 27–28, CA.

1225. When the principle is applicable. The principle set out in the previous paragraph applies only to cases where, at the moment when the agreement to give time is made, the parties occupy the relation of creditor, principal debtor and guarantor[1]. The giving of time will not discharge someone who is not a guarantor but merely occupies a position of secondary liability[2].

A guarantor will be discharged under this principle, whether he originally contracted with the creditor as a guarantor, or originally contracted as a co-debtor and only became a guarantor by subsequent agreement between himself and his co-debtor[3], provided that the creditor had notice of the guarantee at the time the agreement to give time was made[4]. Conversely, the principle will not apply to discharge a person who, although he originally contracted as a guarantor, had entered into an arrangement with the creditor by which he became a principal debtor prior to the giving of time[5].

1 *British Airways Board v Parish* [1979] 2 Lloyd's Rep 361, CA. See also the cases cited in notes 2–5 and in PARA 1224 note 4.

2 *Way v Hearn* (1862) 11 CBNS 774; *British Airways Board v Parish* [1979] 2 Lloyd's Rep 361, CA (director liable for company's debt because full name of company not stated on company cheque signed by him not discharged by agreement between creditor and company to give time).

3 As to the rights which arise in these circumstances see generally PARA 1015.

4 *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corpn Ltd (liquidators)* (1874) LR 7 HL 348; *Oakeley v Pasheller* (1836) 10 Bli NS 548, HL; *Pooley v Harradine* (1857) 7 E & B 431; *Maingay v Lewis* (1870) IR 5 CL 229, Ex Ch; *Rouse v Bradford Banking Co* [1894] AC 586 at 591, 593, HL; *Leicestershire Banking Co Ltd v Hawkins* (1900) 16 TLR 317, DC; *Goldfarb v Bartlett and Kremer* [1920] 1 KB 639. Before the introduction of equitable pleas it was doubtful whether a guarantor could at law set up as a defence to an action on a guarantee that he was discharged by time given to the principal debtor, where the original contract between him and the creditor was not one of guarantee: *Manley v Boycot* (1853) 2 E & B 46; *Re Black, ex p Graham* (1854) 5 De GM & G 356; *Strong v Foster* (1855) 17 CB 201; *Taylor v Burgess* (1859) 5 H & N 1; *Lawrence v Walmsley* (1862) 12 CBNS 799 at 807; *York City and County Banking Co v Bainbridge* (1880) 43 LT 732. However, the equitable rule now prevails: see the Supreme Court Act 1981 s 49(1); and EQUITY vol 16(2) (Reissue) PARA 500.

5 *Reade v Lowndes* (1857) 23 Beav 361; affd 30 LTOS 110, CA.

1226. The binding arrangement. The agreement giving time must be really binding and capable of enforcement[1], for valuable consideration[2] and made with the principal debtor[3]; and it must actually give time[4]. An agreement that if the creditor forbears to require due repayment of a loan the debtor will thereafter pay a higher rate of interest is not an agreement to give time if the creditor retains the option as to whether or not he will require such repayment[5]. The agreement to give time need not, however, be express[6], and may be written or oral, whether the guaranteed contract is made by deed[7] or not.

1 *Clarke v Birley* (1889) 41 ChD 422; *Rouse v Bradford Banking Co* [1894] AC 586 at 594, HL, per Lord Herschell LC. See also *Badnall v Samuel* (1817) 3 Price 521; *Price v Edmunds* (1829) 10 B & C 578; *Vernon v Turley* (1836) 1 M & W 316; *Nicolsons v Burt* (1882) 10 R 121 at 127, Ct of Sess, per Lord Inglis, Lord President.

2 *English v Darley* (1800) 2 Bos & P 61 at 62; *Brickwood v Anniss* (1814) 5 Taunt 614; *Badnall v Samuel* (1817) 3 Price 521; *London Assurance Co v Buckle* (1820) 4 Moore CP 153; *Heath v Key* (1827) 1 Y & J 434; *Philpot v Briant* (1828) 4 Bing 717; *Blake v White* (1835) 1 Y & C Ex 420; *Clarke v Wilson* (1838) 3 M & W 208; *Smith v Winter* (1838) 4 M & W 454; *Bell v Banks* (1841) 3 Man & G 258; *Tucker v Laing* (1856) 2 K & J 745; *Price v Kirkham* (1864) 3 H & C 437; *Petty v Cooke* (1871) LR 6 QB 790. See also *Ladbrook v Hewett* (1832) 2 Dowl 488; *Rayner v Fussey* (1859) 28 LJEx 132; *McManus v Bark* (1870) LR 5 Exch 65.

3 The agreement giving time will not discharge the guarantor if it is made with a stranger (*Lyon v Holt* (1839) 5 M & W 250; *Frazer v Jordan* (1857) 8 E & B 303) or with one of several guarantors (*Clarke v Birley* (1889) 41 ChD 422).

4 *Prendergast v Devey* (1821) 6 Madd 124 at 126; *Pring v Clarkson* (1822) 1 B & C 14; *Jay v Warren* (1824) 1 C & P 532; *Philpot v Briant* (1828) 4 Bing 717; *Price v Edmunds* (1829) 10 B & C 578; *Whitfield v Hodges* (1836) 1 M & W 679; *Tatum v Evans* (1885) 54 LT 336; *Munster and Leinster Bank v France* (1889) 24 LR Ir 82, CA; *Bolton v Buckenham* [1891] 1 QB 278, CA; *Rouse v Bradford Banking Co* [1894] AC 586, HL.

5 *York City and County Banking Co v Bainbridge* (1880) 43 LT 732. Contrast *Burnes v Trade Credits Ltd* [1981] 2 All ER 122, [1981] 1 WLR 805, PC, where no such right was retained, and the guarantor was held to be discharged.

6 *Blake v White* (1835) 1 Y & C Ex 420; *Cross v Sprigg* (1850) 2 Mac & G 113; *Croydon Commercial Gas Co v Dickinson* (1876) 2 CPD 46, CA; *Bolton v Buckenham* [1891] 1 QB 278, CA.

7 This was not the case at law, although it was at equity: *Nisbet v Smith* (1789) 2 Bro CC 579.

1227. What constitutes giving time. The making of a new and valid contract, to which the guarantor does not assent, between the creditor and the principal debtor which extends the period at which, by the original contract between them, the principal debtor was obliged to pay the creditor amounts to a giving of time[1]. Thus, to substitute for payment in one sum payment by instalments amounts to a giving of time[2]. Again, whenever the taking of a new security from the principal debtor by the creditor operates as a giving of time, the guarantor is no longer liable[3], but not where that transaction has no such effect[4]. The guarantor has been held to be discharged where an action of replevin was by agreement referred to arbitration, and, without the consent or privity of the guarantor in the replevin bond, the time for making the award was enlarged[5], or where the creditor sued the principal debtor by direction of the guarantor, but without his knowledge agreed to stay execution[6]. Where a bill has been accepted to the knowledge of the holder for another's accommodation, the acceptor will be discharged if the holder gives time to the party accommodated[7]. The doctrine that where time is given to the principal debtor the guarantor is discharged also applies where the guarantee arises under a promissory note[8].

1 *Howell v Jones* (1834) 1 Cr M & R 97 at 107 per curiam.

2 *Clarke v Henty* (1838) 3 Y & C Ex 187; cf *Bellingham & Co Ltd v Hurley* (1908) Times, 4 April, CA.

3 *Munster and Leinster Bank v France* (1889) 24 LR Ir 82, CA; *Overend, Gurney & Co (liquidators) v Oriental Financial Corpn (liquidators)* (1874) LR 7 HL 348 at 361 per Lord Cairns LC.

4 *Overend, Gurney & Co (liquidators) v Oriental Financial Corpn (liquidators)* (1874) LR 7 HL 348; *Bell v Banks* (1841) 3 Man & G 258; *Twopenny v Young* (1824) 3 B & C 208.

5 *Bowmaker v Moore, Shirreff and Trelfs* (1819) 7 Price 223.

6 *Rees v Berrington* (1795) 2 Ves 540.

7 *Re Acraman, ex p Webster* (1847) De G 414; *Bailey v Edwards* (1864) 4 B & S 761; *Ewin v Lancaster* (1865) 6 B & S 571. *Laxton v Peat* (1809) 2 Camp 185 may therefore be regarded as correct today, although at that time it was probably erroneous (see *Fentum v Pocock* (1813) 5 Taunt 192; *Manley v Boycot* (1853) 2 E & B 46), and it seems that *Kerrison v Cooke* (1813) 3 Camp 362 cannot now be treated as correct.

8 *Manley v Boycot* (1853) 2 E & B 46; *Greenough v McClelland* (1860) 2 E & E 429, Ex Ch; *Taylor v Burgess* (1859) 5 H & N 1; *Bellingham & Co Ltd v Hurley* (1908) Times, 4 April, CA.

1228. Effect of omission to press for payment. If there is no binding agreement to give time, mere omission on the creditor's part to press the principal debtor for payment will not discharge the guarantor[1], even if the debtor subsequently becomes insolvent[2], unless the creditor is bound to use the utmost efforts to obtain payment from the principal debtor before suing the guarantor[3].

1 *Shepherd v Beecher* (1725) 2 P Wms 288; *Peel v Tatlock* (1799) 1 Bos & P 419; *Wright v Simpson* (1802) 6 Ves 714 at 734; *Trent Navigation Co v Harley* (1808) 10 East 34; *Boultbee v Stubbs* (1811) 18 Ves 20 at 22; *Orme v Young* (1815) Holt NP 84; *Samuell v Howarth* (1817) 3 Mer 272 at 278; *Mayhew v Crickett* (1818) 2 Swan 185; *Perfect v Musgrave* (1818) 6 Price 111; *London Assurance Co v Buckle* (1820) 4 Moore CP 153; *Eyre v Everett* (1826) 2 Russ 381; *Goring v Edmonds* (1829) 6 Bing 94; *M'Taggart v Watson* (1836) 3 Cl & Fin 525, HL; *Creighton v Rankin* (1840) 7 Cl & Fin 325 at 346–347, HL; *Dawson v Lawes* (1854) Kay 280; *Black v Ottoman Bank* (1862) 10 WR 871, PC; *Price v Kirkham* (1864) 3 H & C 437 at 441; *Belfast Banking Co v Stanley* (1867) IR 1 CL 693; *Overend, Gurney & Co (liquidators) v Oriental Financial Corpn (liquidators)* (1874) LR 7 HL 348; *York City and County Banking Co v Bainbridge* (1880) 43 LT 732.

2 *Trent Navigation Co v Harley* (1808) 10 East 34.

3 *Holl v Hadley* (1835) 2 Ad & El 758; *Watson v Allcock* (1853) 4 De GM & G 242; *London Guarantee Co v Fearnley* (1880) 5 App Cas 911, HL; *Mountague v Tidcombe* (1705) 2 Vern 518; but see *Musket v Rogers* (1839) 5 Bing NC 728.

1229. Trade custom does not justify giving time. The custom of a trade does not justify the creditor in agreeing to give time to the principal debtor[1]. In the case, however, of a general guarantee against loss in a course of dealing the guarantor is not, apparently, discharged by the creditor taking a bill at one month from the principal debtor in payment of an account for goods supplied, as the principal debtor and creditor are free to arrange the details of their transaction as they see fit, provided these are not at variance with the ordinary custom of merchants[2].

1 *Combe v Woolf* (1832) 8 Bing 156; *Holl v Hadley* (1835) 2 Ad & El 758; *Howell v Jones* (1834) 1 Cr M & R 97.

2 *Stewart, Moir and Muir v Brown* (1871) 9 Macph 763 at 766, Ct of Sess, per Sir James Moncreiff, Lord Justice-Clerk; and see *Allan v Kenning* (1833) 9 Bing 618; *Re Fox, Walker & Co, ex p Bishop* (1880) 15 ChD 400, CA.

1230. Continuing guarantees and severable contracts. In the case of a continuing guarantee, an agreement to give time may only partially relieve the guarantor from liability. Thus, one supply of goods to the principal debtor under such a guarantee at a longer credit than the guarantor has stipulated for will not relieve the guarantor from liability in respect of a past or subsequent supply at the prescribed credit[1]; and where a contract is severable in character, a guarantor

for its performance will still be liable for the fulfilment of so much of the contract as is not affected by the agreement to give time[2].

1 *Bingham v Corbitt* (1864) 34 LJQB 37, Ex Ch.
2 *Croydon Commercial Gas Co v Dickinson* (1876) 2 CPD 46, CA, followed in *Dowden v Levis* (1884) 14 LR Ir 307. See also *Harrison v Seymour* (1866) LR 1 CP 518; *Skillett v Fletcher* (1866) LR 2 CP 469. It is otherwise where the contract is not severable: see *Eyre v Bartrop* (1818) 3 Madd 221; *Midland Motor Showrooms Ltd v Newman* [1929] 2 KB 256, CA, where liability for payments under a hire-purchase agreement was held indivisible so that the creditor's agreement to give time for the payment of one instalment discharged the guarantor. Cf *WR Simmons Ltd v Meek* [1939] 2 All ER 645.

1231. Effect of reserving remedies against guarantor. Even where there is a binding agreement to give time to the principal debtor, the guarantor is not discharged[1] if the remedies against him are expressly reserved[2], with or without his consent or knowledge[3]. Such reservation of remedies may normally be expected to appear on the face of the agreement giving time[4], but sometimes the reservation can be proved by oral evidence[5], although not if such evidence varies the instrument giving time[6].

1 For an explanation of the reason for this see *Webb v Hewitt* (1857) 3 K & J 438 at 442 per Page Wood V-C; and *Boultbee v Stubbs* (1811) 18 Ves 20 at 26 per Lord Eldon LC.
2 *Kearsley v Cole* (1846) 16 M & W 128 at 135–136 per Parke B; *Boaler v Mayor* (1865) 19 CBNS 76 at 83–84; *Close v Close* (1853) 4 De GM & G 176; *Owen and Gutch v Homan* (1853) 4 HL Cas 997 at 1037; *Wyke v Rogers* (1852) 1 De GM & G 408; *Ex p Gifford* (1802) 6 Ves 805 at 808; *Re Renton, ex p Glendinning* (1819) Buck 517 at 519; *Melvill v Glendining* (1816) 7 Taunt 126; *Lindsay v Lord Downes* (1840) 2 I Eq R 307; *Muir v Crawford* (1875) LR 2 Sc & Div 456, HL; *Nichols v Norris* (1831) 3 B & Ad 41.
3 *Kearsley v Cole* (1846) 16 M & W 128 at 135 per Parke B; *Webb v Hewitt* (1857) 3 K & J 438; *Re Renton, ex p Glendinning* (1819) Buck 517; *Boaler v Mayor* (1865) 19 CBNS 76; *Close v Close* (1853) 4 De GM & G 176; *Owen and Gutch v Homan* (1853) 4 HL Cas 997; *Wyke v Rogers* (1852) 1 De GM & G 408; *Bateson v Gosling* (1871) LR 7 CP 9 at 13 per Willes J.
4 *Re Renton, ex p Glendinning* (1819) Buck 517; *Boultbee v Stubbs* (1819) 18 Ves 20 at 22; *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corpn Ltd (liquidators)* (1874) LR 7 HL 348.
5 *Re Blakely, ex p Harvey, ex p Springfield* (1854) 4 De GM & G 881 at 899 per Turner LJ; *Norman v Bolt* (1883) Cab & El 77; and see 4 B & C 515 note (a); but see, contra, *Re Renton, ex p Glendinning* (1819) Buck 517. Oral evidence is admissible to prove that there was a general understanding between the creditor and the principal debtor that the taking of a promissory note should not discharge the guarantor: see *Wyke v Rogers* (1852) 1 De GM & G 408.
6 *Re Renton, ex p Glendinning* (1819) Buck 517 at 520 per Lord Eldon LC; *Mercantile Bank of Sydney v Taylor* [1893] AC 317, PC.

1232. When guarantor is not discharged by giving of time. An agreement between the creditor and the principal debtor that the creditor will not enforce his remedy against the principal debtor until a particular date does not discharge the guarantor if the date in question is earlier than the date when the creditor would otherwise have enforced his remedy[1]. Moreover, a guarantor is not discharged by an agreement giving time where he has himself agreed not to require the principal debtor to relieve him until he has himself been sued[2], and, apparently, an extension of time to the principal debtor permitted by court order, though with the creditor's consent, will not discharge the guarantor[3]. Again, an agreement to give time to the principal debtor will not discharge a guarantor if it is made after the creditor has obtained judgment against the principal debtor and the guarantor[4], or against the guarantor alone[5], or after the guarantor has by agreement with the creditor converted himself into a debtor[6], or if he has agreed in his guarantee[7] or in some other way that time may with impunity be given to the principal debtor[8], or if he subsequently confirms the agreement giving time[9].

1 Cf *Hulme v Coles* (1827) 2 Sim 12.
2 *Rouse v Bradford Banking Co* [1894] 2 Ch 32 at 57, CA, per Lindley LJ; affd [1894] AC 586, HL.
3 *Provincial Bank v Cussen* (1886) 20 ILT 73, CA.
4 *Re A Debtor (No 14 of 1913)* [1913] 3 KB 11.
5 *Jenkins v Robertson* (1854) 2 Drew 351. Cf *Woosnam v Price* (1833) 1 Cr & M 352. Where a creditor has a judgment debt assigned to him by his debtor, he does not necessarily, by giving time to the judgment debtor, become chargeable to his own debtor: *Williams v Price* (1824) 1 Sim & St 581 at 587 per Leach V-C.
6 *Reade v Lowndes* (1857) 23 Beav 361; affd 30 LTOS 110, CA. See also *Strong v Foster* (1855) 17 CB 201.
7 See PARAS 1216–1217. An agreement of this kind is invariably found in standard forms of guarantee.
8 *Yates v Evans* (1892) 61 LJQB 446; *Cowper v Smith* (1838) 4 M & W 519; *Kirkwood v Carroll* [1903] 1 KB 531, CA (where *Yates v Evans* above was approved, and *Kirkwood v Smith* [1896] 1 QB 582 was overruled); see also *Clark v Devlin* (1803) 3 Bos & P 363; *Smith v Winter* (1838) 4 M & W 454; *Tyson v Cox* (1823) Turn & R 395; *Union Bank of Manchester Ltd v Beech* (1865) 3 H & C 672; *Duffy v Orr* (1831) 5 Bli NS 620, HL; cf *Midland Counties Motor Finance Co Ltd v Slade* [1951] 1 KB 346, [1950] 2 All ER 821, CA, where the term in a hire-purchase agreement by which time might be given contained a proviso that the guarantor be informed if any payment was more than 30 days overdue, and on 17 November the debtor was allowed until 30 November to pay the instalment due on 31 October. The guarantor, who was not informed of the non-payment until 28 December, successfully disclaimed liability on the ground that he should have been informed on 30 November.
9 *Mayhew v Crickett* (1818) 2 Swan 185 at 192; *Smith v Winter* (1838) 4 M & W 454; *Phillips v Foxall* (1872) LR 7 QB 666 at 676–677.

E. AGREEMENT TO GIVE TIME TO THE GUARANTOR

1233. Agreement by creditor with debtor to give time to guarantor. A binding agreement by the creditor with the principal debtor, made without the guarantor's consent, to give time to the guarantor discharges the guarantor, as its effect is to alter prejudicially his position by tying the creditor's hands from receiving payment from the guarantor and so enabling the guarantor to sue the principal debtor[1].

1 *Oriental Financial Corpn v Overend, Gurney & Co* (1871) 7 Ch App 142 at 152 per Lord Hatherley LC; affd sub nom *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corpn Ltd (liquidators)* (1874) LR 7 HL 348; and see *Vyner v Hopkins* (1842) 6 Jur 889.

1234. Agreement by creditor with guarantor giving time. A creditor may compound with and give time to a guarantor, or take security from him, without discharging co-guarantors or the principal debtor[1]. Moreover, where by separate contract with the guarantor, made on good consideration and without the concurrence of the principal debtor, the creditor gives the guarantor further time for payment of a bill of exchange accepted by the guarantor, and afterwards the principal debtor is released from his debt by the creditor, the guarantor is not discharged from liability[2].

On the other hand, where there are two co-guarantors and the creditor, after granting a further loan to the principal debtor and taking a new security from him for that and the former loan, gives further time to him and one of the guarantors only without specially reserving the remedy against the other guarantor, that other guarantor is discharged[3].

1 *Ex p Smith* (1713) 1 P Wms 237 at 238 per Lord Harcourt LC; *Bedford v Deakin* (1818) 2 B & Ald 210; *Dunn v Slee* (1817) 1 Moore CP 2.
2 *Defries v Smith* (1862) 10 WR 189. Cf *Clarke v Birley* (1889) 41 ChD 422.
3 *Vyner v Hopkins* (1842) 6 Jur 889.

F. OTHER VARIATIONS OF THE PRINCIPAL CONTRACT

1235. The principle. When considering the effect upon the liability of a guarantor of an agreement between the creditor and the principal debtor to vary the principal contract, the construction of the contract of guarantee is of critical importance, because it is vital to identify the precise nature of the obligation or obligations guaranteed[1].

Where the obligations are those arising under a specific contract between debtor and creditor[2], the terms of the contract giving rise to the obligations guaranteed may sometimes be embodied or incorporated[3] expressly or impliedly[4] in the contract of guarantee[5]. If in such a case the creditor, without the guarantor's consent[6], enters into a binding agreement[7] which varies the principal contract in a way which is not manifestly insubstantial or incapable of prejudicing the guarantor[8], the guarantor will be discharged from his obligations under the contract of guarantee[9]. This general rule is subject to the qualification that where the guarantee is for the performance of several and distinct contracts or duties, a change in one of those contracts or duties will not affect the guarantor's liability as to the rest[10]. Hence a guarantor may be liable for a default which occurred before the variation of the principal contract.

Where on the other hand the guarantee is given in respect of obligations arising out of a contemplated course of dealing without incorporating, expressly or impliedly, the terms of any specific contract, it is open to the creditor to vary the terms applying to the course of dealing so long as that course of dealing remains within the scope of the guarantee[11].

1 *City of London v New Hampshire Insurance Co* (18 January 1991, unreported), QBD, but summarised at (1991) 3 JIBFL 144; revsd on the particular facts of the case sub nom *Mercers Co v New Hampshire Insurance Co* [1992] 3 All ER 57n, sub nom *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 1 WLR 792n, [1992] 2 Lloyd's Rep 365, CA. However, see the comments of Scott LJ in [1992] 2 Lloyd's Rep 365 at 375–376, cited in note 5. For a more recent example of a case where there was a dispute on the facts as to whether a loan agreement had been varied without the guarantor's consent, so as to discharge him, see *Lloyds TSB Bank plc v Hayward* [2002] EWCA Civ 1813, [2002] All ER (D) 161 (Dec), where the Court of Appeal ordered a retrial.

2 This may be evident from the terms of the contract of guarantee itself, where specific reference is made to the contract giving rise to the obligations guaranteed, or from a consideration of the circumstances surrounding the conclusion of the contract of guarantee, where these show that a specific contract was the subject matter of the guarantee: *City of London v New Hampshire Insurance Co* (18 January 1991, unreported), QBD, but summarised at (1991) 3 JIBFL 144; revsd on the particular facts of the case sub nom *Mercers Co v New Hampshire Insurance Co* [1992] 3 All ER 57n, sub nom *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 1 WLR 792n, [1992] 2 Lloyd's Rep 365, CA. See also *Holme v Brunskill* (1878) 3 QBD 495, CA; *Sanderson v Aston* (1873) LR 8 Exch 73 at 76; *Whitcher v Hall* (1826) 5 B & C 269: and cf *Stewart v M'Kean* (1855) 10 Exch 675 at 689–690.

3 Where the terms of the principal contract are incorporated into the contract of guarantee, any breach of them constitutes a breach of the guarantee itself: *Glyn v Hertel* (1818) 8 Taunt 208; *Garrett v Handley* (1825) 4 B & C 664; *Holme v Brunskill* (1878) 3 QBD 495, CA; *Bacon v Chesney* (1816) 1 Stark 192; *Blest v Brown* (1862) 3 Giff 450; on appeal 4 De GF & J 367; *Whitcher v Hall* (1826) 5 B & C 269; *Holme v Brunskill* above at 505 per Cotton LJ. For the effect of breaches of the principal contract see PARA 1242 et seq.

4 The terms of the principal contract will not be treated as impliedly embodied in the guarantee if those terms have not been finalised at the date the guarantee is given: *Wardens etc of Mercers Co v New Hampshire Insurance Co* as reported in [1992] 2 Lloyd's Rep 365 at 370, CA, per Parker LJ, and at 371 per Nolan LJ.

5 *Wardens etc of Mercers Co v New Hampshire Insurance Co* as reported in [1992] 2 Lloyd's Rep 365, CA. However, in *Wardens etc of Mercers Co v New Hampshire Insurance Co* at 375–376, Scott LJ expressed the view that it was unhelpful to speak of the terms of the principal contract

being 'embodied' in the guarantee, and that the vital question in deciding whether the guarantor was discharged by a variation was whether that variation altered the risk that the guarantor had contracted to undertake.

6 The guarantee will often expressly authorise the creditor to vary the principal obligation without discharging the guarantor. Such provisions, if appropriately worded, are effective to preserve the guarantor's liability: see PARAS 1216–1217. It is for the creditor to prove that the guarantor has consented: *Provincial Bank of Ireland v Fisher* [1919] 2 IR 249, HL. See generally PARA 1241.

7 *Price v Kirkham* (1864) 3 H & C 437; *Egbert v National Crown Bank* [1918] AC 903, PC. Cf *Clarke v Birley* (1889) 41 ChD 422; *Samuell v Howarth* (1817) 3 Mer 272 at 278 per Lord Eldon LC; and see *Creighton v Rankin* (1840) 7 Cl & Fin 325, HL.

8 The court will not embark on an inquiry if the insubstantial nature and lack of prejudice to the guarantor is not self-evident: *Holme v Brunskill* (1878) 3 QBD 495 at 505, CA. See also *Rees v Berrington* (1795) 2 Ves 540 at 543 per Lord Loughborough LC ('I cannot try the cause by inquiring what mischief it might have done; for that would go into a vast variety of speculation, upon which no sound principle could be built'); *Hollier v Eyre* (1840) 9 Cl & Fin 1 at 57, HL, per Lord Cottenham; *Newton v Chorlton* (1853) 2 Drew 333 at 339 per Page Wood V-C; *Polak v Everett* (1876) 1 QBD 669 at 674, 677, CA; *Re Darwen and Pearce* [1927] 1 Ch 176. As a guarantor cannot succeed to the owner's rights of seizure of goods under a hire-purchase agreement, he cannot be prejudiced by the alteration of those rights and consequently is not released thereby: *Chatterton v Maclean* [1951] 1 All ER 761.

9 *City of London v New Hampshire Insurance Co* (18 January 1991, unreported), QBD, but summarised at (1991) 3 JIBFL 144; revsd on the particular facts of the case sub nom *Mercers Co v New Hampshire Insurance Co* [1992] 3 All ER 57n, sub nom *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 1 WLR 792n, [1992] 2 Lloyd's Rep 365, CA, applying *Holme v Brunskill* (1878) 3 QBD 495. See also *Rees v Berrington* (1795) 2 Ves 540 at 543 per Lord Loughborough LC; *Eyre v Bartrop* (1818) 3 Madd 221; *Bellingham v Freer* (1837) 1 Moo PCC 333; *Warre v Calvert* (1837) 7 Ad & El 143; *Calvert v London Dock Co* (1838) 2 Keen 638; *Newton v Chorlton* (1853) 2 Drew 333 at 339 per Page Wood V-C; *General Steam-Navigation Co v Rolt* (1858) 6 CBNS 550; *Price v Kirkham* (1864) 3 H & C 437; *Burke v Rogerson* (1866) 12 Jur NS 635; *Stewart, Moir and Muir v Brown* (1871) 9 Macph 763 at 766, Ct of Sess, per Sir James Moncreiff, Lord Justice-Clerk; *Grant v Budd* (1874) 30 LT 319; *Polak v Everett* (1876) 1 QBD 669, CA; *Ward v National Bank of New Zealand* (1883) 8 App Cas 755 at 763, PC; *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA; *Taylor v Bank of New South Wales* (1886) 11 App Cas 596 at 603, PC; *Egbert v National Crown Bank* [1918] AC 903, PC; *Re Darwen and Pearce* [1927] 1 Ch 176; *National Bank of Nigeria Ltd v Awolesi* [1964] 1 WLR 1311, [1965] 2 Lloyd's Rep 389, PC; *Burnes v Trade Credits Ltd* [1981] 2 All ER 122, [1981] 1 WLR 805, PC; *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2005] EWCA Civ 395, [2005] 2 All ER (Comm) 289, [2005] 1 WLR 2497; *Van Der Merwe v IIG Capital LLC* [2007] EWHC 2631 (Ch), [2007] All ER (D) 214 (Nov). See also *Triodos Bank NV v Dobbs (No 2)* [2005] EWCA Civ 630, (2005) Times, 30 May (agreement purporting to be variation was in fact new agreement).

10 *Skillett v Fletcher* (1867) LR 2 CP 469; *Croydon Commercial Gas Co v Dickinson* (1876) 2 CPD 46, CA. Cf *Midland Motor Showrooms Ltd v Newman* [1929] 2 KB 256, CA.

11 *City of London v New Hampshire Insurance Co* (18 January 1991, unreported), QBD, but summarised at (1991) 3 JIBFL 144; revsd on the particular facts of the case sub nom *Mercers Co v New Hampshire Insurance Co* [1992] 3 All ER 57n, sub nom *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 1 WLR 792n, [1992] 2 Lloyd's Rep 365, CA; *Stewart v M'Kean* (1855) 10 Exch 675; *Sanderson v Aston* (1873) LR 8 Exch 73; *National Westminster Bank plc v Riley* [1986] BCLC 268, CA.

1236. Basis of the principle. The basis of the principle that a guarantor is discharged by an agreement between the creditor and the principal debtor which has the effect of varying the guarantee, is that it is the clearest and most evident equity not to carry on any transaction without the privity of the guarantor, who must necessarily have a concern in every transaction with the principal debtor[1], and who cannot as guarantor be made liable for default in the performance of a contract which is not the one the fulfilment of which he has guaranteed[2].

1 *Rees v Berrington* (1795) 2 Ves 540 at 543 per Lord Loughborough LC.

2 *Taylor v Bank of New South Wales* (1886) 11 App Cas 596 at 603, PC. See also *Blest v Brown* (1862) 4 De GF & J 367 per Lord Westbury LC; *Polak v Everett* (1876) 1 QBD 669, CA;

Holme v Brunskill (1878) 3 QBD 495, CA; *Grant v Budd* (1874) 30 LT 319 at 320 per Blackburn J; *Egbert v National Crown Bank* [1918] AC 903 at 908, PC; *Smith v Wood* [1929] 1 Ch 14, CA; and see eg *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2005] EWCA Civ 395, [2005] 2 All ER (Comm) 289 (refinancing agreements between the claimant creditor and the principal debtor discharged the guarantor).

1237. Particular variations. A guarantor for payment of a composition to creditors by the principal debtor is discharged from liability to a particular creditor who, without his consent or knowledge, obtains from the principal debtor an agreement binding the principal debtor to pay the creditor's debt in full[1]. A guarantor for the performance of an agreement which provides that advances are to be made to the principal debtor by means of consignments is discharged from liability if acceptances are substituted for the consignments[2]. A guarantor for payment of an annuity is wholly discharged from liability by the alteration, without his consent, of the time for and terms of its redemption[3]. The forfeiture of shares by a company, by reason of the non-payment of instalments, which the guarantor had guaranteed, releases the guarantor[4]. A guarantor of a particular bank account will be discharged where the bank agrees to open a second account for the principal debtor while the guarantee is still current, thereby making it possible for the principal debtor to make payments into the bank without reducing the guarantor's liability on the guaranteed account[5].

1 *Mayhew v Boyes* (1910) 103 LT 1, CA. As to compositions see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 863.

2 *Bellingham v Freer* (1837) 1 Moo PCC 333. A guarantor to the vendor of ships for payment of the purchase money by the purchasers is discharged from liability by the improper use by the vendor of one of the ships sold, which the vendor had agreed with the purchasers to freight: *Burke v Rogerson* (1866) 12 Jur NS 635. Where the principal contract obliges the creditor to give notice to the principal debtor requiring him to pay, and the creditor fails to give such notice, the guarantor will be discharged even though, owing to the death of the principal debtor, it has become impossible to fulfil this requirement: *Rickaby v Lewis* (1905) 22 TLR 130.

3 *Eyre v Bartrop* (1818) 3 Madd 221. So where a guarantor guarantees the redemption by the principal debtor of shares in a company to which the principal debtor is about to assign his business, and afterwards the mode of redemption is altered without the guarantor's consent and to his prejudice, the guarantor will be discharged: *Polak v Everett* (1876) 1 QBD 669, CA. A guarantee given for the due performance of a shipbuilding contract which stipulates for payment by instalments as certain stages of the work are reached is discharged if the building owner makes advance payments greater than those permitted by the contract: *General Steam-Navigation Co v Rolt* (1858) 6 CBNS 550; *Calvert v London Dock Co* (1838) 2 Keen 638; *Warre v Calvert* (1837) 7 Ad & El 143.

4 *Re Darwen and Pearce* [1927] 1 Ch 176. See also *Guy-Pell v Foster* [1930] 2 Ch 169, CA.

5 *National Bank of Nigeria Ltd v Awolesi* [1964] 1 WLR 1311, [1965] 2 Lloyd's Rep 389, PC.

1238. Release of property pledged. Where a guarantor pledges his personal credit by bond or covenant, and by the same contract also pledges his goods, or mortgages or charges his land, as security for the same debt, any alteration of the contract by the mortgagee and the principal debtor behind the guarantor's back, for example by a consolidation deed, with a fresh covenant for payment of the principal sum and other money subsequently advanced at a later date, will discharge the guarantor from all personal liability and also release the property which he has included in the contract[1].

1 *Bolton v Salmon* [1891] 2 Ch 48. Where, pursuant to a memorandum of charge, several persons deposited the title deeds of their respective properties with the chargee to secure payment to him of money due or to become due to him from a company and respectively charged their respective properties with the payment of those sums, the subsequent release by the chargee of the title deeds of the property of one of the depositors without the consent of the others, so as to enable that depositor to execute a mortgage of his property having priority to the charge, affected the

right of any depositor to have all the properties marshalled so that the burden might fall rateably on the properties charged, and thus increased the risk on the remaining properties, with the result that the other depositors were released from liability: *Smith v Wood* [1929] 1 Ch 14, CA. It is no longer possible to create an equitable charge over land by the mere deposit of title deeds: see MORTGAGE vol 32 (2005 Reissue) PARA 305.

1239. Effect of fraudulent variations. Certain departures from the terms of the principal contract will not discharge the guarantor. Thus, a guarantor cannot claim to be discharged on the ground that his position has been altered by the conduct of the person with whom he has contracted, where that conduct has been caused by the fraudulent act or omission against which the guarantor, by the contract of guarantee, has guaranteed the employer[1] to whom the guarantor owes a duty to see that the principal debtor performs his obligations[2]. Therefore guarantors who have guaranteed that a works contract be well and truly executed will not be discharged by the payment to the contractor of retention money upon a final certificate obtained by the contractor's fraud from the owner of the works, as such fraud is one of the risks covered by and incident to such a guarantee[3].

Nor will a guarantor be discharged from liability where the principal debtor has obtained by fraud an increase of salary from his employers thereby varying the principal contract[4].

1 *Kingston-upon-Hull Corpn v Harding* [1892] 2 QB 494 at 504–505, CA, per Bowen LJ; and see *Bramley Union Guardians v Guarantee Society* (1900) 64 JP 308, CA.
2 *Creighton v Rankin* (1840) 7 Cl & Fin 325, HL.
3 *Kingston-upon-Hull Corpn v Harding* [1892] 2 QB 494, CA; and see *Dawson v Lawes* (1854) Kay 280.
4 *Bramley Union Guardians v Guarantee Society* (1900) 64 JP 308, CA.

1240. Other matters which do not discharge the guarantor. A guarantor who has guaranteed the due performance of a building contract which entitles the employer to superintend the execution of the works will not be discharged by the mere non-exercise of the right of superintendence[1], as a mere omission on the part of an employer holding a guarantee will not discharge a guarantor unless, apparently, it is an omission to do some act which the employer has contracted with the guarantor to do, or to preserve some security to the benefit of which the guarantor is entitled[2].

Where a guarantee for an agent leaves the mode of accounting between him and his principal to the principal's discretion, and the principal, by an agreement with the agent, substitutes for the original method of accounting another of a different but reasonable character, the guarantor will not be discharged[3]; nor will he necessarily be discharged by the employer's acquiescence in an irregular mode of accounting[4], nor by the employer's non-compliance with its byelaws for the examination of its employees' accounts[5], nor by negligence in auditing the accounts, nor by allowing the principal debtor to retain in his hands balances far exceeding the amount permitted by the guarantee bond and principal contract, without payment being required or notice given to the guarantor[6].

A creditor's acceptance of a debtor's wrongful repudiation is not a variation of the contract[7]. Nor is the assignment of a head contract a variation discharging the guarantor of a sub-contract arising under it[8].

In the case of a guarantee, limited as to amount, for the due and regular payment for goods to be supplied to a trader the guarantor is not discharged by a subsequent agreement between the vendors and the trader providing that the trader shall purchase from them all the goods he requires for his business, or in

default pay them a fixed commission on all goods he may purchase elsewhere[9]. An indemnity in respect of all liability to be incurred in giving a bond to the Treasury[10] is applicable to a payment subsequently made by the obligor of the bond to the Treasury for the express purpose of obtaining the cancellation of the bond originally given, where the guarantor's position has not been materially altered by such payment[11].

Where a person has become guarantor for the performance of two things which are separate and distinct, a subsequent variation, without the guarantor's consent, of the principal contract as to one of them only will not relieve the guarantor from liability in respect of the other thing should it not be performed[12].

That which merely deprives the principal debtor of a moral inducement to perform his contract will, it seems, not discharge his guarantor from liability[13].

1 *Kingston-upon-Hull Corpn v Harding* [1892] 2 QB 494, CA.
2 *Kingston-upon-Hull Corpn v Harding* [1892] 2 QB 494 at 508, CA, per Bowen LJ; and see *Clydebank and District Water Trustees v Fidelity and Deposit Co of Maryland* 1915 SC 362; affd 1916 SC (HL) 69.
3 *Stewart v M'Kean* (1855) 10 Exch 675; *Holme v Brunskill* (1878) 3 QBD 495, CA.
4 *Durham Corpn v Fowler* (1889) 22 QBD 394 (rate collector).
5 *Price v Kirkham* (1864) 3 H & C 437.
6 *Creighton v Rankin* (1840) 7 Cl & Fin 325, HL.
7 *Moschi v Lep Air Services Ltd* [1973] AC 331, [1972] 2 All ER 393, HL.
8 *Town of Truro v Toronto General Insurance Co* [1974] SCR 1129, 38 DLR (3d) 1, Can SC.
9 *Stewart and McDonald v Young* (1894) 38 Sol Jo 385.
10 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
11 *Webster v Petre* (1879) 4 ExD 127.
12 *Harrison v Seymour* (1866) LR 1 CP 518 (completion of one ship and repair of another); *Skillett v Fletcher* (1867) LR 2 CP 469, Ex Ch (duties as collector of poor rates and duties as collector of sewers and general rates); and see *Croydon Commercial Gas Co v Dickinson* (1876) 2 CPD 46, CA (agreement to take goods and pay for them monthly held to be severable into separate contracts in respect of each month) (distinguished in *Midland Motor Showrooms Ltd v Newman* [1929] 2 KB 256, CA, where liability under a hire-purchase agreement was held indivisible).
13 *Grant v Budd* (1874) 30 LT 319 at 320 per Blackburn J.

1241. Variation with guarantor's consent. The guarantor is not discharged by any variation of the principal contract made with his consent[1]. The guarantee will often expressly authorise the creditor to vary the principal obligation without discharging the guarantor. Such provisions, if appropriately worded, are effective to preserve the guarantor's liability[2].

The onus of proving that the guarantor has consented is upon the person seeking to enforce the guarantee[3]. The guarantor is not bound to warn the creditor against doing an act which will discharge the guarantee, even though the guarantor knows of the creditor's intention to do the act[4]; nor will the guarantor's mere knowledge of irregularities committed by the creditor in carrying out the principal contract necessarily amount to consent to those irregularities[5].

1 *Woodcock v Oxford and Worcester Rly Co* (1853) 1 Drew 521; and see *Browne v Carr* (1831) 7 Bing 508 at 515–516; *Hollier v Eyre* (1840) 9 Cl & Fin 1 at 52, HL, per Lord Cottenham; *Re Blakely, ex p Harvey, ex p Springfield* (1854) 4 De GM & G 881 at 899 per Turner LJ; *Oakford v European and American Steam Shipping Co* (1863) 1 Hem & M 182; *Swire v Redman and Holt* (1876) 1 QBD 536. After he has been discharged from his contract by the creditor's act, the guarantor may revive his liability by a subsequent promise or consent: see *Phillips v Foxall* (1872) LR 7 QB 666 at 676–677 per Quain J; *Mayhew v Crickett* (1818) 2 Swan 185; *Smith v Winter* (1838) 4 M & W 454.

2 See PARAS 1216–1217.

3 *Provincial Bank of Ireland v Fisher* [1919] 2 IR 249, HL; *General Steam Navigation Co v Rolt* (1858) 6 CBNS 550.

4 *Polak v Everett* (1876) 1 QBD 669 at 673, CA, per Blackburn J; and see *Rees v Berrington* (1795) 2 Ves 540.

5 *Warre v Calvert* (1837) 7 Ad & El 143 at 155 per Littledale J.

G. DEPARTURE BY THE CREDITOR FROM THE PRINCIPAL CONTRACT

1242. The principle. When considering the effect upon the liability of a guarantor of a departure by the creditor from the terms of the principal contract, the construction of the contract of guarantee is of critical importance, because it is vital to identify the precise nature of the obligation or obligations guaranteed[1].

Where the obligations are those arising under a specific contract between debtor and creditor[2], the terms of the contract giving rise to the obligations guaranteed may sometimes be embodied or incorporated[3] expressly or impliedly[4] in the contract of guarantee[5]. Any departure by the creditor from his contract with the guarantor without the guarantor's consent[6], whether it be from the express terms of the guarantee itself[7] or from the embodied terms of the principal contract, which is not obviously and without inquiry quite insubstantial, will discharge the guarantor from liability[8], whether it injures him or not[9], for it constitutes an alteration in the guarantor's obligations.

Where on the other hand the guarantee is given in respect of obligations arising out of a contemplated course of dealing without incorporating, expressly or impliedly, the terms of any specific contract, the guarantor will not be discharged if what is done remains within the scope of the guarantee[10]. Even a breach by the creditor of the terms of the principal contract will not discharge the guarantor, unless it is a repudiatory breach[11].

1 *City of London v New Hampshire Insurance Co* (18 January 1991, unreported), QBD, but summarised at (1991) 3 JIBFL 144; revsd on the particular facts of the case sub nom *Mercers Co v New Hampshire Insurance Co* [1992] 3 All ER 57n, sub nom *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 1 WLR 792n, [1992] 2 Lloyd's Rep 365, CA. However, see the comments of Scott J in [1992] 2 Lloyd's Rep 365 at 375–376, cited in note 5.

2 This may be evident from the terms of the contract of guarantee itself, where specific reference is made to the contract giving rise to the obligations guaranteed, or from a consideration of the circumstances surrounding the conclusion of the contract of guarantee, where these show that a specific contract was the subject matter of the guarantee: *City of London v New Hampshire Insurance Co* (18 January 1991, unreported), QBD, but summarised at (1991) 3 JIBFL 144; revsd on the particular facts of the case sub nom *Mercers Co v New Hampshire Insurance Co* [1992] 3 All ER 57n, sub nom *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 1 WLR 792n, [1992] 2 Lloyd's Rep 365, CA. See also *Holme v Brunskill* (1878) 3 QBD 495, CA; *Sanderson v Aston* (1873) LR 8 Exch 73 at 76; *Whitcher v Hall* (1826) 5 B & C 269: and cf *Stewart v M'Kean* (1855) 10 Exch 675 at 689–690.

3 Where the terms of the principal contract are incorporated into the contract of guarantee, any breach of them constitutes a breach of the guarantee itself: *Glyn v Hertel* (1818) 8 Taunt 208; *Garrett v Handley* (1825) 4 B & C 664; *Holme v Brunskill* (1878) 3 QBD 495, CA; *Bacon v Chesney* (1816) 1 Stark 192; *Blest v Brown* (1862) 3 Giff 450; on appeal 4 De GF & J 367; *Whitcher v Hall* (1826) 5 B & C 269; *Holme v Brunskill* at 505 per Cotton LJ.

4 The terms of the principal contract will not be treated as impliedly embodied in the guarantee if those terms have not been finalised at the date the guarantee is given: *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 2 Lloyd's Rep 365 at 370, CA, per Parker LJ and at 371 per Nolan LJ.

5 *Wardens etc of Mercers Co v New Hampshire Insurance Co* as reported in [1992] 2 Lloyd's Rep 365, CA. However, in *Wardens etc of Mercers Co v New Hampshire Insurance Co* at 375–377, Scott LJ expressed the view that it was unhelpful to speak of the terms of the principal contract being 'embodied' in the guarantee: see further note 11.

6 The guarantee will often expressly authorise the creditor to vary the principal obligation without discharging the guarantor. Such provisions, if appropriately worded, are effective to preserve the guarantor's liability: see PARAS 1216–1217. It is for the creditor to prove that the guarantor has consented: *Provincial Bank of Ireland v Fisher* [1919] 2 IR 249, HL. Cf generally PARA 1241.

7 In *Blest v Brown* (1862) 4 De GF & J 367, the guarantor's engagement was construed by the court as one 'to be answerable for flour supplied in conformity with the requisitions of ' a contract between the debtor (a baker) and a third party. The flour supplied by the principal creditor (a corn factor) did not conform to those requisitions, although it did conform to the terms of the contract between the debtor and the creditor. The guarantor was held to be discharged.

8 *Blest v Brown* (1862) 4 De GF & J 367 at 376 per Lord Westbury LC; *Holme v Brunskill* (1878) 3 QBD 495 at 505–506, CA, per Cotton LJ; *Smith v Wood* [1929] 1 Ch 14 at 22–23, CA, per Lord Hanworth MR; *Re Darwen and Pearce* [1927] 1 Ch 176 at 183–184 per Lawrence J; *Egbert v National Crown Bank* [1918] AC 903 at 908–909, PC; *Vavasseur Trust Co Ltd v Ashmore* [1976] CA Transcript 157; *National Westminster Bank plc v Riley* [1986] BCLC 268 at 275–276, CA; *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 2 Lloyd's Rep 365, CA. In the following cases the guarantor was held not to be discharged, as there had been no real departure from the terms of the guarantee: *Davey v Phelps* (1841) 2 Man & G 300; *Evans v Earle* (1854) 10 Exch 1; *Price v Kirkham* (1864) 3 H & C 437; *Taylor v Bank of New South Wales* (1886) 11 App Cas 596, PC; *Re Wolmershausen, Wolmershausen v Wolmershausen* (1890) 62 LT 541. See also *Egbert v National Crown Bank* above; *Smith v Wood* above. In *Wardens etc of Mercers Co v New Hampshire Insurance Co* above Scott LJ expressed the view that, in cases where the guarantor is a professional compensated guarantor such as a bank or insurance company, binding authority may not prevent the adoption in England of the United States approach, which holds that the guarantor is not discharged absolutely but only pro tanto to the injury to the guarantor's rights.

9 *General Steam-Navigation Co v Rolt* (1858) 6 CBNS 550 at 575. See also *Bowmaker v Moore, Shirreff and Trelfs* (1819) 7 Price 223, Ex Ch; *Whitcher v Hall* (1826) 5 B & C 269; *Wright v Sandars* (1857) 3 Jur NS 504; *Blest v Brown* (1862) 4 De GF & J 367 at 376 per Lord Westbury LC; *Luning v Milton* (1890) 7 TLR 12.

10 *City of London v New Hampshire Insurance Co* (18 January 1991, unreported), QBD, but summarised at (1991) 3 JIBFL 144; revsd without affecting this point sub nom *Mercers Co v New Hampshire Insurance Co* [1992] 3 All ER 57n, sub nom *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 1 WLR 792n, [1992] 2 Lloyd's Rep 365, CA; see also *Stewart v M'Kean* (1855) 10 Exch 675; *Sanderson v Aston* (1873) LR 8 Exch 73; *National Westminster Bank plc v Riley* [1986] BCLC 268, CA.

11 *National Westminster Bank plc v Riley* [1986] BCLC 268 at 275–276, CA; *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 2 Lloyd's Rep 365, CA. As to the right of the innocent party to terminate a contract where the other party has committed a serious or repudiatory breach see CONTRACT vol 9(1) (Reissue) PARA 986 et seq. In *Wardens etc of Mercers Co v New Hampshire Insurance Co* at 376–377, Scott LJ rejected the distinction between embodied and non-embodied terms as unhelpful, and expressed the view that the question whether a guarantor was discharged should turn not on whether the breach was repudiatory, but on the impact of the breach on the risk undertaken; sed quaere.

1243. Particular departures by the creditor. Where a guarantee stipulates that a certain period of credit be given to the principal debtor, this stipulation must be strictly adhered to[1]. If, however, no definite period of credit is prescribed by the guarantee, then a reasonable credit must be given[2], and not merely the strict customary credit of the trade[3]. A guarantor for payment of a bill of exchange to be given for a stated sum of money will not be liable, even for that sum, if the bill is given for a different amount[4], nor in the case of renewed bills unless they substantially correspond with the originals[5]. A guarantor who has agreed to pay whatever another party is made to pay under an insurance policy is not liable for sums paid by that other party under a scheme of arrangement substituted for the policy[6]. A guarantor bond conditioned for payment of a sum to be awarded by the judgment of a court does not extend to a sum awarded under a judgment

obtained by consent[7]. Moreover, a guarantor whose liability is defined by one statute may be wholly discharged if his position is subsequently changed by another statute[8].

However, a guarantor for a customer's account with a bank will not be discharged if the bank commits a non-repudiatory breach of its agreement with the customer, as for example by wrongfully dishonouring a cheque or direct debit[9]. Where a guarantee is given of obligations under a building contract, the creditor's breach by a short delay in giving the principal debtor possession of the site will not discharge the guarantor, where the guarantor had in any event left the creditor and the principal debtor to settle the contractual date for possession[10].

1 *Bacon v Chesney* (1816) 1 Stark 192 at 193 per Lord Ellenborough CJ.
2 *Henton v Paddison* (1893) 68 LT 405.
3 *Simpson v Manley* (1831) 2 Cr & J 12.
4 *Philips v Astling* (1809) 2 Taunt 206; and see *Pickles v Thornton* (1875) 33 LT 658, CA; *Clarke v Green* (1849) 3 Exch 619.
5 *Barber v Mackrell* (1892) 41 WR 341, CA.
6 *Mortgage Insurance Corpn Ltd v Pound* (1894) 64 LJQB 394, CA; affd (1895) 65 LJQB 129, HL.
7 *Tatum v Evans* (1885) 54 LT 336.
8 *Finch v Jukes* [1877] WN 211. For other examples see *Bellairs v Ebsworth* (1811) 3 Camp 53; *Evans v Whyle* (1829) 5 Bing 485; *London Assurance Co v Bold* (1844) 6 QB 514; *Archer v Hudson* (1844) 7 Beav 551; *Mills v Alderbury Union Guardians* (1849) 3 Exch 590; *Blest v Brown* (1862) 3 Giff 450; on appeal 4 De GF & J 367.
9 *National Westminster Bank plc v Riley* [1986] BCLC 268, CA.
10 *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 2 Lloyd's Rep 365, CA.

H. LOSS OF SECURITIES HELD BY CREDITOR

1244. Effect of loss of securities. On paying the guaranteed debt the guarantor is entitled to have all securities held by the creditor[1] for the debt handed over to him by the creditor in exactly the same state and condition in which they were originally received[2], whether they were in existence at the date of the contract of guarantee or came into existence subsequently[3]. To protect this right a guarantor is discharged[4] if the creditor without the guarantor's consent[5] fails to make those securities properly available to the guarantor[6].

This principle will apply whenever the creditor, by reason of what he has done, cannot, on payment by the guarantor, give him the securities in exactly the same condition as they formerly stood in his hands[7]. So the guarantor will be discharged where the creditor loses securities which he had in his possession or power, or permits them to get into the possession of the principal debtor, or fails to perfect them[8].

The guarantor will be wholly discharged if the release or other dealing with the security constitutes a variation of the principal obligation[9], or if the maintenance of the security is a condition of the guarantee[10]. In any other case, the guarantor will be released pro tanto to the extent that his rights have been impaired[11].

1 As to the guarantor's rights to securities held by the creditor in respect of the guaranteed debt see PARA 1141 et seq. These will include securities received by the creditor from co-guarantors: see PARA 1177. Securities held from a co-guarantor may not be wasted: see *Margrett v Gregory* (1862) 6 LT 543.
2 *Pledge v Buss* (1860) John 663 at 667 per Page Wood V-C; *Newton v Chorlton* (1853) 10 Hare 646 at 652 per Page Wood V-C; *Mayhew v Crickett* (1818) 2 Swan 185 at 191 per Lord Eldon LC; *Forbes v Jackson* (1882) 19 ChD 615 at 621–622 per Hall V-C;

Lord Harberton v Bennett (1829) Beat 386; *Pearl v Deacon* (1857) as reported in 26 LJCh 761; *Strange v Fooks* (1863) 4 Giff 408 at 412 per Stuart V-C.

3 See *Pledge v Buss* (1860) John 663; *Campbell v Rothwell* (1877) 47 LJQB 144, not following on this point *Newton v Chorlton* (1853) 10 Hare 646. See also *Forbes v Jackson* (1882) 19 ChD 615 at 619–620.

4 For the extent to which the guarantor is discharged see the text and notes 9–11.

5 The guarantee will often expressly authorise the creditor to deal with or release security without discharging the guarantor. Such provisions, if appropriately worded, are effective to preserve the guarantor's liability: see PARAS 1216–1217. It is for the creditor to prove that the guarantor has consented: *Provincial Bank of Ireland v Fisher* [1919] 2 IR 249, HL.

6 *Wulff v Jay* (1872) LR 7 QB 756 at 762 per Cockburn CJ, cited in *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536, [1989] 3 All ER 839, PC; *Pledge v Buss* (1860) John 663; and see the cases cited in notes 7–11. See also e g *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2005] EWCA Civ 395, [2005] 2 All ER (Comm) 289, [2005] 1 WLR 2497 (refinancing agreements between the claimant creditor and the principal debtor discharged the guarantor).

7 *Wulff v Jay* (1872) LR 7 QB 756 at 764 per Hannen J.

8 *Wulff v Jay* (1872) LR 7 QB 756. However, the guarantor will not be discharged if he has consented (see PARAS 1216–1217) or if the creditor's conduct does not amount to a breach of his equitable duties to the guarantor (see PARA 1245).

9 See e g *Polak v Everett* (1876) 1 QBD 669, CA; *Rainbow v Juggins* (1880) 5 QBD 138 at 142 per Manisty J; on appeal 5 QBD 422, CA; *Dale v Powell* (1911) 105 LT 291 at 294 per Parker J. As to the effect of variations of the principal obligation on the liability of the guarantor see generally PARA 1235 et seq.

10 See e g *Carter v White* (1883) 25 ChD 666, CA; *Byblos Bank SAL v Al-Khudhairy* [1987] BCLC 232, CA; *TCB Ltd v Gray* [1987] Ch 458n, [1988] 1 All ER 108, CA; and c f *Ward v National Bank of New Zealand* (1883) 8 App Cas 755, PC.

11 *Carter v White* (1883) 25 ChD 666 at 670, CA, per Cotton LJ; *Watts v Shuttleworth* (1861) 7 H & N 353, Ex Ch; *Wulff v Jay* (1872) LR 7 QB 756; *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536, [1989] 3 All ER 839, PC. See also *Ex p Mure* (1788) 2 Cox Eq Cas 63; *Straton v Rastall* (1788) 2 Term Rep 366; *Williams v Price* (1824) 1 Sim & St 581; *Capel v Butler* (1825) 2 Sim & St 457; *Pledge v Buss* (1860) John 663; *Mutual Loan Fund Association v Sudlow* (1860) 5 CBNS 449; *Strange v Fooks* (1863) 4 Giff 408; *Rainbow v Juggins* (1880) 5 QBD 138; on appeal 5 QBD 422, CA; *Forbes v Jackson* (1882) 19 ChD 615. Where a landlord advanced money to his tenant on the security of a promissory note of the tenant and a guarantor and subsequently took a mortgage of the tenant's furniture for the same debt, and afterwards the landlord took the furniture under a distress for rent, the proceeds of the furniture were decreed to be applied in discharge of the guarantor pro tanto and not in discharge of the rent: *Pearl v Deacon* (1857) as reported in 26 LJCh 761. See also *Re Duffy's Estate, Dutch v O'Leary* (1880) 5 LR Ir 92; *Belfast Banking Co v Stanley* (1867) IR 1 CL 693; *Glenie v Smith* [1908] 1 KB 263, CA.

1245. When guarantor is not discharged by loss of securities. The liability of a guarantor for the principal debtor is not affected by a sale by the principal debtor of the mortgaged property in the manner contemplated by the mortgage deed and with the mortgagee's consent[1]. Moreover, the creditor, on the bankruptcy of the principal debtor, is not required to keep up a policy on the principal debtor's life, but, on the contrary, should sell and realise such a security[2] or surrender the policy and prove for the whole debt[3]. Again, a guarantor is not discharged where, by the creditor's conduct, a right of distress for rent in arrear is destroyed, as a distress is not, strictly speaking, a security held by the creditor in respect of a debt[4]. On the other hand a guarantor is discharged where the creditor abandons an execution against the claimant debtor[5].

A transaction which causes no loss of securities, or a loss not attributable to the fault of the creditor, will not discharge the guarantor[6]. Thus, if a creditor, having in respect of a debt owing to him a security upon the equitable interests in trust funds of his debtor and of the debtor's guarantor, assigns the debt, together with the securities for the debt, he does not thereby relieve the guarantor from

liability, and he need not even give the guarantor notice of the assignment in order to render it binding and effectual[7]. A temporary loan of title deeds for a legitimate purpose by the creditor to the principal debtor on the principal debtor undertaking to return them, which he subsequently does, will not, it seems, discharge the guarantor[8].

Where a security for the guaranteed debt proves worthless, whether it was originally so or became so afterwards, the guarantor is not discharged unless the loss or deficiency was occasioned by the creditor's act[9]. The creditor is not liable to the principal debtor or to the guarantor for a decline in value of a security, unless the creditor was personally responsible for the decline[10].

1 *Taylor v Bank of New South Wales* (1886) 11 App Cas 596, PC.
2 *Coates v Coates* (1864) 33 Beav 249; and see *Wheatley v Bastow* (1855) 7 De GM & G 261.
3 *Rainbow v Juggins* (1880) 5 QBD 138; on appeal 5 QBD 422, CA.
4 See *Re Russell, Russell v Shoolbred* (1885) 29 ChD 254, CA. Cf *Chatterton v Maclean* [1951] 1 All ER 761.
5 *Mayhew v Crickett* (1818) 2 Swan 185; *English v Darley* (1800) 3 Esp 49 at 50; *Williams v Price* (1824) 1 Sim & St 581 at 587 per Leach V-C. This was also the case, under the old law, when the execution was against the body of the debtor: *Watson v Allcock* (1853) 1 Sm & G 319; on appeal 4 De GM & G 242; *Wulff v Jay* (1872) LR 7 QB 756; but see *R v Fay* (1878) 4 LR Ir 606 at 616, CA.
6 *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536, [1989] 3 All ER 839, PC; *Wheatley v Bastow* (1855) 7 De GM & G 261 at 279–280 per Turner LJ; *Hardwick v Wright* (1865) 35 Beav 133; *Polak v Everett* (1876) 1 QBD 669 at 675, CA, per Blackburn J; *Carter v White* (1883) 25 ChD 666 at 670, CA.
7 *Wheatley v Bastow* (1855) 7 De GM & G 261.
8 *Bushell v Collett* (1862) 6 LT 20; *Newton v Chorlton* (1853) 10 Hare 646; but see *Pledge v Buss* (1860) John 663; and cf *Smith v Wood* [1929] 1 Ch 14, CA.
9 *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536, [1989] 3 All ER 839, PC; *Hardwick v Wright* (1865) 35 Beav 133.
10 *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536 at 545, [1989] 3 All ER 839 at 842, PC.

I. RELEASE OF CO-GUARANTOR

1246. Release of co-guarantor. In accordance with the general rule of law[1], a release of one of two joint or joint and several guarantors, without the consent of the other[2] and without reserving remedies against him[3], will bar the creditor's right of action against the other on the guarantee[4]. Moreover, where one co-guarantor is released the security given by the other will also, apparently, be discharged[5].

In each case, however, it has to be determined whether what has occurred amounts to a release, and, where no formal release is given and what is relied on is an agreement not made by deed, the surrounding circumstances and the intention of the parties must be regarded[6].

Where co-guarantors are only severally bound, the release of one[7] will wholly or partially discharge the others if it destroys or injuriously affects the right of contribution or marshalling[8]. If, however, it is no part of the contract that others shall join in it as co-guarantors, that is to say if each guarantor contracts only severally, the release of one will not discharge the others if it does not affect the right of contribution[9].

1 See *Deanplan Ltd v Mahmoud* [1993] Ch 151, [1992] 3 All ER 945; and CONTRACT vol 9(1) (Reissue) PARA 1089.
2 Modern forms of guarantee often contain provisions permitting the creditor to release one or more co-guarantors without affecting the liability of the others. Such provisions, if appropriately worded, are effective: see PARAS 1216–1217.

3 For an example of an effective reservation of rights against the other guarantor see *Commercial Bank of Australia v Wilson & Co's Estate (Official Assignee)* [1893] AC 181, PC. See also PARA 1247 notes 4–5. A reservation of rights may be implied in appropriate cases and prevent the discharge of a co-guarantor: *Finley v Connell Associates (a firm)* [1999] Lloyd's Rep PN 895, (1999) Times, 23 June.

4 *Mercantile Bank of Sydney v Taylor* [1893] AC 317, PC.

5 *Hodgson v Hodgson* (1837) 2 Keen 704; and see *Bolton v Salmon* [1891] 2 Ch 48 at 53 per Chitty J. See also *Smith v Wood* [1929] 1 Ch 14, CA (release of securities).

6 *Re Wolmershausen, Wolmershausen v Wolmershausen* (1890) 62 LT 541 at 545 per Stirling J; and see *Done v Walley* (1848) 2 Exch 198. For instances of the transaction being held to amount to a release see *Ex p Slater* (1801) 6 Ves 146; *Vyner v Hopkins* (1842) 6 Jur 889; *Re EWA* [1901] 2 KB 642, CA; *Nicholson v Revill* (1836) 4 Ad & El 675. For instances of the converse see *Watters v Smith* (1831) 2 B & Ad 889; *Cardwell v Smith* (1886) 2 TLR 779.

7 At law the release of one of severally bound debtors does not discharge the others: *Collins v Prosser* (1823) 1 B & C 682.

8 *Re Wolmershausen, Wolmershausen v Wolmershausen* (1890) 62 LT 541 (compromise by creditor with trustee in bankruptcy of one of several guarantors; solvent guarantors discharged to extent of dividend, which, but for compromise, creditor might have received); *Smith v Wood* [1929] 1 Ch 14, CA (release by creditor of title deeds deposited by guarantor; other guarantors discharged). See also *Mayhew v Crickett* (1818) 2 Swan 185 at 192–193 per Lord Eldon LC; *Ward v National Bank of New Zealand* (1883) 8 App Cas 755 at 766, PC.

9 *Ex p Gifford* (1802) 6 Ves 805 (as explained in *Re Wolmershausen, Wolmershausen v Wolmershausen* (1890) 62 LT 541 at 545–546); *Ward v National Bank of New Zealand* (1883) 8 App Cas 755 at 765, PC; *Smith v Wood* [1929] 1 Ch 14 at 30, CA; and see *Re Wolmershausen, Wolmershausen v Wolmershausen* above.

1247. Where co-guarantors are not discharged. A guarantor will not be discharged where there is no actual release of his co-guarantor by the creditor, but a mere compounding with or giving of time to the co-guarantor[1], or a mere covenant not to sue[2], or where the creditor acts with the guarantor's consent[3]; and in the case of a release of one co-guarantor, with a reservation of remedies against the other, that other is not discharged[4], such a release operating as a covenant not to sue[5]. A release of a guarantor will, however, release his co-guarantors even though it reserves remedies against guarantors for the person released, since the relationship between co-guarantors is not that of principal and guarantor[6].

Where guarantors are jointly liable under a guarantee, an unsatisfied judgment in a claim on a cheque given by one of them in respect of the common liability is no bar to a claim against the other on the guarantee[7].

A release by a creditor of an ostensible partner in a firm does not discharge the person whose partner he has held himself out to be, as there is no right of contribution between them[8].

For there to be a release of a joint obligor that discharges another joint obligor, whether the liability be joint or joint and several, the release must be immediate, or have become operative, and must be without reservation of rights against the other joint obligor[9].

1 *Kearsley v Cole* (1846) 16 M & W 128 at 136 per Parke B.

2 *Price v Barker* (1855) 4 E & B 760 at 777 per Coleridge J.

3 *Kearsley v Cole* (1846) 16 M & W 128 at 136 per Parke B. The guarantor's consent will often be contained in a provision in the guarantee: see PARAS 1216–1217.

4 *Cheetham v Ward* (1797) 1 Bos & P 630; *Solly v Forbes* (1820) 2 Brod & Bing 38; *Thompson v Lack* (1846) 3 CB 540; *North v Wakefield* (1849) 13 QB 536; *Commercial Bank of Australia v John Wilson & Co's Estate (Official Assignee)* [1893] AC 181, PC. This method used to be frequently adopted where creditors executed a deed of composition (see *Re Slade, ex p Carstairs* (1820) Buck 560) before the Bankruptcy Act 1883 first preserved the guarantor's liability to a creditor executing a composition deed. See also *Greene King plc v Stanley* [2001] EWCA Civ 1966, [2002] All ER (D) 56 (Jan) (no relevant distinction between the position of a surety and

that of a co-debtor and it has long been accepted that on the release of a co-debtor a creditor may reserve his rights against other co-debtors; accordingly, it is open to a creditor to release the debtor under an individual voluntary arrangement ('IVA') whilst reserving its rights against the debtor's sureties. Further, it is open to the court in construing an IVA to look at all the circumstances, including the dealings between the parties which have led to the IVA). See further PARA 1100. As to compositions see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 863.

Some transactions which release a debtor do not admit of a reservation of rights against another: see *Webb v Hewitt* (1857) 3 K & J 438.

5 *Willis v De Castro* (1858) 4 CBNS 216; *Re Armitage, ex p Good* (1877) 5 ChD 46, CA.

6 See *Liverpool Corn Trade Association v Hurst* [1936] 2 All ER 309.

7 See the Civil Liability (Contribution) Act 1978 s 3; and see also *Wegg-Prosser v Evans* [1895] 1 QB 108, CA; *Re EWA* [1901] 2 KB 642, CA.

8 *Re Armitage, ex p Good* (1877) 5 ChD 46, CA.

9 See *Koutrouzas v Lombard Natwest Factors Ltd* [2002] EWHC 1084 (QB) at [40], [2003] BPIR 444, [2002] All ER (D) 273 (Apr) per Field J. In that case, an individual voluntary arrangement entered into by one co-guarantor was interpreted as suspending the creditors' rights, not releasing the first co-guarantor from his obligations, and did not release the second co-guarantor from his obligations to the claimant under the guarantee.

J. UNCONSCIONABLE DELAY BY CREDITOR

1248. Creditor's laches discharging guarantor. The doctrine of unconscionable delay ('laches'), as generally applied, provides an equitable defence which bars claims where there has been undue delay in prosecuting them[1]. The chief element in laches, in this sense, is acquiescence[2]; and there is little uniformity in the way that the words 'laches' and 'acquiescence' are used[3]. However, in the law of guarantee, the word 'laches' is sometimes used in a specialised sense, to mean conduct by the creditor (usually the omission to do something) which has the effect of discharging the guarantor[4].

In general, a creditor is entitled to consult his own interests, and is not obliged to take positive steps to protect or to improve the guarantor's position[5]. However, the terms of the contract of guarantee may impose obligations on the creditor, which if unperformed will prevent him from claiming against the guarantor[6]; and equity also requires him to take certain steps for the protection of the guarantor as a condition of permitting him to enforce the guarantee[7]. An omission by the creditor to do something which he is bound in equity to do for the protection of the guarantor will amount to laches, discharging the guarantor[8]. However, mere passive acquiescence in acts which, although contrary to the conditions of the guarantee[9], do not amount to connivance or negligence, equivalent to shutting the eyes to fraud or conduct approximating to it, will not do so[10].

1 See generally EQUITY vol 16(2) (Reissue) PARA 910 et seq.

2 See EQUITY vol 16(2) (Reissue) PARA 911.

3 *Goldsworthy v Brickell* [1987] Ch 378 at 410, [1987] 1 All ER 853 at 872, CA, per Nourse LJ.

4 See the cases cited in notes 5–10 and in PARAS 1249–1254.

5 See *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536 at 545, [1989] 3 All ER 839 at 842, PC. See also the cases cited in PARA 1251. It is the task of the guarantor, not of the creditor, to see that the principal debtor performs the guaranteed obligation: *Wright v Simpson* (1802) 6 Ves 714; *M'Taggart v Watson* (1836) 3 Cl & Fin 525 at 540, HL, per Lord Brougham; *Durham Corpn v Fowler* (1888) 22 QBD 394; *Bank of India v Trans Continental Commodity Merchants Ltd and Patel* [1983] 2 Lloyd's Rep 298, CA.

6 A contract of guarantee is a contract *strictissimi juris* in this sense, that the guarantor cannot be made liable under it unless its terms are strictly complied with: *Bacon v Chesney* (1816) 1 Stark 192 at 193 per Lord Ellenborough CJ. See PARAS 1106, 1244 the text and note 10.

7 As to the nature and extent of the guarantor's equitable rights and the creditor's equitable obligations see PARAS 1214–1215; and as to the extent to which the terms of the contract of guarantee may prevent these equitable obligations from arising see PARAS 1216–1217.

8 *Mansfield Union Guardians v Wright* (1882) 9 QBD 683 at 688, CA, per Hannen J; *Carter v White* (1883) 25 ChD 666 at 670, CA, per Cotton LJ; *Strong v Foster* (1855) 17 CB 201; *Wulff v Jay* (1872) LR 7 QB 756; *Durham Corpn v Fowler* (1889) 22 QBD 394; *Belfast Banking Co v Stanley* (1867) IR 1 CL 693, 15 WR 989; *Caxton and Arrington Union v Dew* (1899) 68 LJQB 380; and see *Kingston-upon-Hull Corpn v Harding* [1892] 2 QB 494 at 508, CA, per Bowen LJ.

9 *Durham Corpn v Fowler* (1889) 22 QBD 394; *Eyre v Everett* (1826) 2 Russ 381; *Mayhew v Crickett* (1818) 2 Swan 185 at 191 per Lord Eldon LC; *Wright v Simpson* (1802) 6 Ves 714 at 734; *Trent Navigation Co v Harley* (1808) 10 East 34; *Creighton v Rankin* (1840) 7 Cl & Fin 325, HL.

10 *Dawson v Lawes* (1854) Kay 280. Merely 'irregular' conduct on the part of the creditor, even if prejudicial to the interest of the guarantor, will not discharge the guarantor: *Bank of India v Trans Continental Commodity Merchants Ltd and Patel* [1983] 2 Lloyd's Rep 298, CA.

1249. Examples of laches. A guarantor for the performance of a building contract is discharged from liability by the building owner's omission to insure the work undertaken against loss by fire in accordance with a stipulation in the contract notified to the guarantor before he became bound as such[1]. A broker buying goods for his principal and undertaking for a stated commission to indemnify him from any loss on resale is not responsible if the principal neglects a fair opportunity of selling goods at a profit and is afterwards obliged to sell at a loss[2]. A person who has bound himself to indorse any bills that may be given in part payment of a debt to be contracted by a third person is discharged unless a demand is made upon him to fulfil his promise within a reasonable and convenient time[3]; while a guarantor for payment of a bill by the drawer or acceptor is not liable after the creditor fails to take necessary steps to obtain payment of the bill which might reasonably have been taken before the insolvency of the drawer and acceptor[4]. Such a guarantor will not, however, be discharged from liability by the creditor's failure to render the bill complete by inserting the drawer's name[5]. Nevertheless there may be circumstances showing a contract which binds the creditor, as between him and the guarantor, to make the principal debtor's liability complete, so that the guarantor will be entitled to relief should the creditor not do so[6].

1 *Watts v Shuttleworth* (1861) 7 H & N 353, Ex Ch.

2 *Curry v Edensor* (1790) 3 Term Rep 524 at 527; *Mutual Loan Fund Association v Sudlow* (1858) 5 CBNS 449.

3 *Payne v Ives* (1823) 3 Dow & Ry KB 664.

4 *Philips v Astling* (1809) 2 Taunt 206.

5 *Carter v White* (1883) 25 ChD 666, CA; and see *Belfast Banking Co v Stanley* (1867) IR 1 CL 693; *Re Duffy's Estate, Dutch v O'Leary* (1880) 5 LR Ir 92.

6 *Jephson v Maunsell* (1847) 10 I Eq R 132 at 133 per Brady LC; and see *Carter v White* (1883) 25 ChD 666 at 670, CA, per Cotton LJ.

1250. Laches in relation to fidelity guarantees. A guarantor for the good behaviour of another in an office or employment has a right to expect that persons associated with that other person will in all things affecting the guarantor's liability conduct themselves according to law and fulfil their duties[1]. The guarantor will not, however, be discharged, even where there are such persons who have been guilty of laches, unless it can also be proved that the person to whom the guarantor is bound has either prevented the principal debtor from doing the things for the due performance of which the guarantor is answerable or has connived at their omission or enabled the principal debtor to

do what he ought not to have done, and that but for such conduct the omission or commission guaranteed against would not have occurred[2].

The guarantor is discharged if the employer does not deal with the employee in the manner required by the nature of his office[3]. He may further require the employer to dismiss the employee where the employee has been guilty of misconduct, and should the employer possess the power to dismiss and fail to exercise it, the guarantor will be discharged[4].

1 *M'Taggart v Watson* (1836) 3 Cl & Fin 525 at 542–543, HL, per Lord Brougham; *Mein v Hardie* (1830) 8 Sh 346, Ct of Sess; *Mountague v Tidcombe* (1705) 2 Vern 518; *Dawson v Lawes* (1854) Kay 280.
2 *M'Taggart v Watson* (1836) 3 Cl & Fin 525 at 542–543, HL, per Lord Brougham; *Dawson v Lawes* (1854) Kay 280; *Mansfield Union Guardians v Wright* (1882) 9 QBD 683, CA; *Madden v M'Mullen* (1860) 13 ICLR 305; *Durham Corpn v Fowler* (1889) 22 QBD 394. Failure to observe statutory requirements does not necessarily release a guarantor: *Wicklow County Council v Hibernian Fire and General Insurance Co* [1932] IR 581. As to the meaning of 'laches' see PARA 1248.
3 *Mein v Hardie* (1830) 8 Sh 346, Ct of Sess; *Mountague v Tidcombe* (1705) 2 Vern 518.
4 See PARA 1133.

1251. Creditor's acts and omissions not amounting to laches. A creditor is not guilty of laches if, knowing that security held by him for the guaranteed debt is declining in value, he omits to exercise his power of sale so that the security eventually becomes worthless[1].

A creditor's refusal to take legal proceedings which must prove abortive[2], or failure by the principal debtor, with the creditor's connivance, to do something under the principal contract diminishing the guarantor's risk, is not laches[3]. Nor is it laches where, owing to the creditor's omission to reply to the guarantor's question, the guarantor wrongly interprets his silence to mean that a supply of goods to the principal debtor, stipulated for by the guarantee, has not been made, and in consequence gives up an indemnity he has received[4].

Where a guarantor guarantees the honesty of an employee, he is not entitled to be discharged from his obligation because the employer fails to use all the means in his power to guard against the consequences of dishonesty[5]. Nor, it seems, is an employer debarred from recovering against the guarantor under a fidelity guarantee merely because he has delayed in giving notice to the guarantor of the employee's misconduct in respect of which the employer is seeking to recover, if the guarantor had become acquainted with the misconduct from another quarter[6]. A creditor who continues to trust the principal debtor after the principal debtor has been guilty of theft to the knowledge of the guarantor may enforce the guarantor's liability, in respect of a subsequent default of the principal debtor also amounting to theft, even though the guarantor has desired him not to trust the debtor any more with cash[7], but he cannot do so if the guarantor has called upon him to dismiss the principal debtor[8].

1 *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536, [1989] 3 All ER 839, PC. As to the meaning of 'laches' see PARA 1248.
2 *Musket v Rogers* (1839) 5 Bing NC 728; *Holl v Hadley* (1835) 2 Ad & El 758.
3 *Re Barber & Co, ex p Agra Bank* (1870) LR 9 Eq 725.
4 *Oxley v Young* (1796) 2 Hy Bl 613.
5 *Black v Ottoman Bank* (1862) 15 Moo PCC 472.
6 See *Peel v Tatlock* (1799) 1 Bos & P 419. Cf *Snaddon v London, Edinburgh and Glasgow Assurance Co* (1902) 5 F 182, Ct of Sess, where the employee confessed his misconduct to his employer and, more than a fortnight later, absconded; the employer did not inform the guarantor of the misconduct until after the employee had absconded and was held to be debarred from recovering in respect of the misconduct. As to the effect of non-disclosure of

misconduct upon the liability of the guarantor under the guarantee in the event of further misconduct subsequently occurring see PARA 1133.

7 *Shepherd v Beecher* (1725) 2 P Wms 288; cf *Mountague v Tidcombe* (1705) 2 Vern 518.

8 See PARA 1133 text to note 2.

1252. Provision for sale of debtor's effects. Where it is provided by deed that the principal debtor's effects are to be sold before recourse is made to the guarantor, the guarantor is not discharged by the carelessness of the trustee under the deed in omitting to sell them and thereby enabling the goods to be seized and sold in bankruptcy[1]. On the other hand, if the creditor seizes and sells the principal debtor's goods under a bill of sale, the guarantor may plead, as a defence to a claim brought against him on his guarantee, that but for the mismanagement of the creditor's agents those goods would have realised sufficient to satisfy the guaranteed debt[2].

1 *Lancaster v Harrison* (1830) 6 Bing 726. See also PARA 1103 et seq.

2 *Mutual Loan Fund Association v Sudlow* (1858) 5 CBNS 449.

1253. No laches by Crown or court officer. In accordance with the general common law rule that there can be no laches by the Crown, the Crown cannot be guilty of laches towards a guarantor[1]. Moreover, the laches of an officer of the court will not, apparently, discharge a guarantor from liability under his guarantee[2].

1 *R v Fay* (1878) 4 LR Ir 606, CA; but see *The Zoe* (1886) 11 PD 72; and see EQUITY vol 16(2) (Reissue) PARA 911. As to the meaning of 'laches' see PARA 1248.

2 *Jephson v Maunsell* (1847) 10 I Eq R 132.

1254. When guarantor is not wholly discharged by laches. Where the creditor has been guilty of laches, the guarantor is not thereby necessarily wholly discharged from liability[1], but may sometimes be only pro tanto relieved from it[2]. Whether or not a guarantor is wholly discharged depends, it seems, upon a distinction made in equity between those rights of the guarantor which he acquired at the time he entered into the guarantee, and those rights subsequently acquired by him. That which prejudicially affects rights acquired upon entry into the guarantee amounts to a breach of contract which wholly discharges the guarantor, but that which only affects rights acquired subsequent to the guarantee will usually do no more than discharge the guarantor to the extent to which he is actually injured[3].

1 *Polak v Everett* (1876) 1 QBD 669 at 676, CA, per Blackburn J. As to the meaning of 'laches' see PARA 1248.

2 *Polak v Everett* (1876) 1 QBD 669 at 675–676, CA; and see *Taylor v Bank of New South Wales* (1886) 11 App Cas 596 at 603, PC; *Capel v Butler* (1825) 2 Sim & St 457; *Northern Banking Co Ltd v Newman and Calton* [1927] IR 520.

3 *Polak v Everett* (1876) 1 QBD 669 at 676, CA, per Blackburn J; *Dale v Powell* (1911) 105 LT 291 at 294 per Parker J. As to the distinction between a loss occasioned to a guarantor by the creditor's own act and loss not so occasioned see also *Hardwick v Wright* (1865) 35 Beav 133; *Smith v Wood* [1929] 1 Ch 14, CA.

(8) CONTRACTS OF INDEMNITY

(i) In general

A. NATURE AND CREATION OF RIGHTS OF INDEMNITY

1255. Nature of contract of indemnity. A contract of indemnity is a contract by one party to keep the other harmless against loss[1].

In the widest sense of the term, therefore, it will include most contracts of insurance[2] and also a contract of guarantee[3]. All three types of contract may perform similar commercial functions, in providing compensation to the creditor for the failure of a third party to perform his obligations. However, the description 'contract of indemnity' is normally limited to describing a contract to save the promisee from loss caused by the claims of third parties, when it will not include a contract of marine insurance against loss or damage to the subject matter of the insurance[4], and may even be differentiated from those contracts of insurance which have for their object the protection of the assured against liability to third parties[5]. It is normally used in law to denote a contract by which the promisor undertakes an original and independent obligation to indemnify, as distinct from a collateral contract in the nature of a guarantee by which the promisor undertakes to answer for the default of another person who is to be primarily liable to the promisee[6]. Performance bonds, which are considered separately below[7], fall within this definition.

1 *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294 at 296, [1961] 1 WLR 828 at 830–831, CA, per Holroyd Pearce LJ; *Davys v Buswell* [1913] 2 KB 47 at 53–55, CA, per Vaughan Williams LJ; *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289 at 296, CA, per Orr LJ. Cf the definition provided by the Indian Contract Act 1872 (No IX of 1872) (Ind) s 124: 'A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person, is called a contract of indemnity'.

2 See INSURANCE vol 25 (2003 Reissue) PARA 3.

3 *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294 at 296, [1961] 1 WLR 828 at 830, CA, per Holroyd Pearce LJ; *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289 at 296, CA, per Orr LJ (cited with approval in *Scottish & Newcastle plc v Raguz* [2007] EWCA Civ 150, [2007] 2 All ER 871).

4 *Johnston v Salvage Association* (1887) 19 QBD 458, CA; *Clover Clayton & Co Ltd v Hessler & Co* [1925] 1 KB 1, CA. See also *Jones v Birch Bros Ltd* [1933] 2 KB 597 at 606, CA; *Lothian v Epworth Press* [1928] 1 KB 199n at 202, CA, per Scrutton LJ; and cf *Nelson v Empress Assurance Corpn Ltd* [1905] 2 KB 281, CA.

5 *Re Law Guarantee Trust and Accident Society Ltd, Liverpool Mortgage Insurance Co's Case* [1914] 2 Ch 617, CA; *Law Guarantee Trust and Accident Society Ltd v Munich Reinsurance Co* (1915) 31 TLR 572. The importance of the distinction appears to be that the contract of indemnity, as such, is not a contract of the utmost good faith (uberrimae fidei) (*Law Guarantee Trust and Accident Society Ltd v Munich Reinsurance Co*), and that in the case of an insurance there is a legal and not merely an equitable right on the part of the assured to claim under the policy as soon as the event insured against (ie the liability to meet the claims of a third person) has arisen, and it is immaterial that he has not discharged the liability (see *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 AC 1, [1990] 2 All ER 705, HL; *Re Law Guarantee Trust and Accident Society Ltd, Liverpool Mortgage Insurance Co's Case* above; *Re Eddystone Marine Insurance Co* [1892] 2 Ch 423). As to the doctrine of uberrima fides see INSURANCE vol 25 (2003 Reissue) PARAS 5, 36 et seq. See further *Re Harrington Motor Co Ltd, ex p Chaplin* [1928] Ch 105, CA; *Hood's Trustees v Southern Union General Insurance Co of Australasia Ltd* [1928] Ch 793, CA (which cases led to the passing of the Third Parties (Rights against Insurers) Act 1930: see PARA 1263; and INSURANCE vol 25 (2003 Reissue) PARA 679 et seq). As to the right to enforce an indemnity see PARA 1266 et seq.

6 *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294 at 296, [1961] 1 WLR 828 at 830, CA, per Holroyd Pearce LJ. See also *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 at

784, CA, per Vaughan Williams LJ; *Goulston Discount Co Ltd v Clark* [1967] 2 QB 493, [1967] 1 All ER 61, CA; *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289 at 296, CA, per Orr LJ; *Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone* [1987] 1 Lloyd's Rep 546 at 555. For the distinction between a guarantee and an indemnity see generally PARA 1021. In *Yeoman Credit Ltd v Latter* above at 299 and at 835, Harman LJ observed that the question whether a contract was one of guarantee or indemnity was 'a most barren controversy. It dates back ... to the Statute of Frauds, 1677, and has raised many hair-splitting distinctions of exactly that kind which brings the law into hatred, ridicule and contempt by the public ... and the decided cases on the subject are hardly to be reconciled'.

7 See PARA 1271 et seq.

1256. Necessity for writing. A promise in the nature of an indemnity is not within the Statute of Frauds (1677), and thus does not need to be evidenced by a written memorandum signed by the party to be charged or his duly authorised agent[1], even though it may involve the obligation of compensating a loss caused by the failure of another to pay a debt[2]. Nor does the Statute of Frauds apply to a promise by one of several persons against whom a claim lies to discharge the claim[3]. The statute does not apply where the promise to answer for another's debt or default is only an incident of a contract dealing with other matters[4], as in the case of an agreement by an agent to sell on a del credere commission[5], or an agreement by an agent or employee to be answerable in respect of a certain proportion of bad debts incurred by him[6]. Where, however, the only object of the contract is to secure forbearance in favour of the person primarily liable, a promise to pay his debt is within the Statute of Frauds, whatever may be the promisor's ultimate motives[7].

1 See the Statute of Frauds (1677) s 4; and PARA 1052 et seq, especially PARA 1059.

2 *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84, CA, where an undertaking by a partner to indemnify the firm in respect of debts owing by a named person was held not to be within the statute; *Guild & Co v Conrad* [1894] 2 QB 885, CA (acceptance of bills of exchange by plaintiff with guarantee from defendant; subsequent promise by defendant to indemnify in respect of bills); *Seaton v Burnand, Burnand v Seaton* [1900] AC 135, HL (undertaking by an underwriter at Lloyd's for the solvency of a guarantor for the maker of a promissory note). See also *Davys v Buswell* [1913] 2 KB 47, CA, where an oral promise to answer for another's debt was distinguished from an indemnity.

3 *Orrell v Coppock* (1856) 26 LJCh 269 (claim against trustees and a beneficiary who had bought a portion of the trust property from them in breach of trust; promise by the beneficiary to pay a certain sum in settlement of the claim); *Thomas v Cook* (1828) 8 B & C 728 (promise by one co-guarantor to another to see him harmless); *Guild & Co v Conrad* [1894] 2 QB 885, CA; *Huggard v Representative Church Body* [1916] 1 IR 1.

4 *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84 at 123, [1981] 3 All ER 577 at 585, CA, per Eveleigh LJ, applying *Sutton & Co v Grey* [1894] 1 QB 285, CA. See also *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, CA; *Couturier v Hastie* (1852) 8 Exch 40; revsd on another point (1856) 5 HL Cas 673; *Fleet v Murton* (1871) LR 7 QB 126 at 132; and PARA 1061.

5 *Shaw v Woodcock* (1827) 7 B & C 73; *Couturier v Hastie* (1852) 8 Exch 40; revsd on another point (1856) 5 HL Cas 673; *Wickham v Wickham* (1855) 2 K & J 478; *Thomas Gabriel & Sons v Churchill and Sim* [1914] 3 KB 1272, CA. See AGENCY vol 1 (2008) PARA 13.

6 *Sutton & Co v Grey* [1894] 1 QB 285, CA.

7 *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, CA.

1257. Creation of rights of indemnity. Rights of indemnity may arise from contract, express or implied, from an obligation resulting from the relation of the parties[1], or by statute[2]. Whether in any particular case any right of indemnity arises, and the extent of any such indemnity, will depend upon the terms of the contract[3] or statute in question[4], or the nature of the relationship[5].

1 See eg *Re Downer Enterprises Ltd* [1974] 2 All ER 1074, [1974] 1 WLR 1460; *Selous Street Properties Ltd v Oronel Fabrics Ltd* [1984] 1 EGLR 50, 270 Estates Gazette 643; *Becton*

Dickinson UK Ltd v Zwebner [1989] QB 208, [1988] 3 WLR 1376 (implied indemnity between persons primarily and secondarily liable); *Eastern Shipping Co Ltd v Quah Beng Kee* [1924] AC 177 at 182–183, PC; *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, [1957] 1 All ER 125, HL (implied indemnity by tortfeasor to person vicariously liable); *Sheffield Corpn v Barclay* [1905] AC 392, HL; *Yeung v Hong Kong and Shanghai Banking Corpn* [1981] AC 787, [1980] 2 All ER 599, PC; *Telfair Shipping Corpn v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243, [1985] 1 WLR 553; *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412, CA (implied indemnity against consequence of act done at indemnifier's request); *Lord Midleton v Eliot* (1847) 15 Sim 531 (mortgagor's right on redemption to express indemnity in respect of missing title deeds). As to the guarantor's implied right to an indemnity from the principal debtor see PARA 1148 et seq. In *Wynne v Tempest* [1897] 1 Ch 110 at 113, where trust money had been paid by a deceased trustee into the hands of a firm in which he was a partner, his co-trustee's right to recover the money from the firm was held not to be a right of indemnity against his liability in proceedings for breach of trust, since the right existed independently of the proceedings.

2 Among the many statutes which create an express right of indemnity (some of which are merely declaratory) are the Mercantile Law Amendment Act 1856 s 5 (see PARA 1141 note 2); the Partnership Act 1890 s 24(2) (see PARTNERSHIP vol 35 (Reissue) PARA 127); the Trustee Act 1925 s 62 (see TRUSTS vol 48 (2007 Reissue) PARA 1131); the Consumer Credit Act 1974 s 75(2) (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 250); the Companies Act 2006 s 767(3) (formerly the Companies Act 1985 s 117(8)) (see COMPANIES); the Land Registration Act 2002 s 8(b), s 103, Sch 8 (see LAND REGISTRATION vol 26 (2004 Reissue) PARAS 829, 983 et seq). By statute there is a right of contribution which may amount to an indemnity between persons liable in respect of the same damage: see the Civil Liability (Contribution) Act 1978; and TORT vol 45(2) (Reissue) PARA 348 et seq.

3 See PARA 1264.

4 See note 2.

5 *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412 at 417, 422, CA; *Dugdale v Lovering* (1875) LR 10 CP 196.

1258. Implied contract or obligation of law. A right to indemnity based on an implied contract or an obligation imposed by law may arise in various ways.

Such a right may arise where money is paid at the request of another[1]. Similarly, where one person has been compelled by law to pay, or, being compellable by law, has paid money to another which a third party was ultimately liable to pay so that the third party obtains the benefit of the payment by the discharge of his liability, the person who made the payment may recover the amount of the payment from the third party[2].

When an act is done by one person at the request of another, and the act is not in itself manifestly tortious to the knowledge of the person doing it, and it turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from the person who requested that it should be done[3]. This principle is not confined to cases of principal and agent[4]. A special situation exists where the person receiving the request or demand has a duty to act upon it, where the right of indemnity arises by operation of law[5]. It may also apply even though the person seeking the indemnity is acting in the exercise of his free discretion[6]. But it does not apply where the injury to the third party arose not as the natural and necessary consequence of the doing of an act but merely from the manner in which the act was done[7], or where the liability to the third party arose from the person seeking the indemnity's own default or breach of duty[8].

1 See RESTITUTION vol 40(1) (2007 Reissue) PARAS 6, 76.

2 See eg *Moule v Garrett* (1872) LR 7 Exch 101 at 104 (liability of ultimate assignee of lease to indemnify lessee against money which lessee had been compelled to pay to lessor in respect of dilapidations); *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 10, HL, per Lord Selborne LC; *Re Downer Enterprises Ltd* [1974] 2 All ER 1074, [1974] 1 WLR 1460 (liability of insolvent ultimate lessee to indemnify intermediate lessee for rent paid to lessor after commencement of winding up); *Selous Street Properties Ltd v Oronel Fabrics Ltd*

[1984] 1 EGLR 50, 270 Estates Gazette 643 (liability of assignee and guarantor for assignee to indemnify original lessee and guarantor for original lessee); *Kumar v Dunning* [1989] QB 193 at 201, [1987] 2 All ER 801 at 807, CA, per Sir Nicolas Browne-Wilkinson V-C; *Becton Dickinson UK Ltd v Zwebner* [1989] QB 208, [1988] 3 WLR 1376. See also PARA 1020 text and note 4; but note that leases granted on or after 1 January 1996 are 'new tenancies' for the purposes of the Landlord and Tenant (Covenants) Act 1995 under which a lessee who assigns the tenancy is released from the tenant covenants of the tenancy: see PARA 1259 note 7. Contrast *Metropolitan Police District Receiver v Croydon Corpn, Monmouthshire County Council v Smith* [1957] 2 QB 154, [1957] 1 All ER 78, CA, where the principle was held not to apply in a claim to recover wages and allowances paid to employees while incapable of duty in consequence of defendant's negligence; *Owen v Tate* [1976] QB 402, [1975] 2 All ER 129, CA (payment under voluntary guarantee). As to payments made under compulsion, and as to the meaning of 'compulsion', see further RESTITUTION vol 40(1) (2007 Reissue) PARA 64 et seq.

3 *Yeung v Hong Kong and Shanghai Banking Corpn* [1981] AC 787, [1980] 2 All ER 599, PC; *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412 at 417, CA. See also *Toplis v Grane* (1839) 5 Bing NC 636; *Collins v Evans* (1844) 5 QB 804, Ex Ch; *Dugdale v Lovering* (1875) LR 10 CP 196 at 197; *Birmingham and District Land Co Ltd v London and North Western Rly Co* (1886) 34 ChD 261, CA; *Sheffield Corpn v Barclay* [1905] AC 392 at 397, HL, per Earl of Halsbury LC; *Secretary of State for India v Bank of India Ltd* [1938] 2 All ER 797 at 800, PC; *Welch v Bank of England* [1955] Ch 508 at 548–549, [1955] 1 All ER 811 at 830–831. See also the cases concerned with indemnities and other rights arising from carriage under bills of lading cited in PARA 1259 note 12. This is a general principle, not a conclusion of law which is always to be drawn. Whether there is an obligation to indemnify must greatly depend upon the circumstances of each individual case: *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* above at 417 per curiam. This principle may have to be reviewed in the light of the statutory provisions for contribution between persons liable in respect of the same damage (see the Civil Liability (Contribution) Act 1978; and TORT vol 45(2) (Reissue) PARA 348 et seq): *Yeung v Hong Kong and Shanghai Banking Corpn* above at 799–800, 608; see also PARA 1261 text and note 5.

4 *Sheffield Corpn v Barclay* [1905] AC 392 at 400, HL, per Lord Davey; *Dugdale v Lovering* (1875) LR 10 CP 196. For the right of an agent to indemnity, and for its extent, see AGENCY vol 1 (2008) PARA 111 et seq.

5 *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412 at 417, CA. The indemnity does not arise where there is a 'default' on the part of that person. However, the 'default' which disqualifies the claimant who acts ministerially is the same as the 'manifestly tortious' act which is an exception to the general principle. It always involves an element of turpitude and does not extend to the case where the actor has carelessly failed to make inquiries which would have revealed the true nature of the act, or where he has culpably but not recklessly drawn the wrong inference from such inquiries as he has made: *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* at 417; and see the text and note 8. See also *Sheffield Corpn v Barclay* [1905] AC 392 at 394, HL, per Lord Davey; *Bank of England v Cutler* [1908] 2 KB 208, CA; *Starkey v Bank of England* [1903] AC 114, HL; *Secretary of State for India v Bank of India Ltd* [1938] 2 All ER 797, PC; *Yeung v Hong Kong and Shanghai Banking Corpn* [1981] AC 787, [1980] 2 All ER 599, PC.

6 *Secretary of State for India v Bank of India Ltd* [1938] 2 All ER 797 at 801, PC; and see eg *Dugdale v Lovering* (1875) LR 10 CP 196 (dispute as to ownership of trucks in plaintiffs' possession; plaintiffs sent trucks to defendant on his order; defendant bound to indemnify plaintiffs against money paid to true owners in respect of conversion). For other instances in which the principle has been held to apply see *Betts v Gibbins* (1834) 2 Ad & El 57 (goods delivered by wharfingers by order of vendor to persons other than purchasers); *Kirby v Chessum & Sons* (1914) 79 JP 81, CA (trespass by builders upon adjoining property on orders of building owner); *A-G v Odell* [1906] 2 Ch 47 at 68–69, 76–80, CA (possible liability of person procuring registration of forged transfer of registered land). See also the cases concerned with indemnities and other rights arising from carriage under bills of lading, cited in PARA 1259 note 12.

7 *W Cory & Son Ltd v Lambton and Hetton Collieries Ltd* (1916) 86 LJKB 401, CA (negligence in removing hatch beams of ship).

8 See *Goulandris Bros Ltd v B Goldman & Sons Ltd* [1958] 1 QB 74 at 98–99, [1957] 3 All ER 100 at 110–111 per Pearson J, and the cases there cited. For this purpose, 'default' only arises in the event of dishonesty, lack of good faith or failure to comply with the request, direction or demand of the person from whom the indemnity is sought: *Yeung v Hong Kong and Shanghai Banking Corpn* [1981] AC 787 at 798, [1980] 2 All ER 599 at 607, PC; and see *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412 at 417

(cited in note 5). Cf *Ellis v Pond* [1898] 1 QB 426, CA; AGENCY vol 1 (2008) PARA 113; and cf *Redmond v Allied Irish Banks* [1987] 2 FTLR 264.

1259. Examples of rights of indemnity. An indorser of a bill of exchange is entitled to an indemnity from the acceptor[1]. An accommodation party[2] to a bill of exchange is entitled to an indemnity from the party accommodated[3]. A broker has a right to be indemnified by his client[4]. A contract of marine insurance is not a perfect contract of indemnity, but it and other contracts of insurance, except life assurance, are ordinarily termed contracts of indemnity[5].

The assignor of a lease is not a guarantor for the assignee[6], but a lessee is entitled to indemnity from his assignee for the assignee's breach of covenant[7]. A covenant by the assignee of a lease to perform and observe the covenants of the lease, or a covenant by a purchaser of freehold land to observe and perform covenants contained in a previous conveyance of the land, is construed as a covenant of indemnity only, and the covenantee is not entitled to insist on its observance except so far as is necessary for his indemnity[8]. But a covenant by an underlessor to observe the covenants in the head lease and indemnify the underlessee against them is not merely a covenant of indemnity against forfeiture proceedings by the head lessor, but one requiring the underlessor to comply with the obligations imposed by the head lease[9].

A mortgagee is entitled to be paid his reasonable costs and expenses as mortgagee[10]. Partners are entitled to be indemnified out of the partnership assets against liabilities properly incurred in the partnership business[11]. Where a charterparty exempts shipowners from liability for negligence and the charterers by failing to introduce such an exemption into the bills of lading involve the shipowners in liability to third parties, the charterers must indemnify the shipowners[12]. An enforcement officer executing a distress is entitled to indemnity from the landlord[13], and a judgment creditor who requires a sheriff or other enforcement officer to execute against particular goods is liable to indemnify him against a resulting claim by a third party[14].

1 See PARA 1580. The indorser is in the position of a guarantor: cf PARA 1019; and see PARA 1580.

2 See the Bills of Exchange Act 1882 s 28(1); and PARA 1482.

3 See PARA 1583 et seq.

4 See eg *Smith v Reynolds* (1892) 66 LT 808, CA; affd sub nom *Reynolds v Smith* (1893) 9 TLR 494, HL.

5 See PARA 1255.

6 See PARA 1020 text and note 4.

7 See PARA 1020 text and note 4, and the cases there cited. A covenant for indemnity is commonly inserted in an assignment, and, where the assignment was for valuable consideration, such a covenant was formerly implied by statute: see the Law of Property Act 1925 s 77(1)(C), (D), Sch 2 Pts IX, X (repealed in relation to 'new tenancies' by the Landlord and Tenant (Covenants) Act 1995 Sch 2). However, in relation to new tenancies to which the 1995 Act applies a tenant is now released from the tenant covenants on assignment of the lease (see s 5) and the landlord may be released from the landlord covenants on assignment of the reversion (see s 6). See further PARA 1081; and LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARAS 1214, 1215.

8 See eg *Harris v Boots Cash Chemists (Southern) Ltd* [1904] 2 Ch 376; *Reckitt v Cody* [1920] 2 Ch 452. See LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 576.

9 *Ayling v Wade* [1961] 2 QB 228, [1961] 2 All ER 399, CA (where the underlessee recovered from the underlessor damages which flowed from the underlessor's failure to comply with the repairing obligations imposed by the head lease); *Yorkbrook Investments Ltd v Batten* (1985) 52 P & CR 51, [1985] 2 EGLR 100, CA.

10 *Detillin v Gale* (1802) 7 Ves 583 at 585. See also *Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA; and MORTGAGE vol 32 (2005 Reissue) PARA 940 et seq.

11 See the Partnership Act 1890 s 24(2), which gives statutory effect to the principle; and PARTNERSHIP vol 35 (Reissue) PARA 127 et seq.

12 *Moel Tryvan Ship Co v Kruger & Co* [1906] 2 KB 792; on appeal [1907] 1 KB 809, CA; affd sub nom *Krüger & Co Ltd v Moel Tryvan Ship Co Ltd* [1907] AC 272, HL. See also the following cases concerned with indemnities and other rights arising from carriage under bills of lading: *Elder, Dempster & Co v Dunn & Co* (1909) 11 Asp MLC 337, HL; *Groves & Son v Webb and Kenward* (1916) 85 LJKB 1533, CA; *Dawson Line v AG Adler für Chemische Industrie of Berlin* [1932] 1 KB 433, CA; *Strathlorne Steamship Co v Andrew Weir & Co* (1934) 40 Com Cas 168, CA; *Thomson v Louis Dreyfus & Co* (1936) 56 Ll L Rep 44, CA; *A/S Hansen-Tangens Rederi III v Total Transport Corpn, The Sagona* [1984] 1 Lloyd's Rep 194; *Telfair Shipping Corpn v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243, [1985] 1 WLR 553; *Ben Shipping Co (Pte) Ltd v An Bord Bainne, The C Joyce* [1986] 2 All ER 177, [1986] 2 Lloyd's Rep 285; *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412, CA; and see SHIPPING AND NAVIGATION vol 43(2) (Reissue) PARA 1481 et seq. A provision in a towage contract that the tug be not liable for damage caused to or by the towed vessel is not an indemnity by the owners of the vessel against the liability for negligence of the tug's owners to third parties: *The Richmond* (1902) 19 TLR 29, DC. As to provisions for indemnity in contracts of towage see further SHIPPING AND NAVIGATION vol 43(1) (Reissue) PARA 792.

13 See DISTRESS vol 13 (2007 Reissue) PARA 993.

14 *Humphrys v Pratt* (1831) 5 Bli NS 154, HL; *Sheffield Corpn v Barclay* [1905] AC 392, HL. Contrast *Evans v Collins* (1844) 5 QB 804. As to a debtor's liability to indemnify third parties whose goods have been distrained or seized see PARA 1266 note 3.

1260. Indemnities as incidents of legal relationships. A right of indemnity is an incident of certain legal relationships, for example those of agency or employer and employee, where an agent or employee is liable to be indemnified by his principal or employer against liabilities incurred in the reasonable performance of his agency or employment[1]. Rights of indemnity may also arise under principles of equity. In case of breach of trust a trustee may be indemnified out of the interest of a beneficiary who has instigated the breach[2] or be entitled to contribution or indemnity from a co-trustee[3]. A personal representative is entitled to be indemnified out of the estate for his proper expenses[4]. A receiver is ordinarily entitled to be indemnified out of the assets against liabilities properly incurred by him[5]. A director of a company regulated by the Companies Act 1985 is entitled to be indemnified by the company for all debts, expenses and liabilities incurred in the ordinary course of business, and for money borrowed and applied for those purposes[6].

The trustees or committee of a club are not in general entitled to be indemnified by the members against liabilities incurred on behalf of the club[7]. Rights of indemnity arising in relation to branches of law other than guarantee are discussed elsewhere in this work in the appropriate context[8].

1 See AGENCY vol 1 (2008) PARA 111 et seq; AUCTION vol 2(3) (Reissue) PARA 225; EMPLOYMENT vol 16(1A) (Reissue) PARA 39.

2 See the Trustee Act 1925 s 62; and TRUSTS vol 48 (2007 Reissue) PARA 1131.

3 See TRUSTS vol 48 (2007 Reissue) PARA 1129 et seq. As to a trustee's right to remuneration see TRUSTS vol 48 (2007 Reissue) PARA 930 et seq.

4 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 437 (right of indemnity), 458 (representative's liability and right to indemnity), 468 (power to employ and pay agents), 790 (torts by personal representative), 807 (indemnity for beneficiary's interest).

5 See the Insolvency Act 1986 ss 37(1)(b), (3), 44(1)(c), (3); COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 402; and RECEIVERS vol 39(2) (Reissue) PARA 306.

6 See *Re Norwich Yarn Co, ex p Bignold* (1856) 22 Beav 143; and see COMPANIES.

7 See CLUBS vol 6 (2003 Reissue) PARA 142.

8 See eg the titles referred to in notes 1–7 and in PARA 1257 note 2.

1261. Implied right excluded by express contract. In the absence of an indication of a contrary intention, the right to an implied indemnity is excluded by an express contract relating to the same subject matter[1]; for, where there is an express contract, the parties must be guided by it, and one party cannot relinquish it or abide by it as it may suit his convenience to do[2]. Thus the guarantor's implied right to be indemnified by the principal debtor is excluded by an express contract of indemnification between them[3].

The statutory right to contribution[4] does not affect any express or implied contractual or other right to an indemnity which would be enforceable apart from that statutory right[5].

1 See *Upton v Fergusson* (1833) 3 Moo & S 88. As to the implication of terms in contracts see generally CONTRACT vol 9(1) (Reissue) PARA 778 et seq.
2 *Cutter v Powell* (1795) 6 Term Rep 320 at 325 per Ashhurst J.
3 *Toussaint v Martinnant* (1787) 2 Term Rep 100 at 105 per Buller J; and see PARAS 1147, 1163e. See, however, *Telfair Shipping Corpn v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243 at 254–255, [1985] 1 WLR 553 at 568 per Neill J.
4 Ie the right conferred by the Civil Liability (Contribution) Act 1978 s 1 to recover contribution from any other person liable in respect of the same damage.
5 Civil Liability (Contribution) Act 1978 s 7(3). See DAMAGES vol 12(1) (Reissue) PARA 837; TORT vol 45(2) (Reissue) PARA 349; and cf PARA 1258 note 3.

1262. Quasi-indemnities. Akin to implied indemnities are those cases where necessaries are supplied to persons who, by reason of disability, cannot themselves contract, in circumstances which would justify the court in inferring an obligation to repay the money spent upon them. In cases of this kind the law implies an obligation on the part of such persons to pay for the necessaries supplied out of their own property[1].

1 *Re Rhodes, Rhodes v Rhodes* (1890) 44 ChD 94, CA; *Nash v Inman* [1908] 2 KB 1, CA. In *Re Clabbon* [1904] 2 Ch 465 this principle was extended to relief supplied to a child under the former Poor Law Acts; but see *Pontypridd Union v Drew* [1927] 1 KB 214, CA. As to the liability of a child for necessaries see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 18.

1263. Assignment of right of indemnity. Except in the case of certain contracts of insurance[1], the right to enforce an indemnity is property which, on the bankruptcy of the person indemnified, passes to the trustee in bankruptcy[2], and the trustee may recover the full amount for which the promisor is liable under the contract of indemnity, and not only the amount of dividend which the estate may pay to the creditor in respect of his claim[3]. The amount so recovered forms part of the assets divisible among the general body of creditors, and the creditor in respect of whose debt the indemnity was given may not in general claim payment of that amount to himself[4].

The right to indemnification is also assignable, at any rate to the creditor, either by the indemnified party himself or by his trustee in bankruptcy, and the assignee may enforce it in his own name in an action against the indemnifier[5]. In certain cases, where the right to indemnification arises under a contract of insurance, the rights of the assured against the insurer, on the bankruptcy of the assured, are by statute transferred to the person to whom he has incurred the liability against which the contract insures him[6].

1 See the text and note 6.
2 The right to indemnity is a 'thing in action' within the meaning of 'property' in the Insolvency Act 1986 s 436: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 400 et seq.

3 *Re Law Guarantee Trust and Accident Society Ltd, Liverpool Mortgage Insurance Co's Case* [1914] 2 Ch 617, CA, where the position was held to be the same in equity whether the contract was treated as a contract of insurance or of indemnity; *Re Harrington Motor Co Ltd, ex p Chaplin* [1928] Ch 105, CA; *Hood's Trustees v Southern Union General Insurance Co of Australasia Ltd* [1928] Ch 793, CA; and see *Wolmershausen v Gullick* [1893] 2 Ch 514 at 528.

4 *Wolmershausen v Gullick* [1893] 2 Ch 514 at 528; *Re Law Guarantee Trust and Accident Society, Godson's Claim* [1915] 1 Ch 340; *Re Harrington Motor Co Ltd, ex p Chaplin* [1928] Ch 105, CA; *Hood's Trustees v Southern Union General Insurance Co of Australasia Ltd* [1928] Ch 793, CA. Contrast *Re Richardson, ex p Governors of St Thomas' Hospital* [1911] 2 KB 705, CA, where the right of indemnity arose on equitable grounds and the creditor in respect of whose debt the indemnity arose was held entitled to money paid by the debtor. For comment on this decision see *Re Law Guarantee Trust and Accident Society, Liverpool Mortgage Insurance Co's Case* [1914] 2 Ch 617 at 640–641, 650–651, CA; *Re Harrington Motor Co Ltd, ex p Chaplin* above at 123, 125; *Hood's Trustees v Southern Union General Insurance Co of Australasia* above at 805, CA. See, however, note 6.

5 *Re Perkins, Poyser v Beyfus* [1898] 2 Ch 182, CA; *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476, CA, distinguishing *Rendall v Morphew* (1914) 84 LJCh 517. In *Rendall v Morphew* above there was no liability any longer in existence in respect of which the contract to indemnify could operate.

6 See the Third Parties (Rights against Insurers) Act 1930 s 1 (amended by the Insolvency Act 1985 Sch 8 para 7(2); the Insolvency Act 1986 Sch 14; and by SI 2003/2096). In the case of compulsory motor vehicle insurance, the transfer of rights against the insurer by virtue of that Act does not affect the bankrupt's liability to the third party: see the Road Traffic Act 1988 s 153(1), (2); and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 953. The 1930 Act does not apply to contracts of reinsurance: Third Parties (Rights against Insurers) Act 1930 s 1(5). It supersedes the decisions in *Re Harrington Motor Co Ltd, ex p Chaplin* [1928] Ch 105, CA, and *Hood's Trustees v Southern Union General Insurance Co of Australasia Ltd* [1928] Ch 793, CA. See generally *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363, [1967] 1 All ER 577, CA; *Murray v Legal and General Assurance Society Ltd* [1970] 2 QB 495, [1969] 3 All ER 794; *Farrell v Federated Employers Insurance Association* [1970] 3 All ER 632, [1970] 1 WLR 1400, CA; *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957, [1989] 1 All ER 961, HL; and INSURANCE vol 25 (2003 Reissue) PARA 679 et seq.

B. EXTENT OF INDEMNITY

1264. Extent of liability under indemnity. The extent of a person's liability under an indemnity depends on the nature and terms of the contract, and each case must be governed, in general, by its own facts and circumstances[1]. A clause will not indemnify a person against damage caused by his negligence, where it also indemnifies against damage otherwise arising, unless it is clearly expressed to have such an effect[2].

The holder of an indemnity, when acting within the scope of his authority, is generally entitled to recover the amount payable by him by virtue of any judgment recovered against or compromise reasonably made by him in any legal proceedings in respect of any matter comprised by the indemnity, together with all costs properly incurred in defending such legal proceedings, including his own costs[3].

It is not necessary in order to bring the claim against the indemnifier that notice of the proceedings should have been given to the indemnifier, but if it is not given it will be open to him to impugn the judgment or the compromise[4]. It is therefore prudent to join him as a party to the proceedings[5]. If, having been put on notice, he then refuses so to act, he will, in general, be estopped from denying the validity of the judgment or the reasonableness of the compromise[6], and it will be difficult for him to show that any costs incurred in defending the proceedings were improperly incurred[7]. Nevertheless, if they were improperly incurred, he will not be liable for them[8].

1 *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165, HL; *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400, [1973] 1 All ER 193, CA. Cf *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412 at 417, 422, CA. See also *Rank Enterprises Ltd v Gerard* [2000] 1 All ER (Comm) 449, [2000] 1 Lloyd's Rep 403, CA (indemnity afforded to buyers of vessels against consequences of claims incurred prior to delivery). See also *Westerngeco Ltd v ATP Oil & Gas (UK) Ltd* [2006] EWHC 1164 (Comm), [2006] 2 All ER (Comm) 637; *Tyco Fire and Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd* [2007] BLR 419, [2007] All ER (D) 86 (Jul) (implicit that contractor's duty to indemnify was subject to employer's duty to obtain insurance). For examples of particular contracts see *Sumner v Powell* (1816) 2 Mer 30; affd (1823) Turn & R 423 (joint covenant to indemnify cannot be treated as joint and several so as to render the estate of a covenantor who predeceases the others liable); *Draper v Thompson* (1829) 4 C & P 84 (express indemnity by landlord to agent levying distress covered only case where distress illegal); *Lewis v Smith* (1850) 9 CB 610 (indemnity construed as an indemnity against lawful claims only); contrast *Ibbett v De la Salle* (1860) 6 H & N 233 (where the indemnity was held to cover unfounded claims); *Tanner v Woolmer* (1853) 8 Exch 482 (indemnity confined to certain specified claims); *Grylls v Grylls, Mann v Kendall* (1869) 18 WR 85 (covenant of indemnity given by continuing partner to incoming partners against firm's existing liabilities held to cover only payments made by incoming partners out of private means); *Dumbell v Isle of Man Rly Co* (1880) 42 LT 745, PC; *Hooper v Bromet* (1904) 90 LT 234, CA (indemnity against inaccuracy in copy of lost title deed; deed found; deed contained building restriction not in copy; action to enforce deed by adjoining owner; indemnity covered difference in value of land in light of restriction, but not costs of removing buildings erected after notice of true terms of deed or defences unreasonably put forward in action); *Webster v Petre* (1879) 4 ExD 127 (effect of subsequent legislation on the indemnity); *Gooch v Clutterbuck* [1899] 2 QB 148, CA (indemnity by assignee to assignor of lease against claims for breach of covenant held to apply to breaches committed at the date of the assignment); *Greenwood Ltd v Hawkings* (1906) 23 TLR 72 (undertaking of work by sub-contractors under contract constituted acceptance of term that they should indemnify contractors, although indemnity in writing left unsigned); *Croydon RDC v Sutton District Water Co* (1908) 72 JP 217, CA (indemnity by contractor against damage resulting from works; damage caused to highways by extraordinary traffic); *Great Western Rly Co v James Durnford & Sons Ltd* (1928) 44 TLR 415, HL (indemnity against all claims and demands or liability whatsoever held not to include claims by the party giving the indemnity); *The Carlton* [1931] P 186 (same point); *Montagu Stanley & Co v JS Solomon Ltd* [1932] 1 KB 611; affd [1932] 2 KB 287, CA (indemnity against 50% of 'loss sustained' by plaintiffs in connection with business introduced by defendant not enforceable merely on a customer signing a deed of assignment); *Bradstreets British Ltd v Harold Mitchell and Carapanayoti & Co Ltd* [1933] Ch 190 (extent of indemnity against loss owing to publication of a confidential communication which is libellous); *London and North Eastern Rly Co v Furness Shipbuilding Co Ltd* (1934) 150 LT 382, HL (indemnity not limited to acts for which the party giving the indemnity was responsible); *London Passenger Transport Board v T Walton (London) Ltd* (1934) 78 Sol Jo 224 (extent of indemnity against claims arising out of accident); *Great Western Rly Co v Port Talbot Dry Dock Co Ltd* [1944] 2 All ER 328 (whether indemnity clause applicable to subject matter of contract to repair a ship); *Henson v London and North Eastern Rly Co and Coote and Warren Ltd* [1946] 1 All ER 653, CA (wagon repairing company undertook to indemnify railway company against liability for injury to former's employees; requisition of railways and wagons during war; indemnity still effective); *John Lee & Son (Grantham) Ltd v Railway Executive* [1949] 2 All ER 581, CA (meaning of 'loss which but for the tenancy hereby created would not have arisen'); *TF Maltby Ltd v Pelton Steamship Co Ltd* [1951] 2 All ER 954n (indemnity for all claims respecting personal injuries to employees); *William Hamilton & Co v Anderson & Co* 1953 SC 129, Ct of Sess (indemnity against claims incurred at common law); *Stevens v Britten* [1954] 3 All ER 385, [1954] 1 WLR 1340, CA (indemnity of outgoing partner against income tax liability); *Warrellow v Chandler and Braddick* [1956] 3 All ER 305, [1956] 1 WLR 1272 (indemnity by licensee against liability for personal injury 'which but for the permission hereby granted would not have arisen'; indemnity held to cover injury to licensee's employee on licensor's premises where, but for the licence, he would have been a trespasser); *Murfin v United Steel Cos Ltd* [1957] 1 All ER 23, [1957] 1 WLR 104, CA (indemnity against claims arising from causes other than negligence; 'negligence' did not include breach of statutory duty); *Re Hollebone's Agreement, Hollebone v WJ Hollebone & Sons Ltd* [1959] 2 All ER 152, [1959] 1 WLR 536, CA (vendor's liability, on sale of a business, in respect of its tax liability); *Unity Finance Ltd v Woodcock* [1963] 2 All ER 270, [1963] 1 WLR 455, CA (recourse agreement); *Bowmaker (Commercial) Ltd v Smith* [1965] 2 All ER 304, [1965] 1 WLR 855, CA (recourse agreement); *Bosma v Larsen* [1966]

1 Lloyd's Rep 22 (nature of indemnity by charterers to owners for acts of master on orders of charterers); *Goulston Discount Co Ltd v Clark* [1967] 2 QB 493, [1967] 1 All ER 61, CA; *Wright v Tyne Improvement Comrs* [1968] 1 All ER 807, [1968] 1 WLR 336, CA (meaning of 'howsoever caused'); *Bentworth Finance Ltd v Lubert* [1968] 1 QB 680, [1967] 2 All ER 810, CA (hire-purchase agreements); *Westcott v JH Jenner (Plasterers) Ltd* [1962] 1 Lloyd's Rep 309, CA; *The White Rose* [1969] 3 All ER 374, [1969] 1 WLR 1098; *Smith v Vange Scaffolding and Engineering Co Ltd* [1970] 1 All ER 249, [1970] 1 WLR 733; *Richardson v Buckinghamshire County Council* [1971] 1 Lloyd's Rep 533, (1970) 69 LGR 327, CA (claim under standard form conditions of building contract for indemnity against costs of defending unsuccessful action brought by contractor's employee); *FMC (Meat) Ltd v Fairfield Cold Stores Ltd* [1971] 2 Lloyd's Rep 221 (storage contract); *Moffat Tank Co Ltd v Canadian Indemnity Co* (1973) 42 DLR (3d) 260 (Alta App Div) (meaning of 'liability imposed by law'); *Blake v Richards and Wallington Industries Ltd and Fram Siegwart Ltd* (1974) 16 KIR 151 (whether crane owner entitled to indemnity from hirer for negligence of owner's own employee); *Clark v Sir William Arrol & Co Ltd* 1974 SLT 90, Ct of Sess; *Hair and Skin Trading Co Ltd v Norman Airfreight Carriers Ltd and World Transport Agencies* [1974] 1 Lloyd's Rep 443 (indemnity in contract of carriage); *County and District Properties Ltd v C Jenner & Son Ltd* [1976] 2 Lloyd's Rep 728 (indemnity by building sub-contractor to main contractor); *Boughen v Frederick Attwood Ltd and Cryoplants Ltd* [1978] 1 Lloyd's Rep 413 (extent of indemnity under Road Haulage Association standard conditions); *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205, [1983] 1 Lloyd's Rep 448; on appeal [1983] 2 All ER 205, [1983] 1 WLR 399, [1983] 2 Lloyd's Rep 152, HL (whether plaintiff's right to indemnity on breach of other contracts a penalty); *R & H Green & Silley Weir Ltd v British Railways Board (Kavanagh, third party)* [1985] 1 All ER 237, [1985] 1 WLR 570n (general indemnity in tipping contract); *Thompson v T Lohan (Plant Hire) Ltd (JW Hurdiss Ltd, third party)* [1987] 2 All ER 631, [1987] 1 WLR 649, CA (indemnity against liability for personal injuries or death); *Hancock Shipping Co Ltd v Deacon and Trysail (Pte) Ltd, The Casper Trader* [1991] 2 Lloyd's Rep 550 (indemnity to vessel owner for acts of riding repair technicians); *EE Caledonia Ltd (formerly Occidental Petroleum (Caledonia) Ltd) v Orbit Valve Co Europe* [1993] 4 All ER 165, [1993] 2 Lloyd's Rep 418 (whether indemnity by contractors to owners of 'Piper Alpha' platform covered owners' liability to contractors' employee for owners' negligence causing employee's death); *Anglian Water Services Ltd v Crawshaw Robbins & Co Ltd* [2001] BLR 173, [2001] All ER (D) 59 (Feb) (where injury or damage arises from a sub-contractor's failure to fulfil an express duty assigned to him under a specific term of his contract of employment, a general indemnity clause will not render the sub-contractor's employer liable). See also *Guy-Pell v Foster* [1930] 2 Ch 169, CA, where the right to indemnity was lost in consequence of the breach by the indemnified party of an implied term of the contract, amounting to the removal of consideration for the indemnity.

2 *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165, HL. See also *Canada Steamship Lines Ltd v R* [1952] AC 192, [1952] 1 All ER 305. PC; *North of Scotland Hydro Electric Board v Taylor* 1955 SLT 373, Ct of Sess; *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71, [1972] 1 All ER 399, CA; *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400, [1973] 1 All ER 193, CA; *EE Caledonia Ltd (formerly Occidental Petroleum (Caledonia) Ltd) v Orbit Valve Co Europe* [1993] 4 All ER 165, [1993] 2 Lloyd's Rep 418 (plaintiff could not rely on an indemnity from a defendant in respect of damage caused both by negligence and by breach of statutory duty by the plaintiff, because (1) the indemnity did not, in the absence of express wording, extend to the plaintiff 's own negligence; and (2) the breach of statutory duty had not on its own been sufficient to cause the damage, so the plaintiff 's liability could not be indemnified on the basis of the breach alone). See further *James Archdale & Co Ltd v Comservices Ltd* [1954] 1 All ER 210, [1954] 1 WLR 459, CA; *AMF International Ltd v Magnet Bowling Ltd* [1968] 2 All ER 789, [1968] 1 WLR 1028; *Clark v Sir William Arrol & Co Ltd* 1974 SLT 90, Ct of Sess; and CONTRACT vol 9(1) (Reissue) PARA 806.

3 *Howard v Lovegrove* (1870) LR 6 Exch 43; *Re Wells and Croft, ex p Official Receiver* (1895) 72 LT 359; *Simpson and Miller v British Industries Trust Ltd* (1923) 39 TLR 286; *Smith v Compton* (1832) 3 B & Ad 407 (but see the observations on this case in *Great Western Rly Co v Fisher* [1905] 1 Ch 316); *The Millwall* [1905] P 155, CA; see also *Ibbett v De la Salle* (1860) 6 H & N 233. So if two trustees are held liable for breach of trust, and as between them one is primarily liable, he is bound to indemnify his co-trustee against the amount which the co-trustee has to pay to the trust estate, including the costs incurred: *Lockhart v Reilly, Reilly v Lockhart* (1856) 25 LJCh 697; *Re Linsley, Cattley v West* [1904] 2 Ch 785.

4 *Duffield v Scott* (1789) 3 Term Rep 374 at 377; *Smith v Compton* (1832) 3 B & Ad 407. As to the caution to be exercised in applying pre-CPR authorities see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 60.
5 Ie under CPR Pt 19: see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 254 et seq.
6 *Duffield v Scott* (1789) 3 Term Rep 374 at 377; *Jones v Williams* (1841) 7 M & W 493; and see *Gray v Lewis, Parker v Lewis* (1873) 8 Ch App 1035 at 1058–1059 per Mellish LJ, where it was held that the rule does not apply in cases of an implied indemnity consequential upon a breach of trust. Cf *Ben Shipping Co (Pte) Ltd v An Bord Bainne, The C Joyce* [1986] 2 All ER 177, [1986] 2 Lloyd's Rep 285.
7 See *The Millwall* [1905] P 155, CA; *Blyth v Smith* (1843) 5 Man & G 405; *Broom v Hall* (1859) 7 CBNS 503; *Smith v Howell* (1851) 6 Exch 730 at 737.
8 See PARA 1265.

1265. When indemnity covers costs of proceedings. In all cases where there is a contract of indemnity the costs of legal proceedings properly incurred by the person indemnified are recoverable under the indemnity[1], and in such cases it seems that costs on an indemnity basis[2] are to be awarded[3]. The person indemnified is not, however, entitled to defend a claim which must obviously be decided against him[4].

Where one person promises to indemnify another from costs if he will stay proceedings against a third person and sue some one designated, the mere stay of proceedings will entitle the promisee to enforce the indemnity[5].

The public policy against maintenance[6] may be a reason for ordering a person who has agreed to indemnify a party to litigation against the costs of the claim to pay the costs of the other party if that other party is successful[7]. However, although the court undoubtedly has power to order someone who is not a party to the litigation to pay the costs of it[8], that power will only be exercised in exceptional circumstances[9].

1 *Duffield v Scott* (1789) 3 Term Rep 374; *Jones v Williams* (1841) 7 M & W 493; *The Millwall* [1905] P 155, CA; and see *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, [1957] 1 All ER 125, HL; *Allen v London Guarantee and Accident Co Ltd* (1912) 28 TLR 254, where an insurance company defended actions in the name of the assured without his consent, and was held, therefore, to have incurred a common law liability for the costs of the action; and *Bourne v Colodense Ltd* [1985] ICR 291, CA (when the plaintiff agreed to accept legal assistance offered by his union there was an understanding between the parties amounting in law to a contract that the union would discharge any liability for costs which the plaintiff might incur). In the absence of special circumstances, the costs of an appeal are not recoverable: see *Maxwell v British Thomson Houston Co Ltd* [1904] 2 KB 342; *Shepheard v Bray* [1906] 2 Ch 235 at 254; and see also *Great Western Rly Co v Fisher* [1905] 1 Ch 316 (costs of action to enforce arbitration award). An agreement to be bound by the result of an arbitration does not carry with it an implied agreement to pay the costs which may be incurred in it: *Thomas Jackson & Co Ltd v Henderson, Craig & Co Ltd* (1916) 115 LT 36, CA. See also *Potter v LCC* (1905) 70 JP 35, where the agreement was by the defendants to repay to the plaintiff any sum paid by way of compensation for damage caused to third parties by certain operations of the plaintiff and it was held that this was not a contract of indemnity under which the plaintiff could recover the costs of the proceedings in which the compensation was settled.
2 As to the assessment of costs on the indemnity basis see COSTS.
3 *Smith v Compton* (1832) 3 B & Ad 407; *Howard v Lovegrove* (1870) LR 6 Exch 43, where it was held that the whole costs paid by the client to the solicitor were reasonable; *Born v Turner* [1900] 2 Ch 211; *Barnett v Eccles Corpn* [1900] 2 QB 423 at 428, CA, per Vaughan Williams LJ. In *Maxwell v British Thomson Houston Co Ltd* [1904] 2 KB 342 at 344 per Kennedy J, it was held that a person who was indemnifying another against the costs of an action could not, unless there were some special circumstances, be called upon to pay them on the former solicitor and own client basis. It would appear, however, that there is a distinction between the case of a person who is entitled by contract to an indemnity and the case of a person who is simply recovering damages. A person so entitled to an indemnity may recover costs on what is now the indemnity basis, but a person simply recovering damages may not: *Great Western Rly Co v Fisher* [1905] 1 Ch 316 at 324; *Born v Turner* above; *Barnett v Eccles Corpn* above; *Wiffen v Bailey and Romford UDC* [1915] 1 KB 600 at 607, CA, per Buckley LJ:

see also *Hornby v Cardwell* (1881) 8 QBD 329 at 333, CA; *Penley v Watts* (1841) 7 M & W 601 at 609; *Tindall v Bell* (1843) 11 M & W 228. Cf *Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA; and MORTGAGE vol 32 (2005 Reissue) PARA 940 et seq. As to the caution to be exercised in applying pre-CPR authorities see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 60.

4 *Knight v Hughes* (1828) Mood & M 247; *Gillett v Rippon* (1829) Mood & M 406; *Smith v Howell* (1851) 6 Exch 730; *Beech v Jones* (1848) 5 CB 696; *Roach v Thompson* (1830) Mood & M 487; *Walker v Hatton* (1842) 10 M & W 249 at 259. See also *Hooper v Bromet* (1904) 90 LT 234, CA; *Re Empire Paper Ltd (in liquidation)* [1999] BCC 406.

5 *Wilson v Bevan* (1849) 7 CB 673; *Luning v Milton* (1890) 7 TLR 12, where leave to defend was given on condition that the defendant join in a bond with two sureties for the payment of any such sum as should be recovered in the action.

6 Maintenance is no longer a crime or a tort: see the Criminal Law Act 1967 ss 13(1)(a), 14(1). However, a contract may still be treated as contrary to public policy or otherwise illegal on the ground of maintenance: s 14(2); *Hill v Archbold* [1968] 1 QB 686, [1967] 3 All ER 110, CA; *Orme v Associated Newspapers Group* [1981] CA Transcript 809; *Trendtex Trading Corpn v Credit Suisse* [1982] AC 679, [1981] 3 All ER 520, HL; *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499, CA; *Giles v Thompson* [1994] 1 AC 142, [1993] 3 All ER 321, HL.

7 See *Singh v Observer Ltd* [1989] 2 All ER 751 (revsd on new evidence at [1989] 3 All ER 777n, CA).

8 *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965, [1986] 2 All ER 409, HL.

9 See *Taylor v Pace Developments Ltd* [1991] BCC 406, CA; *Symphony Group plc v Hodgson* [1994] QB 179, [1993] 4 All ER 143.

C. ENFORCEMENT OF INDEMNITY

(A) When Right to Enforce Indemnity Arises

1266. Enforcement of indemnity at law and in equity. Before the passing of the Supreme Court of Judicature Acts 1873 and 1875 there was a difference between the remedies available to enforce an ordinary contract of indemnity at law on the one hand and in equity on the other[1]. At law the indemnified party had[2] to discharge the liability himself first and then sue the indemnifier for damages for breach of contract[3]. In equity, an ordinary contract of indemnity could be directed to be specifically performed by ordering that the indemnifier should pay the amount concerned directly to the third party to whom the liability was owed or in some cases to the party to be indemnified[4]. Since the passing of the Supreme Court of Judicature Acts 1873 and 1875, the equitable remedy has prevailed over the remedy at law[5].

1 *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 AC 1 at 28, [1990] 2 All ER 705 at 711, HL, per Lord Brandon of Oakbrook.

2 Unless, that is, the contract included a special provision by virtue of which the right could be enforced at law before payment had been made: see *Toussaint v Martinnant* (1787) 2 Term Rep 100; *Martin v Court* (1788) 2 Term Rep 640; *Hodgson v Bell* (1797) 7 Term Rep 97; *Warwick v Richardson* (1842) 10 M & W 284; *Spark v Heslop* (1859) 1 E & E 563; *English and Scottish Trust Co v Flatau* (1887) 36 WR 238. In particular this promise would arise when, coupled with the promise of indemnity, there was a promise by the promisor himself to discharge the claim against which the indemnity was given: see *Penny v Foy* (1828) 8 B & C 11; *Carr v Roberts* (1833) 5 B & Ad 78; *Smith v Howell* (1851) 6 Exch 730. An express promise to indemnify was unnecessary in such a case, for the breach of such a contract could raise an obligation to indemnify (see *Hornby v Cardwell* (1881) 8 QBD 329 at 333, CA, per Brett LJ), and gave the promisee an immediate cause of action (*Loosemoor v Radford* (1842) 9 M & W 657; *Ashdown v Ingamells* (1880) 5 ExD 280, CA; and see *Lethbridge v Mytton* (1831) 2 B & Ad 772).

3 See the text and note 2. See also *Goddard v Vanderheyden* (1771) 3 Wils 262; *Young v Hockley* (1772) 3 Wils 346; *Taylor v Mills* (1777) 2 Cowp 525; *Taylor v Young* (1820) 3 B & Ald 521; *Huntley v Sanderson* (1833) 1 Cr & M 467; *Collinge v Heywood* (1839) 9 Ad & El 633 (overruling *Bullock v Lloyd* (1825) 2 C & P 119); *Reynolds v Doyle* (1840) 1 Man & G 753. The amount so paid constituted a debt due to him from the promisor. Under the old system of

pleading it could be recovered under the common money counts as money paid for the defendant's use, and could be set off: see *Rodgers v Maw* (1846) 15 M & W 444; *Hutchinson v Sydney* (1854) 10 Exch 438; *Crampton v Walker* (1860) 3 E & E 321. Payment for this purpose included the case where the indemnified's goods had been taken in execution and the proceeds of sale paid to the creditor: *Rodgers v Maw* above. If a person's goods are lawfully distrained upon or seized for another's debt, he may recover the amount which he pays to redeem them or the value of the goods, if they are sold, from the debtor as under an implied contract of indemnity: *Exall v Partridge* (1799) 8 Term Rep 308; *Edmunds v Wallingford* (1885) 14 QBD 811, CA.

4 *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 AC 1 at 28, [1990] 2 All ER 705 at 711–712, HL, per Lord Brandon of Oakbrook. See also *Johnston v Salvage Association* (1887) 19 QBD 458 at 460, CA, per Lindley LJ; *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476 at 481–482, CA, per Pickford LJ.

5 See now the Supreme Court Act 1981 s 49(1); *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 AC 1 at 28, [1990] 2 All ER 705 at 712, HL, per Lord Brandon of Oakbrook. See further EQUITY vol 16(2) (Reissue) PARA 500.

1267. The remedies available. Unless the terms of the contract expressly prohibit it, a person entitled to an indemnity may obtain relief as soon as his liability to the third person has arisen and before he has made payment[1]. He may therefore, where appropriate, obtain an order compelling the person giving the indemnity to set aside a fund out of which liability may be met[2] or to pay the amount due directly to the third person[3] or even, where the giver of the indemnity is under no liability to the third person[4], to himself[5]. But the equitable right to enforce an indemnity does not constitute a debt[6]. An indemnified person is not precluded from obtaining relief by the fact that his liability to the third person cannot effectively be enforced against him[7].

The date when time begins to run against a person entitled to an indemnity depends upon the nature and extent of the indemnity, and the nature of the relief claimed[8].

1 See *Re National Financial Co, ex p Oriental Commercial Bank* (1868) 3 Ch App 791; *Wooldridge v Norris* (1868) LR 6 Eq 410; *Lacey v Hill, Crowley's Claim* (1874) LR 18 Eq 182; *Wolmershausen v Gullick* [1893] 2 Ch 514; *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401; *Re Richardson, ex p Governors of St Thomas' Hospital* [1911] 2 KB 705, CA. A contractual indemnity takes precedence over independent insurance: *Caledonia North Sea Ltd v Norton (No 2) Ltd (in liquidation)* [2002] UKHL 4, [2002] 1 All ER (Comm) 321, [2002] 1 Lloyd's Rep 553. As to the right of a guarantor to exoneration from liability as soon as his liability to the creditor has arisen see PARA 1151 et seq.

2 *Re Richardson, ex p Governors of St Thomas' Hospital* [1911] 2 KB 705 at 709, CA, per Cozens-Hardy MR.

3 *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401; *Tate v Crewdson* [1938] Ch 869, [1938] 3 All ER 43; *Thomas v Nottingham Incorporated Football Club Ltd* [1972] Ch 596, [1972] 1 All ER 1176.

4 See *Re Harrington Motor Co Ltd, ex p Chaplin* [1928] Ch 105, CA.

5 *Lacey v Hill, Crowley's Claim* (1874) LR 18 Eq 182 at 191 per Sir George Jessel MR; *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476 at 482, CA, per Pickford LJ and at 487 per Warrington LJ. The position is analogous to that which arises when the indemnity can be enforced at law before the promisee has suffered actual loss: see *Carr v Roberts* (1833) 5 B & Ad 78; *Re Harrington Motor Co Ltd, ex p Chaplin* [1928] Ch 105 at 115, CA, per Lord Hanworth MR. Such an order will not be made where the indemnifying party is also under a liability to the creditor, as the payment to the party indemnified will not discharge him from that liability: see *Wolmershausen v Gullick* [1893] 2 Ch 514 at 529.

6 *Re Mitchell, Freelove v Mitchell* [1913] 1 Ch 201, where a clause in a will forgiving 'all debts' due to the testator from his nephew, whose debt the testator had indemnified, was held not to deprive his executors of their right of indemnification by the nephew; *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85 at 113–114, CA; *Re A Debtor (No 66 of 1955), ex p Debtor v Trustee of Property of Waite* [1956] 3 All ER 225 at 230–231, [1956] 1 WLR 1226 at 1234–1235, CA. See also *Israelson v Dawson* [1933] 1 KB 301, CA, where it was held that the liability of a car owner's insurers against third party risks to indemnify the insured is not a debt which can be attached by a person who has recovered judgment against the insured for

personal injuries. As to the right of a company's guarantor to petition to wind up the company see PARA 1155. As to the position of a guarantor who has paid the guaranteed debt see PARA 1157 et seq.

7 *Cruse v Paine* (1868) LR 6 Eq 641; on appeal (1869) 4 Ch App 441; *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476, CA, where the party indemnified was a married woman without separate estate against which a judgment claimed against her could be enforced; but see *Eddowes v Argentine Loan and Mercantile Agency Co Ltd* (1890) 63 LT 364, CA.

8 See *Telfair Shipping Corpn v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243, [1985] 1 WLR 553; and PARA 1183 et seq.

1268. Granting of further relief. The court may grant relief even before any liability has actually arisen if there is real ground for fearing that the rights of the party indemnified are being put in jeopardy[1], and if his claim to be indemnified is denied he can obtain a declaration that he has a right to be relieved from liability[2]. Apart, however, from these exceptional cases, it would seem that the court will not grant relief before any liability has arisen[3], although, apparently, where it has arisen the court will declare the right to indemnity generally, with liberty to apply from time to time to work it out[4].

Whether or not the person entitled to the indemnity and the person liable to indemnify him are already parties to the same claim, a claim by a defendant for an indemnity may be made under Part 20 of the Civil Procedure Rules ('CPR')[5].

1 *Re Anderson-Berry, Harris v Griffith* [1928] Ch 290, CA.

2 *Hobbs v Wayet* (1887) 36 Ch D 256. For a guarantor's similar rights see PARA 1153.

3 *Lloyd v Dimmack* (1877) 7 ChD 398; *Hughes-Hallett v Indian Mammoth Gold Mines Co* (1882) 22 ChD 561; *Bradford v Gammon* [1925] Ch 132; *Morrison v Barking Chemicals Co Ltd* [1919] 2 Ch 325; *Re Ledgard, Attenborough v Ledgard* (1922) 66 Sol Jo 405. Conversely, a party who may be liable to indemnify cannot, before any claim is made upon him, bring an action for a declaration that he is not liable: *Re Clay, Clay v Booth* [1919] 1 Ch 66, CA.

4 *Hughes-Hallett v Indian Mammoth Gold Mines Co* (1882) 22 ChD 561 at 565 per Fry J.

5 See CPR 20.2(1)(b); and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 684 et seq. When a guarantor availed himself of the former procedure for issuing a third party notice under RSC Ord 16 r 1 (revoked) in order to enforce an express contract by the principal debtor to indemnify him, it was held that he could sign judgment against the principal debtor before anything had been paid under the guarantee: *English and Scottish Trust Co v Flatau* (1887) 36 WR 238. As to the caution to be exercised in applying pre-CPR authorities see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 60.

(B) When Indemnity is Unenforceable for Illegality

1269. Indemnities unenforceable for illegality. An express indemnity may be unenforceable for illegality[1]. In cases where an express indemnity would be illegal, no right to an indemnity can arise by implication[2]. There is no right of indemnity where the party to the transaction or the doer of the act in respect of which indemnity is claimed knows it at the time to constitute a criminal offence[3] or would have known had he not been grossly negligent[4]. Nor is there such a right where the party to the transaction or the doer of the act, although he has full knowledge of the circumstances making the transaction an offence, does not appreciate that those circumstances constitute an offence[5].

Punishment inflicted by a criminal court is personal to the offender and the civil courts will not entertain a claim by him to recover an indemnity against it, nor in general does public policy permit an indemnity to be enforced in respect of expenses which the offender has incurred by reason of being compelled to make civil reparation for his crime[6].

A contract to indemnify a surety against liability under a recognisance on the admission of an accused person to bail in criminal proceedings is illegal[7]. So

money deposited with such a surety for his protection against the accused person's default cannot be recovered, unless the person who deposited it did not take part in the illegality[8]; and it is immaterial that the defendant has not committed any default and the surety has not been called upon to pay anything[9].

A guarantor for payment of an instalment under a deed of composition under which the principal debtor's property is vested in a trustee on behalf of one of the creditors, who has a power to seize it if default is made, is not entitled to the benefit of a counter-indemnity received by him from the principal debtor which the creditors have neither sanctioned nor authorised[10], although such a guarantor is entitled to retain goods deposited with him by the principal debtor, unknown to the principal debtor's creditors, under an agreement to indemnify the guarantor in consideration of the guarantor's guaranteeing instalments under a deed of composition, if the terms of the composition leave the goods at the debtor's own disposal[11].

1 *Collins v Blantern* (1767) 2 Wils 341 (indemnity in connection with agreement to stifle prosecution); *Brown, Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 QB 621, [1957] 2 All ER 844, CA (indemnity inducing issue of bill of lading containing fraudulent misrepresentation). For an example of an indemnity expressly declared void by statute see the Land Commission Act 1967 s 83(1), (2)(c) (repealed). As to the principle that an illegal consideration will not support a guarantee see generally PARA 1051; and as to the effect of illegality on contracts generally see CONTRACT vol 9(1) (Reissue) PARA 839 et seq.

2 *Jones v Orchard* (1855) 16 CB 614; cf the text to note 7; and see RESTITUTION vol 40(1) (2007 Reissue) PARA 65. As to the effect of illegality upon the implication of indemnity see further AGENCY vol 1 (2008) PARA 111 et seq; RESTITUTION vol 40(1) (2007 Reissue) PARA 73; EMPLOYMENT vol 16(1A) (Reissue) PARA 39.

3 *Smith v White* (1866) LR 1 Eq 626 (indemnity on assignment of lease of premises known to be used as a brothel); *Burrows v Rhodes* [1899] 1 QB 816 at 829, DC.

4 *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35, cited in note 6.

5 *Burrows v Rhodes* [1899] 1 QB 816 at 829, DC; *Haseldine v Hosken* [1933] 1 KB 822, CA (unsuccessful claim to indemnity arising out of champertous agreement); *Gray v Barr (Prudential Assurance Co Ltd, third party)* [1971] 2 QB 554 at 568, [1971] 2 All ER 949 at 956, CA, per Lord Denning MR (a similar claim arising from an act amounting to manslaughter), as explained in *DPP v Newbury, DPP v Jones* [1977] AC 500, [1976] 2 All ER 365, HL. Cf *Haseldine v Hosken* above; *R v Chief National Insurance Comr, ex p Connor* [1981] QB 758, sub nom *R v National Insurance Comr, ex p Connor* [1981] 1 All ER 769, DC. Compare *Cointat v Myham & Son* [1913] 2 KB 220; revsd on another ground [1914] WN 46, CA (indemnity against consequences of offence of strict liability upheld), and *Osman v J Ralph Moss Ltd* [1970] 1 Lloyd's Rep 313, CA (damages against insurance agent including fine for driving while uninsured). See also *Meah v McCreamer* [1985] 1 All ER 367; and DAMAGES vol 12(1) (Reissue) PARA 835.

6 *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35 at 38, where a wholesale wine merchant who bought from manufacturers and resold liquor which, but for his gross negligence, he would have known to be contaminated was not entitled to recover as damages from the manufacturers fines imposed on him or money refunded to his customers. See also eg *Colburn v Patmore* (1834) 1 Cr M & R 73 (criminal liability for libel); *R Leslie Ltd v Reliable Advertising and Addressing Agency Ltd* [1915] 1 KB 652 (offence against moneylending statutes; see RESTITUTION vol 40(1) (2007 Reissue) PARA 73); *Meah v McCreamer* [1985] 1 All ER 367. For the general principle that there can be no reparation for a criminal act, and for the limits of the application of the principle, see DAMAGES vol 12(1) (Reissue) PARA 835.

7 See CONTRACT vol 9(1) (Reissue) PARA 849; CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1176.

8 *Consolidated Exploration and Finance Co v Musgrave* [1900] 1 Ch 37 at 42, where the plaintiffs recovered from the surety shares which they had transferred to the prisoner for an innocent purpose, and which did not empower the prisoner to make use of the shares for the purpose of indemnifying the surety.

9 *Herman v Jeuchner* (1885) 15 QBD 561, CA, overruling on this point *Wilson v Strugnell* (1881) 7 QBD 548. The test whether a demand connected with an illegal transaction is capable of being enforced at law is whether the claimant requires any aid from the illegal transaction to establish his case: *Simpson v Bloss* (1816) 7 Taunt 246; *Taylor v Chester* (1869) LR 4 QB 309 at 314;

Herman v Jeuchner above: but see now *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, [1988] 2 All ER 23, CA; *Tinsley v Milligan* [1992] Ch 310, [1992] 2 All ER 391, CA. As to the recovery of money paid under an illegal contract see further CONTRACT vol 9(1) (Reissue) PARA 883 et seq.

10 *Re Simons, ex p Allard* (1881) 16 ChD 505, CA; and see *Wood v Barker* (1865) LR 1 Eq 139.

11 *Re Robinson, ex p Burrell* (1876) 1 ChD 537, CA. As to compositions see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 863.

1270. Indemnities not unenforceable for illegality. An employer may be indemnified by a contractor for whose acts he is legally responsible against damage resulting from the execution of the work[1]. A motor insurance policy covering third party liability is enforceable even though the claim arises from manslaughter[2].

An agreement for indemnifying any person against civil liability for libel in respect of the publication of any matter is not unlawful unless at the time of publication that person knows that the matter is defamatory and does not reasonably believe there is a good defence to any claim brought upon it[3].

Apart from questions of illegality, indemnities against claims by third persons of the most varied kinds have always been allowed[4], and they are not invalid on the grounds of maintenance[5], even though involving and contemplating the institution or defence of legal proceedings, when given in the legitimate defence of a business, commercial or other common interest[6].

1 *Newcombe v Yewen and Croydon RDC* (1913) 29 TLR 299, following the opinion of Lord Blackburn in *Hughes v Percival* (1883) 8 App Cas 443 at 446, HL. As to the right of an employer to be indemnified by his employee in respect of liability incurred as a result of the employee's negligence see EMPLOYMENT vol 16(1A) (Reissue) PARA 53. For statutory provisions for contribution between joint tortfeasors see the Civil Liability (Contribution) Act 1978; and as to the effect of those provisions on rights of indemnity see TORT vol 45(2) (Reissue) PARA 348 et seq.

2 *Tinline v White Cross Insurance Association Ltd* [1921] 3 KB 327; *James v British General Insurance Co* [1927] 2 KB 311; *Marles v Philip Trant & Sons Ltd (Mackinnon, third party)* [1954] 1 QB 29 at 40, [1953] 1 All ER 651 at 659, CA, per Denning LJ; *Gray v Barr (Prudential Assurance Co Ltd, third party)* [1971] 2 QB 554, [1971] 2 All ER 949, CA. The motorist only has this right where the crime is committed negligently, not deliberately: *Gardner v Moore* [1984] AC 548 at 560, [1984] 1 All ER 1100 at 1105–1106, HL. See also *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745, [1964] 2 All ER 742, CA; *Department of Trade and Industry v St Christopher Motorists' Association Ltd* [1974] 1 All ER 395, [1974] 1 WLR 99.

3 Defamation Act 1952 s 11; *Shackell v Rosier* (1836) 2 Bing NC 634; *WH Smith & Son v Clinton and Harris* (1908) 99 LT 840. It is not against public policy to agree not to publish a confidential communication which is libellous and to indemnify against the publication: *Weld-Blundell v Stephens* [1920] AC 956, HL; *Bradstreets British Ltd v Harold Mitchell and Carapanayoti & Co Ltd* [1933] Ch 190; contrast *Howard v Odham's Press Ltd* [1938] 1 KB 1, [1937] 2 All ER 509, CA; and see *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] QB 613, [1975] 1 All ER 41. As to the invalidity of an indemnity against criminal liability for libel see *Colburn v Patmore* (1834) 1 Cr M & R 73; and PARA 1269.

4 *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006 at 1014–1015, CA, per Fletcher Moulton LJ.

5 See PARA 1265 text and notes 6–8.

6 *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006 at 1012, CA, per Cozens-Hardy MR, where the indemnities held to be valid took the form of agreements by manufacturers to indemnify their customers against actions by rival manufacturers for using an apparatus manufactured by the givers of the indemnity.

(ii) Performance Bonds

1271. Performance bonds or performance guarantees; in general. Some contracts for the international sale of goods include provision for one party, often the seller, to procure a performance bond or an international bank

guarantee from a bank or an insurance or other company in favour of the other contracting party, normally the buyer, the seller being known as the account party and the buyer the beneficiary of the bond or guarantee[1]. A performance bond or performance guarantee[2] commonly provides for payments to be made on the mere demand of the beneficiary, typically the buyer under the contract of sale, and consequently acts as an incentive to the seller to perform his obligations under that contract[3]. The contractual obligations arising under such guarantees or bonds are separate from, and not dependent on, those existing under the sale contract between the seller and the buyer[4]. A performance bond is thus not a guarantee in the strict sense at all. The obligation to pay is independent of the underlying contract between the account party and the beneficiary, or of the merits of any dispute under that contract, and the various equitable defences which are available to a surety are not available to the issuer of a performance bond[5].

By issuing a performance bond or performance guarantee a bank assumes obligations to a buyer or other beneficiary analogous to those assumed by a confirming bank to the seller under a documentary credit[6]. A bank which gives a performance guarantee must honour that guarantee according to its terms. The bank is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not; nor with the question whether the supplier is in default or not; and, subject to the fraud exception[7], the bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions[8]. A performance bond is virtually a promissory note payable on demand[9], and certainly has much more of the characteristics of a promissory note than of a guarantee[10]. The bank is simply concerned to see whether the event has happened upon which its obligation to pay arises[11].

In the construction industry advance payment guarantees are often issued to employers who make stage payments to contractors[12]. Similarly, refund guarantees are a common feature of the shipbuilding industry. However, there is no standard practice in relation to such guarantees; they can either be in the form of independent performance bonds (or standby letters of credit) or true guarantees. The question as to what is the nature of such a guarantee involves construing the relevant instrument in its factual and contractual context having regard to its commercial purpose[13].

1 'Standby credits' are sometimes used to perform the same function. These are letters of credit under which the beneficiary may draw on presentation of the specified documents, in some cases limited to a certificate prepared by the beneficiary. They are typically used in international sale contracts involving the United States of America where banks do not have power to issue performance guarantees or performance bonds: see 12 USC PARA 24, 7th Power. 'USC' means the Code of the Laws of the United States of America. As to letters of credit and performance bonds generally see PARA 923 et seq. The absence of language in a guarantee indicating that a performance bond has been created gives rise to a strong presumption that the parties did not intend to create a performance bond: *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2005] EWCA Civ 395, [2005] 2 All ER (Comm) 289, [2005] 1 WLR 2497. See also *Van Der Merwe v IIG Capital LLC* [2007] EWHC 2631 (Ch), [2007] All ER (D) 214 (Nov).

2 The difference between the terms 'performance bond' and 'performance guarantee' appears to be purely semantic.

3 Such a bond or guarantee may also go on to provide that such demand is itself conclusive evidence, as between bank and beneficiary, of the beneficiary's entitlement to recover under the guarantee or bond. Such a provision is valid: *Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA* [1973] 2 Lloyd's Rep 437, CA. However, the mere provision for payment on demand achieves a similar effect: see the cases cited in note 4. Where, however, the

bond or guarantee provides that the beneficiary is entitled to payment in certain stipulated circumstances, it has been held that the beneficiary must, when making the demand for payment, commit himself to claiming that the stipulated event has occurred (see *Esal (Commodities) and Reltor Ltd v Oriental Credit Ltd and Wells Fargo Bank NA, Banque du Caire SA v Wells Fargo Bank SA* [1985] 2 Lloyd's Rep 546 at 550, CA); but, unless the bond expressly requires the beneficiary to specify the details of the alleged breach, it is enough, where the bond so requires, that the beneficiary describes the nature of that breach (*Odebrecht Oil and Gas Services Ltd v North Sea Production Co Ltd* [1999] 2 All ER (Comm) 405). As to the validity of a demand see PARA 1273.

4 *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, [1977] 2 All ER 862; *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159, [1978] 1 All ER 976, CA; *Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd* [1978] 1 Lloyd's Rep 161, CA; *Intraco Ltd v Notis Shipping Corpn, The Bhoja Trader* [1981] 2 Lloyd's Rep 256, CA; *Siporex Trade SA v Banque Indosuez* [1986] 2 Lloyd's Rep 146; *Potton Homes Ltd v Coleman Contractors Ltd* (1984) 28 BLR 19, CA; *Attock Cement Co Ltd v Romanian Bank for Foreign Trade* [1989] 1 All ER 1189, [1989] 1 WLR 1147, CA; *Themehelp Ltd v West* [1996] QB 84, [1995] 4 All ER 215, CA; *Wahda Bank v Arab Bank plc* [1996] 1 Lloyd's Rep 470, CA.

5 See note 11 and the cases there cited.

6 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 184, [1982] 2 All ER 720 at 725, HL. However, performance bonds, unlike letters of credit, do not provide any security to the issuer: see *Potton Homes Ltd v Coleman Contractors Ltd* (1984) 28 BLR 19 at 29, CA, per Eveleigh LJ. Moreover, the doctrine of strict compliance, which applies to letters of credit and requires that the documents presented thereunder conform precisely to the letter of credit before there is payment, has no application to performance bonds: see *Siporex Trade AS v Banque Indosuez* [1986] 2 Lloyd's Rep 146 at 159 per Hirst J. As to the commercial advantages of a performance bond or an irrevocable letter of credit see eg *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 All ER 351n at 352n, [1984] 1 WLR 392 at 393, CA, per Sir John Donaldson MR.

7 As to the fraud exception see PARA 1275. In the context of a claim by the beneficiary under the performance bond, where the issuer seeks to invoke the fraud exception, the court will, at the summary judgment stage, assess the weight of the evidence of fraud then before the court, or from which fraud can be inferred, and can either refuse judgment or enter judgment with a stay of execution: see *Balfour Beatty Civil Engineering v Technical & General Guarantee Co Ltd* (1999) 68 Con LR 180, [1999] All ER (D) 1110, CA. However, the fraud must be one which can be shown to have come to the knowledge of the issuer in time: see *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 1 All ER (Comm) 890, [1999] 2 Lloyd's Rep 187; but see *Banco Santander SA v Bayfern Ltd* [1999] 2 All ER (Comm) 18; affd [2000] 1 All ER (Comm) 776, CA.

8 See *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 at 171, [1978] 1 All ER 976 at 983, CA, per Lord Denning MR. See also eg *Standard Bank London Ltd v Canara Bank* [2002] All ER (D) 340 (May); and see the authorities cited in PARA 1273.

9 See *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 at 170, [1978] 1 All ER 976 at 983, CA, per Lord Denning MR

10 See *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 at 175, [1978] 1 All ER 976 at 986, CA, per Geoffrey Lane LJ.

11 *Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd* [1978] 1 Lloyd's Rep 161 at 165, CA. See also *Manx Electricity Authority v JP Morgan Chase Bank* [2003] EWCA Civ 1324 at [37], [2003] BLR 477, [2003] All ER (D) 52 (Oct) per Rix LJ (repudiatory breach of contract; Rix LJ said that the suggestion that a performance guarantee is intended to cease to operate when the contract has failed because the principal has repudiated was 'extraordinary'). The question whether or not there has been compliance is for the issuer alone to determine, at the time when a demand is made: see *Ermis Skai Radio and Television v Banque Indosuez SA* (26 February 1997, unreported), Comm Ct, per Thomas J.

12 A guarantee for the repayment of an advance payment is not a performance guarantee: *Wardens etc of the Mercers' Co v New Hampshire Insurance Co* [1992] 2 Lloyd's Rep 365, CA.

13 See *Gold Coast Ltd v Caja de Ahorros del Mediterraneo* [2001] EWCA Civ 1086 at [11], [2002] 1 All ER (Comm) 142, [2002] 1 Lloyd's Rep 617 per Tuckey LJ. In that case, it was held that the instrument in question had all the appearances of a first demand guarantee. 'It describes itself as a guarantee; but this is simply a label; it does not use the language of guarantee': *Gold Coast Ltd v Caja de Ahorros del Mediterraneo* at [21] per Tuckey LJ.

For examples in use in the construction industry see *General Surety & Guarantee Co Ltd v Francis Parker* (1977) 6 BLR 16; *Tins Industrial Co v Kono Insurance* (1987) 42 BLR 110, HK

CA; *Perar BV v General Surety & Guarantee Co Ltd* (1994) 66 BLR 72, (1994) 43 Con LR 110, CA; *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd* [1996] AC 199, [1995] 3 All ER 737, HL.

1272. Construction in accordance with proper law. As with any other contract, the effect and construction of a performance bond falls to be determined in accordance with its proper law or (to use an alternative expression) the law applicable to it[1]. A performance bond given by or on behalf of a party to the underlying contract is normally governed by the law of the place where payment under it is to be made, and not necessarily by the law of the underlying contract[2]. Absent any contractual term as to the place of payment, that place is the place where the demand is made and where the liability crystallises[3]. If, however, a counter-guarantee is given by one bank to another which has issued a performance bond, the proper law[4] of the performance bond may be the proper law of the counter-guarantee[5].

1 See the Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980; Cmnd 8449) (the 'Rome Convention') introduced into the law of the United Kingdom by the Contracts (Applicable Law) Act 1990. As to the meaning of 'United Kingdom' see PARA 2 note 3. See also PARA 1213. As to letters of credit and performance bonds generally see PARA 923 et seq.
2 *Attock Cement Co Ltd v Romanian Bank for Foreign Trade* [1989] 1 All ER 1189, [1989] 1 WLR 1147, CA.
3 *Britten Norman Ltd v State Ownership Fund of Romania* [2000] Lloyd's Rep Bank 315, [2000] All ER (D) 935.
4 As to the meaning of 'proper law' see PARA 1213 note 1.
5 See *Wahda Bank v Arab Bank plc* [1996] 1 Lloyd's Rep 470, CA.

1273. Demand must be made within stipulated time and in stipulated form. The International Chamber of Commerce has published a standard set of rules, known as the Uniform Rules for Demand Guarantees ('URDG')[1], which may be incorporated into performance bonds and performance guarantees, which require the beneficiary, normally the buyer, to support his demand by a written statement stating that the account party, typically the seller, is in breach of the contract of sale and indicating the respect in which the seller is in breach[2]. It is open for sellers to insist with their buyers that any performance bond they are prevailed on by their buyers to procure will incorporate the URDG.

The beneficiary must have done that which for the purpose of making a valid demand is required of him[3]. However, a demand required to state that it was based on a claim for damages for breach of contract is valid if it says so in substance but not in express words[4]. On the other hand, it has been held that the words 'we claim the sum of £500,000, P having failed to meet their contractual obligations to us' did not comply with the requirement of the performance guarantee that the claims should state that the principals had failed to pay under their contractual obligation, since the key concept underlying the wording of the guarantee was a 'failure to pay'; accordingly, the demand was not valid[5]. Oral demands are permissible, if provided for by the bond document, but the court will be very hesitant to construe a performance bond as payable on oral demand by the beneficiary[6]. The court must construe the performance bond to determine what the beneficiary must do to make an effective call under it; then it must construe the call documentation to determine whether it complies with the requirements of the bond[7].

1 See the *Uniform Rules for Demand Guarantees* ('URDG') (1992, ICC Publication No 458). At the date at which this volume states the law, a revision of the Rules is under way.

2 See URDG art 20(a). As to letters of credit and performance bonds generally see PARA 923 et seq.
3 See *IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank* [1989] 2 Lloyd's Rep 205 at 208 per Leggatt J (revsd in part [1990] 2 Lloyd's Rep 496, CA, without affecting this dictum).
4 *IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496, CA. See also see *Esal (Commodities) and Reltor Ltd v Oriental Credit Ltd and Wells Fargo Bank NA, Banque du Caire SAE v Wells Fargo Bank NA* [1985] 2 Lloyd's Rep 546 at 550, CA; *Oval (717) Ltd v Aegon Insurance Co (UK) Ltd* (1997) 54 Con LR 74, 85 BLR 97; *Odebrecht Oil and Gas Services Ltd v North Sea Production Co Ltd* [1999] 2 All ER (Comm) 405.
5 *Frans Maas (UK) Ltd v Habib Bank AG Zurich* [2000] All ER (D) 1152. See also *Paddington Churches Housing Association v Technical and General Guarantee Co Ltd* (1999) 65 Con LR 132, [1999] BLR 244, [1999] All ER (D) 352 (no obligation to make payment on bond until insurer providing it had been provided with statement of damages sustained by beneficiary in accordance with contract).
6 *IE Contractors Ltd v Lloyd's Bank plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496 at 499 per Staughton LJ.
7 See note 6.

1274. Liability to account. Once payment has been made under the performance bond or performance guarantee, it is implicit in the nature of the bond or guarantee that, in the absence of clear stipulation to the contrary, there will be a financial adjustment between the parties, ensuring that the beneficiary retains so much of the funds paid under the bond or guarantee as represents the real loss arising from the breach of contract committed by the other party to the contract of sale[1].

1 See *Comdel Commodities Ltd v Siporex Trade SA* [1997] 1 Lloyd's Rep 424 at 431, CA, per Potter LJ; *Cargill International SA v Bangladesh Sugar and Food Industries Corpn* [1998] 2 All ER 406, [1998] 1 WLR 461, CA. See also *Spiersbridge Property Developments Ltd v Muir Construction Ltd* [2008] CSOH 44, 2008 Scot (D) 17/3. As to letters of credit and performance bonds generally see PARA 923 et seq.

1275. Circumstances in which payment may be restrained. The account party may, exceptionally[1], apply for an injunction to restrain the bank which is liable to pay under the performance bond from making such payment. If there is no challenge to the validity of the performance bond or performance guarantee itself, or if the challenge is not substantial, prima facie no injunction to restrain payment should be granted and the bank should be left free to honour its contractual obligation, although restrictions may well be imposed on the freedom of the beneficiary to deal with the money after he has received it[2].

An injunction may be granted where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent[3]. The evidence must be clear, both as to the fact of fraud and as to the bank's knowledge[4]. In so challenging a demand made on a performance bond, the challenging party must show that the only inference the bank concerned could draw was that the demand was fraudulent; in doing so, it must put before the bank irrefutable evidence because it is not for the bank to verify mere allegations[5]. Strong corroborative evidence is required to establish fraud which usually takes the form of contemporary documents[6].

Other situations where the court will intervene to restrain payment[7] are:

(1) where there is breach of faith by a beneficiary in threatening a call on the bond[8];
(2) where a call would be invalid, for example where a condition precedent to a call has not yet been fulfilled, where the bond is a 'see to it' bond necessitating prior proof of loss by the beneficiary or poor performance by the third party which has not yet been established, or where the

demand or the supporting documents show that the demand does not conform to the requirements imposed by the bond for a valid demand[9];

(3) where payment is prohibited by a sanctions order[10].

A performance bond issued by a company which does not comply with the mandatory requirements of the Companies Act 1985 regarding the use of the company seal[11] is not for that reason expressly rendered illegal, a nullity or unenforceable[12].

1 'The unique value of [an irrevocable] letter [of credit], performance bond or [performance] guarantee is that the beneficiary can be completely satisfied that, whatever disputes may thereafter arise between him and the bank's customer in relation to the performance or indeed existence of the underlying contract, the bank is personally undertaking to pay him provided that the specified conditions are met ... If, save in the most exceptional cases, he is to be allowed to derogate from the bank's personal and irrevocable undertaking, given ... at his request, by obtaining an injunction restraining the bank from honouring that undertaking, he will undermine what is the bank's greatest asset, however large and rich it may be, namely its reputation for financial and contractual probity. Furthermore, if this happens at all frequently, the value of all irrevocable letters of credit and performance bonds and [performance] guarantees will be undermined': *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 All ER 351n at 352n, [1984] 1 WLR 392 at 393, CA, per Sir John Donaldson MR. As to letters of credit and performance bonds generally see PARA 923 et seq.

2 See *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 All ER 351n at 352n, [1984] 1 WLR 392 at 393, CA, per Sir John Donaldson MR. The account party may obtain a freezing injunction against the beneficiary restraining him from dealing with the proceeds: see eg *Intraco Ltd v Notis Shipping Corpn, The Bhoja Trader* [1981] 2 Lloyd's Rep 256, [1981] Com LR 184, CA. Payment into court can be ordered (see *Themehelp Ltd v West* [1996] QB 84 at 103, [1995] 4 All ER 215 at 231, CA, per Evans LJ); but this will probably not be ordered if the performance bond requires payment to be made abroad (see *Britten-Norman Ltd v State Ownership Fund of Romania* [2000] Lloyd's Rep Bank 315). As to freezing injunctions (formerly known as 'Mareva' injunctions after *Mareva Cia Naviera SA v International Bulkcarriers SA, The Mareva* (1975) [1980] 1 All ER 213n, [1975] 2 Lloyd's Rep 509, CA) see generally INJUNCTIONS vol 24 (Reissue) PARA 866 et seq.

3 *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 All ER 351n at 352n, [1984] 1 WLR 392 at 393, CA, per Sir John Donaldson MR; *Kvaerner John Brown Ltd v Midland Bank plc* [1998] CLC 446 (certificate required to be tendered with demand for payment manifestly untrue; injunction granted); and see *Turkiye IS Bankasi AS v Bank of China* [1996] 2 Lloyd's Rep 611 (where Waller J, in refusing an injunction, held that for an injunction to be granted, 'the only realistic inference the bank could draw was that the demand was fraudulent'). See also *United Trading Corpn SA and Murray Clayton Ltd v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554n at 559n, CA (where Ackner LJ reported a dictum of Lord Denning MR in *State Trading Corpn of India Ltd v ED & F Man (Sugar) and State Bank of India* [1981] Com LR 235, CA); *GKN Contractors v Lloyd's Bank plc* (1985) 30 BLR 48, CA. As to the correct test to be applied where the beneficiary applies for summary judgment and the bank alleges fraud see *Solo Industries UK Ltd v Canara Bank* [2001] EWCA Civ 1059, [2001] 2 All ER (Comm) 217, [2001] 1 WLR 1800; *Balfour Beatty Civil Engineering v Technical & General Guarantee Co Ltd* (1999) 68 Con LR 180, [1999] All ER (D) 1110, CA; *Manx Electricity Authority v JP Morgan Chase Bank* [2003] EWCA Civ 1324, [2003] BLR 477, [2003] All ER (D) 52 (Oct).

4 *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 All ER 351n at 352n, [1984] 1 WLR 392 at 393, CA, per Sir John Donaldson MR. In the context of letters of credit, it has been held that the bank must have knowledge of the fraud at the time of presentation (corresponding, in the case of a performance bond, to the time of the demand): see *Deutsche Ruckversicherung AG v Walbrook Insurance Co Ltd, Group Josi Re (formerly known as Group Josi Reassurance SA) v Wallbrook Insurance Co Ltd* [1996] 1 All ER 791 at 800, sub nom *Group Josi Re (formerly known as Group Josi Reassurance SA) v Wallbrook Insurance Co Ltd* [1996] 1 WLR 1152 at 1160–1161, CA, per Staughton LJ. See also *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 1 All ER (Comm) 890, [1999] 2 Lloyd's Rep 187. But see *Banco Santander SA v Bayfern Ltd* [1999] 2 All ER (Comm) 18; affd [2000] 1 All ER (Comm) 776, CA.

5 *Turkiye IS Bankasi AS v Bank of China* [1996] 2 Lloyd's Rep 611.

6 *Sunderland Association Football Club Ltd v Uruguay Montevideo FC* [2001] 2 All ER (Comm) 828. See also *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 All ER 351n at 352n,

[1984] 1 WLR 392 at 393, CA, per Sir John Donaldson MR ('It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged').

7 See generally *TTI Team Telecom International Ltd v Hutchinson 3G UK Ltd* [2003] EWHC 762 (TCC) at [39], [2003] 1 All ER (Comm) 914 and the authorities there cited.

8 See *TTI Team Telecom International Ltd v Hutchinson 3G UK Ltd* [2003] EWHC 762 (TCC) at [46], [2003] 1 All ER (Comm) 914. The basis for a contention of a breach of faith must be established by clear evidence even for the purposes of interim relief. A breach of faith can arise in such situations as: a failure by the beneficiary to provide an essential element of the underlying contract on which the bond depends; a misuse by the beneficiary of the guarantee by failing to act in accordance with the purpose for which it was given; a total failure of consideration in the underlying contract; a threatened call by the beneficiary for an unconscionable ulterior motive; or a lack of an honest or bona fide belief by the beneficiary that the circumstances, such as poor performance, against which a performance bond has been provided, actually exist: *TTI Team Telecom International Ltd v Hutchinson 3G UK Ltd* at [46] per Judge Thornton QC.

9 See *TTI Team Telecom International Ltd v Hutchinson 3G UK Ltd* [2003] EWHC 762 (TCC) at [46], [2003] 1 All ER (Comm) 914 per Judge Thornton QC.

10 See eg *Shanning International Ltd v Lloyds Bank plc* [2001] UKHL 31, [2001] 1 WLR 1462.

11 Ie the requirements of the Companies Act 1985 s 350 (prospectively repealed): see COMPANIES vol 7(1) (2004 Reissue) PARA 293 (as to replacement provisions see the Companies Act 2006 s 45).

12 *OTV Birwelco Ltd v Technical and General Guarantee Co Ltd* [2002] EWHC 2240 (TCC), [2002] 2 All ER (Comm) 1116 (where the company obtaining the bond had used a seal engraved with its trading name rather than with its registered name as required by the Companies Act 1985; held that the bond could be enforced).

5. MONEY

(1) MONEY AND INTEREST ON MONEY

(i) Money

A. IN GENERAL

1276. Money in general. The primary function of money is to serve as a medium of exchange, and as such it is accepted without question in final discharge of debts or payment for goods or services[1]. Money also serves as a common standard of value by reference to which the comparative values of different commodities are ascertained[2], as a unit of account in which debts and liabilities are expressed[3], and as a store of value or purchasing power[4].

1 *Moss v Hancock* [1899] 2 QB 111 at 116 per Darling J. Money may be paid without any currency passing: see *Kingsley v Sterling Industrial Securities Ltd* [1967] 2 QB 747, [1966] 2 All ER 414, CA.
2 I Bl Com (14th Edn) 276.
3 *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd* [1934] AC 122 at 148, HL, per Lord Russell of Killowen. See also the Bills of Exchange Act 1882 s 3(1) (requirement to pay a sum certain in money essential to a bill of exchange: see PARAS 1405, 1418); and the Sale of Goods Act 1979 s 2(1) (a money consideration, called the price, essential to a contract of sale: see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 29.
4 See *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452 at 508, HL, per Lord Macmillan.

1277. Meaning of 'money'. The term 'money' generally includes banknotes[1] as well as coins[2], although it may be limited to such of each as are legal tender[3] at the time and place in question. The term is sometimes used to include not only actual cash but also a right to receive cash, as, for example, sums standing to the credit of a bank account[4] or invested in securities[5]; and the term may in some cases be used in a popular sense to include all personal or even, exceptionally, all real and personal property[6]. Where the term 'money' is used in relation to the payment of money into court it is to be construed in its ordinary and natural meaning as including money in foreign currency[7].

The precise meaning of the term depends upon the context in which it is used[8] so that, for example, it is usually given a wide meaning when used in a will and when that meaning gives effect to the intention of the testator[9], an intermediate meaning in connection with claims for money paid or for money had and received[10], and a narrow meaning in the criminal law[11] and in relation to execution[12]. In taxing or other statutes, references to money may be limited to sterling or may include foreign currencies, depending on the wording and purpose of the statute[13].

1 *Wright v Reed* (1790) 3 Term Rep 554; and see *Suffel v Bank of England* (1882) 9 QBD 555 at 563, CA, per Jessel MR. See also PARA 1297; and PARA 796 et seq. See also note 8.
2 As to coinage see PARA 1279 et seq. See also note 8.
3 See PARAS 1278, 1279, 1297; and PARAS 796–797.
4 See *Re Collings, Jones v Collings* [1933] Ch 920. See also note 8.
5 *Re Smith, Henderson-Roe v Hitchins* (1889) 42 ChD 302; but see *Re Hodgson, Nowell v Flannery* [1936] Ch 203. See also note 8.
6 *Perrin v Morgan* [1943] AC 399 at 407, 413, [1943] 1 All ER 187 at 191, 193, HL, per Viscount Simon LC.
7 See *The Halcyon the Great* [1975] 1 All ER 882, [1975] 1 WLR 515. As to foreign currency see PARA 1299.

8 *Perrin v Morgan* [1943] AC 399, [1943] 1 All ER 187, HL, where a bequest of 'all moneys of which I die possessed' was held to include all the net personalty, but not the realty, of the testatrix.

Certainly any definition of 'money' is no longer limited to banknotes and coins and may include bank deposits etc: see generally C Proctor *Mann on the Legal Aspect of Money* (6th Edn, 2005) Ch 1.

9 *Perrin v Morgan* [1943] AC 399, [1943] 1 All ER 187, HL; and see WILLS.

10 See CONTRACT vol 9(1) (Reissue) PARA 1104 et seq. As to the recovery of money paid under mistake see MISTAKE.

11 See the Powers of Criminal Courts (Sentencing) Act 2000 s 148(1), (2); *Moss v Hancock* [1899] 2 QB 111; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARA 1808. See also *R v Preddy* [1996] AC 815, [1996] 3 All ER 481, HL (mortgage advance obtained by deception).

12 See *Harrison v Paynter* (1840) 6 M & W 387 at 390 per Alderson B; and ENFORCEMENT.

13 See *Capcount Trading v Evans (Inspector of Taxes)* [1993] 2 All ER 125, CA; and STATUTES vol 44(1) (Reissue) PARA 1320.

1278. Legal money. The tokens known as 'money', which constitute a legal medium of exchange, consist in England either of coins[1] made and issued by the Crown under the exclusive powers it enjoys at common law, which are now for the most part regulated by statute[2], or of bank notes made and issued by the Bank of England under statutory powers[3].

The special statutory offences relating to the coinage are discussed elsewhere in this work[4].

1 See generally Sir CWC Oman *The Coinage of England* (1931). As to coins as legal tender see PARA 1279.

2 At common law the Crown enjoys the exclusive right of making and issuing money, though formerly this right was frequently granted out as a franchise and could be claimed by prescription; but in all cases the impression or stamping of coins was the Crown's prerogative, and the grantees of the franchise usually had the stamp sent to them by the Exchequer: 1 Bl Com (14th Edn) 277. The denomination or value at which the coin was to pass current was also determined by the Crown in all cases, though it seems that the value could not be debased or enhanced below or above the sterling value: 1 Bl Com (14th Edn) 277–278; 2 Co Inst 577. But as to enhancing or debasing the coinage see contra 1 Hale PC 194. These prerogative rights still exist, but have for the most part been placed upon a statutory basis: see PARA 1282. Where no statutory provision has been made, Her Majesty is empowered by proclamation made with the advice of the Privy Council to regulate any matters relating to the coinage within the prerogative, and to revoke or alter any proclamation previously made: see the Coinage Act 1971 s 3(1)(g), (h) (s 3(1) renumbered by the Currency Act 1983 s 1(4)(f)).

3 As to bank notes as legal tender see PARA 1297. As to the statutory powers and duties of the Bank of England regarding the issue of bank notes see PARA 1297; and PARA 796 et seq.

4 See PARA 1298; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 544 et seq. As to forgery generally see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 346 et seq.

B. THE COINAGE

(A) Legal Tender, Issue of Coins and the Mint

1279. Legal tender in coins. Gold coins[1] are legal tender for payment of any amount[2]. Subject to any provision made by proclamation[3], coins of cupro-nickel, silver or bronze are legal tender as follows: coins of cupro-nickel or silver of denominations[4] of more than 10 pence, for payment of any amount not exceeding £10; coins of cupro-nickel or silver of denominations of not more than 10 pence, for payment of any amount not exceeding £5; coins of bronze, for payment of any amount not exceeding 20 pence[5]. Other coins, if made current by a proclamation[6] are legal tender in accordance with the provision made by that proclamation or by any later proclamation[7].

1 'Coins' means coins made by the Mint in accordance with the Coinage Act 1971 and not called in by proclamation under s 3 (see PARA 1282): s 2(3) (added by the Currency Act 1983 s 1(3)(c)). As to the Mint see PARA 1281.
2 Coinage Act 1971 s 2(1) (substituted by the Currency Act 1983 s 1(3)(a)). They are not legal tender if their weight has become less than that specified in the Coinage Act 1971 s 1, Sch 1 (see PARA 1285), or in the proclamation under which they are made, as the least current weight: s 2(1) (as so substituted). Coins that are not legal tender may, however, be accepted as a means of payment. As to legal money see also PARA 1278.
3 Ie under the Coinage Act 1971 s 3: see PARA 1282.
4 References to coins of any denomination include references to coins treated as being of such a denomination by virtue of a proclamation made in pursuance of the Decimal Currency Act 1969 s 15(5) (repealed): Coinage Act 1971 s 2(2) (amended by the Currency Act 1983 s 1(3)(b)). As to decimalisation see PARA 1283 note 3.
5 Coinage Act 1971 s 2(1A) (added by the Currency Act 1983 s 1(3)(a)).
6 Ie under the Coinage Act 1971 s 3: see PARA 1282.
7 Coinage Act 1971 s 2(1B) (added by the Currency Act 1983 s 1(3)(a)).

1280. Issue of coins. No piece of gold, silver, copper or bronze, or of any metal or mixed metal, of any value whatever, may be made or issued except by or with the authority of the Treasury, as a coin or a token for money, or as purporting that its holder is entitled to demand any value denoted on it[1]. Anyone contravening this provision is liable on summary conviction to a fine[2].

1 Coinage Act 1971 s 9(1) (amended by the Government Trading Funds Act 1973 s 7(4)). As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
2 Coinage Act 1971 s 9(2) (amended by virtue of the Criminal Justice Act 1982 ss 37, 46). The penalty is a fine not exceeding level 2 on the standard scale: see the Coinage Act 1971 s 9(2) (as so amended). As to the standard scale see PARA 27 note 21.

A penalty was imposed under earlier legislation (ie the Coinage Act 1870 s 5 (repealed)) on the owner of Lundy Island for unlawfully issuing 'puffins' and 'half-puffins' as tokens for money within the island: *Harman v Bolt* (1931) 47 TLR 219.

1281. The Mint. The Chancellor of the Exchequer is the master of the Mint[1]. There is also a deputy master appointed by the Treasury[2]. All duties, powers and authorities imposed on, vested in or to be transacted before the master of the Mint may be performed and exercised by or transacted before him or his sufficient deputy[3]. The Mint is subject to investigation by the Parliamentary Commissioner for Administration[4].

Provision is made for the funding of the Mint[5].

1 Coinage Act 1971 s 4(1). The Mint was originally established in the Tower of London but moved to the Mint on Tower Hill in 1810. It is now at Llantrisant, Pontyclun, Mid-Glamorgan. As to the Mint see Sir John Craig *The Mint* (1953). As to the Chancellor of the Exchequer see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 514.
2 Coinage Act 1971 s 4(2) (substituted by the Government Trading Funds Act 1973 s 7(2)). As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
3 Coinage Act 1971 s 4(5).
4 See the Parliamentary Commissioner Act 1967 s 4(1), Sch 2; and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 41 et seq.
5 Expenses incurred by the Mint in the purchase of metal to be made into coins are to be defrayed out of money provided by Parliament, and all sums received by the master of the Mint or any deputy master or officer of the Mint in payment for coin made from metal purchased by him and all fees and payments received by him in that capacity are to be paid into the Consolidated Fund: Coinage Act 1971 s 4(6), (7). As to the Consolidated Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 34 (Reissue) PARA 952 et seq. However, these provisions do not have effect for so long as any operations of the Mint are funded operations: Government Trading Funds Act 1973 s 7(2) (amended by the Government Trading Act 1990 s 2(4)). The Mint is a funded operation: see the

Royal Mint Trading Fund Order 1975, SI 1975/501; and the Royal Mint Trading Fund (Extension and Variation) Order 2002, SI 2002/831. As to government trading funds see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 743 et seq.

(B) Dimensions, Designs, Denominations and Standards of Coins

1282. Prerogative rights as to coins. By the royal prerogative the Crown enjoys the exclusive right of fixing the dimensions, designs, denominations and standards of weight and fineness of the various current coins[1]. Since 1870 that prerogative power has been limited by[2] and its exercise regulated by statute[3]. Under the Coinage Act 1971 Her Majesty may from time to time by proclamation made with the advice of Her Privy Council[4]:

(1) determine the denomination of coins to be made at the Mint[5];
(2) determine the design of any coin[6];
(3) determine the weight and fineness of any gold coins or coins of silver of the Queen's Maundy money[7], the remedy to be allowed in making them and (for gold coins) their least current weight[8];
(4) determine the weight and composition of any coins, other than gold coins or coins of silver of the Queen's Maundy money, and the remedy (if any) to be allowed in making them[9];
(5) provide for the variation from the specified standard weight for a gold coin[10] to be measured in the manner specified in the proclamation[11];
(6) determine the dimensions of any coins[12];
(7) determine the percentage of impurities which coins other than gold coins and coins of silver of the Queen's Maundy money may contain[13];
(8) call in coins of any date or denomination, or coins made before a date specified in the proclamation[14];
(9) direct that coins made by the Mint other than gold, silver, cupro-nickel and bronze coins are to be current[15];
(10) direct that any coin is to be legal tender for payment of any amount not exceeding such amount as may be specified in the proclamation or for payment of any amount (without limit)[16];
(11) regulate any matter relating to coinage which was before 1870 within the royal prerogative and is not provided for by the Coinage Acts 1870 and 1971[17]; and
(12) revoke or alter any proclamation so made[18].

1 1 Bl Com (14th Edn) 277–278. The standard is determined by the fineness, and the true standard is termed 'sterling'. As to the present standard see PARA 1284 et seq. Where in early days the making of coins was granted out by the Crown in the form of franchises to monasteries and others, the Crown always retained the right of regulating the stamp or impression and denomination, and the grantees of those franchises usually had the Exchequer stamp sent to them: 1 Bl Com (14th Edn) 277.
2 As to the standards fixed for the weight and fineness of certain coins see the Coinage Act 1870 s 3, Sch 1 (repealed); and the Coinage Act 1971 s 1(3), Sch 1; and PARA 1285.
3 See the Coinage Act 1870 s 11 (repealed); Coinage Act 1971 s 3; and the text to notes 5–18.
4 Proclamations determining the specifications and design of coins are published periodically in the London Gazette but are not listed in this work.
5 Coinage Act 1971 s 3(1)(a) (s 3(1) renumbered by the Currency Act 1983 s 1(4)). As to the Mint see PARA 1281.
6 Coinage Act 1971 s 3(1)(b).
7 Ie other than those of a denomination mentioned in the Coinage Act 1971 Sch 1 (see PARA 1285).
8 Coinage Act 1971 s 3(1)(c) (substituted by the Currency Act 1983 s 1(4)). As to the meaning of 'remedy' see PARA 1284 note 3.
9 Coinage Act 1971 s 3(1)(cc) (added by the Currency Act 1983 s 1(4)(a)).

10 Ie the standard weight in the Coinage Act 1971 for a gold coin of a denomination mentioned in Sch 1 (see PARA 1285).
11 Coinage Act 1971 s 3(1)(cd) (added by the Currency Act 1983 s 1(4)(a)).
12 Coinage Act 1971 s 3(1)(d) (amended by the Currency Act 1983 Act s 1(4)(b)).
13 Coinage Act 1971 s 3(1)(dd) (added by the Currency Act 1983 Act s 1(4)(c)). Where a proclamation is made as to the percentage of impurities which coins of a particular denomination may contain, any coin of that denomination made before the date of the proclamation is treated as if that provision had been in force when that coin was made: Currency Act 1983 s 1(5).
14 Coinage Act 1971 s 3(1)(e).
15 Coinage Act 1971 s 3(1)(f) (amended by the Currency Act 1983 s 1(4)(d)).
16 Coinage Act 1971 s 3(1)(ff) (added by the Currency Act 1983 s 1(4)(e)). As to coins as legal tender see PARAS 1278, 1279. So far as it relates to the matters mentioned in the Coinage Act 1971 s 3(1)(ff), a proclamation may make different provisions in relation to different parts of the United Kingdom: s 3(2) (added by the Currency Act 1983 s 1(4)(f)). As to the meaning of 'United Kingdom' see PARA 2 note 3. Both the Channel Islands and the Isle of Man (although not within the United Kingdom) use the pound sterling.
17 Coinage Act 1971 s 3(1)(g).
18 Coinage Act 1971 s 3(1)(h).

1283. Denominations of money. The denominations of money in the currency of the United Kingdom[1] are the pound sterling and the penny (or new penny)[2], the penny being one-hundredth part of a pound sterling[3].

1 As to the meaning of 'United Kingdom' see PARA 2 note 3.
2 The penny may also be referred to as the new penny: Currency Act 1982 s 1(1).
3 Currency Act 1982 s 1(1). Decimalisation was introduced on 15 February 1971 (ie the day appointed under the Decimal Currency Act 1967 s 1 (repealed)). Prior to that date, the denominations were the pound sterling, the shilling and the penny, the shilling being one-twentieth part of a pound sterling and the penny being one-twelfth part of a shilling. The pound sterling was unchanged.

Transitional provisions, most of which are spent, provided rules for the invalidation of bills of exchange and promissory notes expressed in the old currency and for the conversion of references to shillings and pence in various documents, enactments and forms, including a power to make regulations for payments under friendly society and industrial insurance contracts: see the Decimal Currency Act 1969 ss 2–13 (amended by the Friendly Societies Act 1974 Sch 11; the Statute Law (Repeals) Act 1989; SI 1995/710; and SI 2001/3647).

1284. Form, weight and fineness of coins. Coins other than gold coins and coins of silver of the Queen's Maundy money[1] must be of specified standard weight, composition and dimensions[2]; but in the making of the coins a remedy[3] is to be allowed not exceeding a specified amount[4].

1 As to gold coins and silver coins of the Queen's Maundy money see PARA 1285.
2 Ie specified by proclamation under the Coinage Act 1971 s 3 (see PARA 1282): s 1(1), (4) (s 1 substituted by the Currency Act 1983 s 1(1)).
3 A 'remedy', in relation to gold coins and coins of silver of the Queen's Maundy money, is a variation from the standard weight and fineness specified in the proclamation, and in relation to other coins (ie cupro-nickel coins), from the standard diameter and composition so specified: Coinage Act 1971 s 1(7) (as substituted: see note 2).
4 Coinage Act 1971 s 1(5) (as substituted: see note 2). The variation from the standard weight of any coins is to be measured as the average of a sample of not more than 1 kg of that coin: s 1(6) (as so substituted).

1285. Maundy money. The Queen's Maundy money is issued each year for distribution as a royal bounty by the Lord High Almoner on Maundy Thursday[1]. It consists of gold £5, £2, sovereign (£1), and half sovereign coins, and silver 4p, 3p, 2p and 1p coins. Gold coins and coins of silver of the Queen's Maundy money are to be of specified standard weight and fineness[2], but in the making of the coins a variation from the specified standard weight and fineness is allowed[3].

1 Ie the Thursday before Easter. The word 'Maundy' derives from *mandatum*, middle English *maundee* or *maund*, a command (see Skeat, Etym Dict 359, Langland, Piers Plowman (Whitaker Edn) 140), the command being that given in John 13: 14 'to wash one another's feet'; and see John 13: 34 ('I give you a new commandment'). The practice of washing feet has not been observed since the reign of James II, but the distribution of alms is still made each year.
2 Coins of a denomination mentioned in the Coinage Act 1971 s 1, Sch 1 (amended by the Currency Act 1983 s 1(2)) must be of the weight and fineness specified there (Coinage Act 1971 s 1(1), (2) (s 1 substituted by the Currency Act 1983 s 1(1))); and coins of any other denomination must be of such weight and fineness as may be specified in a proclamation under the Coinage Act 1971 s 3 (see PARA 1282) (s 1(3) (as so substituted)).
3 See the Coinage Act 1971 s 1(2), (3), (5) (as substituted: see note 2).

1286. Standards. From time to time when necessary the Secretary of State[1] must cause to be made and verified standard trial plates to be used for determining the justness of gold, silver and cupro-nickel coins issued from the Mint, or of coins so issued of any other metal or mixture of metals specified in a proclamation[2].

The plates and all books, documents and other things used in connection with the determination of the justness of coins must be in the Secretary of State's custody, and must be kept in accordance with his directions; and the performance of all duties in relation to the plates is to be part of the business of the National Weights and Measures Laboratory of the Department for Innovation, Universities and Skills[3].

The master of the Mint must from time to time cause copies to be made of the coinage standards[4] maintained by the Secretary of State, and once at least in every year the Secretary of State and the master of the Mint must cause the copies to be compared with the coinage standards[5].

1 As to the Secretary of State see PARA 3.
2 Coinage Act 1971 s 6(1). As to the power to specify by proclamation the composition of coins see s 3(1)(cc); and PARA 1282. As to the Mint see PARA 1281. The plates must be of the following composition: for gold coins of a denomination mentioned in the Coinage Act 1971 Sch 1 (see PARA 1285), eleven-twelfths fine gold and one-twelfth alloy; for other gold coins, gold of the standard fineness specified in the proclamation under which the coins are made; for silver coins, pure silver; for cupro-nickel coins, pure copper and pure nickel; for coins of any other metal or mixture of metals, such composition as may be prescribed by the proclamation under which the coins are made: Coinage Act 1971 s 6(2) (amended by the Currency Act 1983 s 1(6)).
3 Coinage Act 1971 s 6(3) (amended by SI 2007/3224). As to weights and measures generally see WEIGHTS AND MEASURES.
4 Ie the standard weights for coins.
5 See the Coinage Act 1971 s 7.

(C) The Trial of the Pyx

1287. Trial. For the purpose of ascertaining that coins issued from the Mint have been coined in accordance with the Coinage Act 1971, a trial of the pyx[1] must be held at least once in every year in which coins have been issued[2]. Her Majesty may from time to time by Order in Council make provisions with respect to the trial of the pyx and all matters incidental to it[3], and in particular with respect to:

(1) the time and place of the trial[4];
(2) setting apart out of the coins issued by the Mint certain coins for the trial[5];
(3) summoning a jury of not less than six competent freemen of the Mystery of Goldsmiths of the City of London or other competent persons[6];
(4) the attendance at the trial of the jury and the proper officers of the

Treasury, the Department for Innovation, Universities and Skills and the Mint, and the production of the coins, the standard trial plates and the standard weights[7];

(5) the proceedings at and the conduct of the trial, including the nomination of a person to preside and the method of examining the coins[8];

(6) the recording and publication of the verdict, the custody of the record and any proceedings to be taken in consequence of the verdict[9].

An Order in Council made under this power may be revoked or amended by a subsequent Order in Council[10].

1 The pyx (from the Greek 'pyxis', meaning a box or container) is the name given to the chest in which the sample coins were deposited for the purpose of trying the issue whether the coins made by the Mint were of the required standard. As to the Mint see PARA 1281.

2 Coinage Act 1971 s 8(1).

3 See the Coinage Act 1971 s 8(2). As to orders made under this power see PARA 1288.

4 Coinage Act 1971 s 8(2)(a).

5 Coinage Act 1971 s 8(2)(b).

6 Coinage Act 1971 s 8(2)(c). As to the Mystery of Goldsmiths of the City of London see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1311.

7 Coinage Act 1971 s 8(2)(d) (amended by SI 2007/3224). As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq. As to the standard trial plates and the standard weights see PARA 1286.

8 Coinage Act 1971 s 8(2)(e).

9 Coinage Act 1971 s 8(2)(f).

10 Coinage Act 1971 s 8(3).

1288. Procedure. The rules and procedure to be observed at the trial of the pyx[1] are regulated by Orders in Council[2], under which at least once every year a warrant, in the form provided, is issued by the Commissioners of the Treasury[3], signed by any two or more of them, appointing a day for the trial to be held at the Goldsmiths' Hall in the City of London, or, if that place is not available, then at such other place as the commissioners think fit[4]. The warrant is delivered to the Queen's Remembrancer, who presides at the trial[5].

Notice of the time appointed for the trial must be given by the Treasury to the proper officers of the Department for Innovation, Universities and Skills (requiring them to produce the standard trial plates and weights and all other things in their possession usually produced at the trial of the pyx)[6], to the deputy master of the Mint[7], and to any other persons whose presence is thought necessary[8].

1 See PARA 1287.

2 See the Trial of the Pyx Order 1998, SI 1998/1764 (amended by SI 2005/254).

3 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

4 See the Trial of the Pyx Order 1998, SI 1998/1764, arts 4(1), (3), Sch 1 (amended by SI 2005/254).

5 Trial of the Pyx Order 1998, SI 1998/1764, arts 4(2), 5(1). The Senior Master of the Supreme Court is Queen's Remembrancer. As to the Queen's Remembrancer see COURTS vol 10 (Reissue) PARA 654. If the Queen's Remembrancer is unable to attend the trial, his place is to be taken by a master of the Queen's Bench Division: art 5(2). The trial may be adjourned by the Queen's Remembrancer or master from time to time and from place to place: art 5(3).

6 Trial of the Pyx Order 1998, SI 1998/1764, art 4(4) (amended by SI 2007/3224). As to the standard trial plates and the standard weights see PARA 1286.

7 As to the Mint see PARA 1281.

8 Trial of the Pyx Order 1998, SI 1998/1764, art 4(5).

1289. Jury. The jury for the trial of the pyx[1] is summoned by precept issued by the Commissioners of the Treasury[2] to the prime warden and wardens of the Goldsmiths' Company[3] informing them of the time appointed for the trial and requesting them to summon a jury of not less than six of competent freemen of the Goldsmiths' Company, or of other competent persons, to attend at the trial as jurymen[4].

The oath[5] is administered to the jury by the Queen's Remembrancer[6].

1 See PARA 1287 note 1.
2 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
3 As to the Goldsmiths' Company see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1311.
4 See the Trial of the Pyx Order 1998, SI 1998/1764, art 4(6). The jury is not entitled to any payment: see the Juries Act 1974 s 19(6); and JURIES vol 26 (2004 Reissue) PARA 552.
5 See the Trial of the Pyx Order 1998, SI 1998/1764, art 5(1), Sch 2 (amended by SI 2005/254).
6 Trial of the Pyx Order 1998, SI 1998/1764, art 5(1), Sch 2 (as amended: see note 5). As to the Queen's Remembrancer see COURTS vol 10 (Reissue) PARA 654.

1290. Selection and trial of coins. The deputy master of the Mint must cause a minimum number of coins to be randomly selected and set apart with a view to the trial of the pyx[1]. One coin must be set apart out of every 2,000 gold coins ready for issue[2], one out of every 150 platinum coins[3], one out of every 150 silver Maundy coins[4], one out of every 3,000 silver coins[5], one out of every 3,000 gold-plated silver coins[6], one out of every 5,000 cupro-nickel coins of a denomination of more than 10 pence[7], one out of every 20,000 cupro-nickel coins of 10 pence or less[8] (provided that the total number of cupro-nickel coins subject to trial is greater than 250 million per year; if less than 250 million, one coin out of every 5,000 irrespective of denomination)[9], one out of every 5,000 nickel-brass coins[10], and one out of every 5,000 bimetallic coins[11]. However, the deputy master of the Mint must ensure that of the coins ready for issue not less than ten coins of each denomination (other than silver Maundy coins or platinum coins) and, in the case of silver Maundy coins or platinum coins, not less than ten such coins, are to be selected at random and set apart, irrespective of the number of such coins that are ready for issue[12].

The coins set apart must be sealed up in separate packets at the Mint before being taken to the trial[13]. The jury must ascertain the number of coins in each packet produced to it and check that that number corresponds with the numbers represented by the officers of the Mint[14].

1 See the Trial of the Pyx Order 1998, SI 1998/1764, art 3(1). See PARA 1287 note 1. As to the Mint see PARA 1281.
2 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1)(a). 'Coins ready for issue' means current coins which are held by the Mint for the purpose of being put into circulation or have been issued to banks for that purpose, and includes silver Maundy coins: art 2(1).
3 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1)(aa) (added by SI 2005/254).
4 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1)(b). 'Maundy coins' means coins of the Queen's Maundy money: art 2(1). As to the Queen's Maundy money see PARA 1285.
5 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1)(c).
6 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1)(d). 'Gold-plated silver coin' means a silver coin plated wholly or partly with gold: art 2(1).
7 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1)(e)(i).
8 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1)(e)(ii).
9 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1)(e) proviso.
10 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1)(f).
11 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1)(g). 'Bimetallic coin' means a coin with joined inner and outer sections, one section being made of cupro-nickel and the other of nickel-brass: art 2(1).

12 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1) proviso (amended by SI 2005/254).
13 See the Trial of the Pyx Order 1998, SI 1998/1764, art 3(2) (amended by SI 2005/254).
14 Trial of the Pyx Order 1998, SI 1998/1764, art 6. As to the jury see PARA 1289.

1291. Trial of gold coins. For the purpose of the trial of the gold coins, the jury must take out from each packet of gold coins[1] as many coins as it thinks necessary, and weigh them in bulk so as to ascertain whether they are on the whole within the permitted variation from the standard weight[2]. It must then group them by type and melt them into separate ingots for each type of gold coin and assay each ingot, comparing it with the standard trial plates of gold so as to ascertain whether the metal of the ingot is within the permitted variation from the standard fineness[3]. The residue of the coins remaining in the packets must then be weighed in bulk so as to ascertain whether they are on the whole within the permitted variation as to weight[4], and then the jury must take out of the residue as many coins as it thinks fit and weigh and assay them separately[5].

1 As to the selection of coins and the sealing of them into packets see PARA 1290. As to the jury see PARA 1289.
2 See the Trial of the Pyx Order 1998, SI 1998/1764, art 7(a). As to the permitted variations in weight and fineness see the Coinage Act 1971 s 1(2), (3), (5)–(7), Sch 1; and PARAS 1284–1285.
3 See the Trial of the Pyx Order 1998, SI 1998/1764, art 7(b).
4 Trial of the Pyx Order 1998, SI 1998/1764, art 7(c).
5 Trial of the Pyx Order 1998, SI 1998/1764, art 7(d).

1292. Trial of platinum coins. For the purpose of the trial of the platinum coins, the jury must take out all the coins from the packets of platinum coins[1] and:

(1) weigh the coins in bulk so as to ascertain whether they are on the whole within the permitted variation from the standard weight[2]; and
(2) after weighing the coins, group them by type and assay such number of coins as it thinks fit, comparing them with the standard trial plate of platinum, so as to ascertain whether the metal of the coins of each type is on the whole within the permitted variation from the standard composition[3].

1 As to the selection of coins and the sealing of them into packets see PARA 1290. As to the jury see PARA 1289.
2 Trial of the Pyx Order 1998, SI 1998/1764, art 7A(a) (art 7A added by SI 2005/254). As to the permitted variations in weight and fineness see the Coinage Act 1971 s 1(2), (3), (5)–(7), Sch 1; and PARAS 1284–1285.
3 Trial of the Pyx Order 1998, SI 1998/1764, art 7A(b) (as added: see note 2). As to the standard trial plates see PARA 1286.

1293. Trial of silver Maundy coins. For the purpose of the trial of silver Maundy coins[1], the jury must take out all the coins from the packets of silver coins[2] and weigh them in bulk so as to ascertain whether they are on the whole within the permitted variation from the standard weight[3]. It must then assay such number of coins as it thinks fit, comparing them with the standard trial plates of silver, so as to ascertain whether the metal of the coins is on the whole within the permitted variation from the standard fineness[4].

1 As to the meaning of 'Maundy coins' see PARA 1290 note 4.
2 As to the selection of coins and the sealing of them into packets see PARA 1290. As to the jury see PARA 1289.
3 See the Trial of the Pyx Order 1998, SI 1998/1764, art 8(a). As to the permitted variations in weight and fineness see the Coinage Act 1971 s 1(2), (3), (5)–(7), Sch 1; and PARAS 1284–1285.

4 See the Trial of the Pyx Order 1998, SI 1998/1764, art 8(b). As to the standard trial plates see PARA 1286.

1294. Trial of silver coins other than Maundy coins, cupro-nickel coins, nickel-brass coins, gold-plated silver coins and bimetallic coins. For the purpose of the trial of the silver coins that are not Maundy coins[1] and cupro-nickel coins, the jury must ascertain whether or not all the coins in the packets of silver coins that are not Maundy coins and cupro-nickel coins weigh more than 500 g, and whether or not the coins of each denomination in the packets weigh more than 1 kg[2].

If the coins of any denomination weigh in all more than 1 kg, the jury must take from each packet as many coins of that denomination as it thinks fit, group them into lots weighing not less than 980 g nor more than 1 kg each and weigh each lot in bulk so as to ascertain whether the coins in it are on the whole within the permitted variation from the standard weight[3]. The jury must weigh in bulk the residue of the coins remaining in the packets, so as to ascertain whether they are on the whole within the permitted variation[4]. If the coins of any denomination weigh in all not more than 1 kg, the jury must weigh all of them in bulk so as to ascertain whether they are on the whole within the permitted variation[5]. If the coins weigh in all more than 500 g, the jury must assay such number of coins as it thinks fit, not weighing less in all than 500 g; if they weigh less than 500 g, the jury must assay all of them[6].

In assaying the coins, the jury must compare them with the standard plate of silver (in the case of silver coins other than Maundy coins) and with the standard plates of copper and nickel (in the case of cupro-nickel coins) so as to ascertain whether the metal of the coins is on the whole within the permitted variation from the standard composition[7].

If the number of cupro-nickel coins of any denomination is more than ten, the jury must measure the diameter of not less than ten and not more than twenty coins of that denomination; but if the number is not more than ten the jury must measure the diameter of all of them[8]. In measuring the diameter of the coins of any denomination the jury must ascertain whether their average diameter is within the permitted variation from the standard diameter[9].

Corresponding provisions have been made in respect of the trial of gold-plated silver coins[10], nickel-brass coins[11] and bimetallic coins[12].

1 As to the meaning of 'Maundy coins' see PARA 1290 note 4.
2 See the Trial of the Pyx Order 1998, SI 1998/1764, arts 9(1), 11(1). As to the selection of coins and the sealing of them into packets see PARA 1290. As to the jury see PARA 1289.
3 See the Trial of the Pyx Order 1998, SI 1998/1764, arts 9(2)(a), 11(2)(a). As to the permitted variations in weight see the Coinage Act 1971 s 1(4)–(7); and PARA 1284.
4 See the Trial of the Pyx Order 1998, SI 1998/1764, arts 9(2)(b), 11(2)(b).
5 See the Trial of the Pyx Order 1998, SI 1998/1764, arts 9(3), 11(3).
6 See the Trial of the Pyx Order 1998, SI 1998/1764, arts 9(4), (5), 11(4), (5).
7 Trial of the Pyx Order 1998, SI 1998/1764, arts 9(6), 11(6) (art 9(6) amended by SI 2005/254). As to the permitted variations in composition see the Coinage Act 1971 s 1(4)–(7); and PARA 1284. As to the standard plates see PARA 1286.
8 Trial of the Pyx Order 1998, SI 1998/1764, art 11(7), (8).
9 the Trial of the Pyx Order 1998, SI 1998/1764, art 11(9). As to the permitted variations in diameter see the Coinage Act 1971 s 1(4)–(7); and PARA 1284.
10 See the Trial of the Pyx Order 1998, SI 1998/1764, art 10 (amended by SI 2005/254). As to the meaning of 'gold-plated silver coin' see PARA 1290 note 6.
11 See the Trial of the Pyx Order 1998, SI 1998/1764, art 12.
12 See the Trial of the Pyx Order 1998, SI 1998/1764, art 13. As to the meaning of 'bimetallic coin' see PARA 1290 note 11.

1295. Findings of the jury. By its verdict the jury[1] must find:

(1) whether the metal of the ingot for each type of gold coin is within the permitted variation from the standard fineness[2];

(2) whether each group of gold coins weighed in bulk is on the whole within the permitted variation from the standard weight[3];

(3) whether each of the gold coins separately weighed and assayed is within the permitted variations as to weight and fineness[4];

(4) whether the platinum coins weighed and those assayed are on the whole respectively within the permitted variations from the standard weight and composition[5];

(5) whether the silver Maundy coins weighed and those assayed are on the whole respectively within the permitted variations from the standard weight and fineness[6];

(6) whether each group of silver coins other than Maundy coins which has been weighed in bulk is on the whole within the permitted variation from the standard weight[7];

(7) whether the silver coins other than Maundy coins which have been assayed are on the whole within the permitted variations from the standard composition[8];

(8) whether each group of gold-plated silver coins weighed in bulk is on the whole within the permitted variation from the standard weight[9];

(9) whether the gold-plated silver coins assayed are on the whole within the permitted variation from the standard composition, and, in relation to the gold plating, within the permitted variation from the standard weight[10];

(10) whether each group of cupro-nickel coins weighed in bulk is on the whole within the permitted variation from the standard weight[11];

(11) whether the cupro-nickel coins assayed are on the whole within the permitted variation from the standard composition[12];

(12) whether the average diameter of the cupro-nickel coins measured is within the permitted variations from the standard diameter[13];

(13) whether each group of nickel-brass coins weighed in bulk is on the whole within the permitted variation from the standard weight[14];

(14) whether the nickel-brass coins assayed are on the whole within the permitted variation from the standard composition[15];

(15) whether the average diameter of the nickel-brass coins measured is within the permitted variation from the standard diameter[16];

(16) whether each group of bimetallic coins weighed in bulk is on the whole within the permitted variation from the standard weight[17];

(17) whether the bimetallic coins assayed are on the whole within the permitted variations from the standard composition in relation to their inner and outer sections[18]; and

(18) whether the average diameter of the bimetallic coins measured is on the whole within the permitted variation from the standard diameter[19].

If the jury finds that in any case there is a variation from the standard weight or fineness or composition or diameter, it must specify in its verdict the amount of the variation[20]. The verdict of the jury must be in writing and signed by each of the jurymen[21]. It is to be handed to the Queen's Remembrancer who authenticates it with his signature, deposits it among the records of his office and delivers a copy of it to the Treasury[22]. The Queen's Remembrancer must direct that the verdict, or those parts of the verdict which he considers appropriate, be

read aloud in his presence[23]. The Treasury must deliver one copy of the verdict to the Department for Innovation, Universities and Skills, and another copy to the deputy master of the Mint[24], and must publish the verdict in such manner as the Treasury considers appropriate[25].

1 As to the jury see PARA 1289.
2 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(a). As to the permitted variations in fineness and weight see the Coinage Act 1971 s 1(2), (3), Sch 1; and PARA 1284.
3 See the Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(b).
4 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(c).
5 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(cc) (added by SI 2005/254).
6 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(d). As to the meaning of 'Maundy coins' see PARA 1290 note 4.
7 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(e).
8 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(f) (amended by SI 2005/254).
9 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(g).
10 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(h) (amended by SI 2005/254).
11 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(i).
12 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(j).
13 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(k).
14 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(l).
15 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(m).
16 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(n).
17 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(o).
18 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(p).
19 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(q). As to the permitted variations in diameter see the Coinage Act 1971 s 1(4); and PARA 1284.
20 See the Trial of the Pyx Order 1998, SI 1998/1764, art 14(2).
21 Trial of the Pyx Order 1998, SI 1998/1764, art 15(1).
22 Trial of the Pyx Order 1998, SI 1998/1764, art 15(1). As to the Queen's Remembrancer see PARA 1288 note 5; and COURTS vol 10 (Reissue) PARA 654. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
23 Trial of the Pyx Order 1998, SI 1998/1764, art 15(1).
24 As to the Mint see PARA 1281.
25 Trial of the Pyx Order 1998, SI 1998/1764, art 15(2) (amended by SI 2005/254; SI 2007/3224).

1296. Coins not to be melted down or broken up without licence. Coins which are current in the United Kingdom[1] or which, having been current there, have ceased to be so at any time after 16 May 1969, must not be melted down or broken up without a licence from the Treasury[2]. Any person contravening this is liable on conviction to a penalty[3]. If any condition attached to such a licence[4] is contravened or not complied with, the person to whom the licence was granted is liable on conviction to a penalty unless he proves that the contravention or non-compliance occurred without his consent or connivance and that he exercised all due diligence to prevent it[5]. Whether or not it imposes any other punishment, the court before which a person is convicted of an offence may order the articles in respect of which the offence was committed to be forfeited to the Crown[6]. Where an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he as well as the body corporate is guilty of that offence and is liable to be proceeded against and punished accordingly[7].

1 As to the meaning of 'United Kingdom' see PARA 2 note 3.
2 See the Coinage Act 1971 s 10(1). As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

3 Coinage Act 1971 s 10(2) (amended by the Magistrates' Courts Act 1980 s 32(2)). The penalty on summary conviction is a fine not exceeding the prescribed sum; and the penalty on conviction on indictment is a fine or imprisonment for a term not exceeding two years, or both: see the Coinage Act 1971 s 10(2) (as so amended). As to the prescribed sum see PARA 56 note 24.

4 Ie granted under the Coinage Act 1971 s 10(1).

5 Coinage Act 1971 s 10(3). The penalty on summary conviction is a fine not exceeding level 5 on the standard scale: see s 10(3). As to the standard scale see PARA 27 note 21.

6 Coinage Act 1971 s 10(4).

7 Coinage Act 1971 s 10(5).

C. BANK NOTES

1297. Bank notes. The Bank of England has the exclusive right of note issue in England and Wales[1]. The Bank may issue bank notes of such denominations as the Treasury may approve and no others[2].

1 See the Bank Charter Act 1844 s 11; and PARA 796. Only Bank of England notes are legal tender in England and Wales; notes that are not legal tender may, however, be accepted as a means of payment. As to legal money see also PARA 1278. As to bank notes see also PARA 796 et seq. As to the Bank of England see PARA 793 et seq.

2 See the Currency and Bank Notes Act 1954 s 1(1); and PARA 796. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

D. COUNTERFEIT COINS AND NOTES

1298. Offences relating to counterfeit coins and notes. There are various offences in relation to the making, passing, tendering and delivering of a counterfeit of a currency note or of a protected coin[1]; and the importation, landing, unloading or exportation[2] of a counterfeit of a currency note or of a protected coin without the consent of the Treasury is prohibited[3].

1 As to counterfeiting offences, and the penalties for them, see the Forgery and Counterfeiting Act 1981 ss 14–19, 22; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 544 et seq. As to forgery generally see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 346 et seq.

'Currency note' means: (1) any note which has been lawfully issued in England and Wales, Scotland, Northern Ireland, any of the Channel Islands, the Isle of Man or the Republic of Ireland and is or has been customarily used as money in the country where it was issued and which is payable on demand; or (2) any note which has been lawfully issued in any other country and is customarily used as money in that country: s 27(1).

'Protected coin' means any coin which is customarily used as money in any country or is specified in an order made by the Treasury: s 27(1). See the Forgery and Counterfeiting (Protected Coins) Order 1981, SI 1981/1505, specifying sovereign, half-sovereign, Krugerrand, any coin denominated as a fraction of a Krugerrand and Maria-Theresia thaler bearing the date 1780. See also the Forgery and Counterfeiting (Protected Coins) Order 1999, SI 1999/2095, specifying euro coins. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

A thing is a counterfeit of a currency note or protected coin if it is not a currency note or protected coin but resembles a currency note or protected coin (whether on one side or both) to such an extent that it is reasonably capable of passing for a currency note or protected coin of that description, or if it is a currency note or protected coin which has been so altered that it is reasonably capable of passing for a currency note or protected coin of some other description: Forgery and Counterfeiting Act 1981 s 28(1).

2 A counterfeit of a currency note or protected coin which is removed from the United Kingdom to the Isle of Man is deemed to be exported for the purposes of this provision: Forgery and Counterfeiting Act 1981 s 21(2). As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 See the Forgery and Counterfeiting Act 1981 ss 20, 21; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 551. As to penalties for importation contrary to this prohibition see the Customs and Excise Management Act 1979 s 50; and CUSTOMS AND EXCISE

vol 12(3) (2007 Reissue) PARA 994. As to penalties for exportation contrary to this prohibition see the Customs and Excise Management Act 1979 s 68; and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1029.

E. FOREIGN MONEY OBLIGATIONS

1299. Construction of references to foreign currency and to gold. Where a debt is expressed in terms of a foreign currency, the reference to that currency may indicate the mode in which the debt is to be discharged or the means by which the amount of the debt is to be measured or both[1].

Where English law is the proper law of the contract[2] under which a debt is payable, any reference in the contract to gold or gold coin will prima facie be construed as an indication of the means by which the amount of the debt is to be measured[3], and not as a requirement to make actual payment in gold[4]; but in some cases a reference to gold in connection with a particular currency may be no more than part of the description of that currency[5].

1 See *Feist v Société Intercommunale Belge d'Électricité* [1934] AC 161 at 172, HL, per Lord Russell of Killowen; *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd* [1934] AC 122 at 145–146, HL, per Lord Tomlin; *Bonython v Commonwealth of Australia* [1951] AC 201 at 216–217, PC; *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271, HL. See also PARA 1301. Foreign currencies are now largely treated on the same footing as sterling: see *Camdex International Ltd v Bank of Zambia (No 2)* [1997] 1 All ER 728, [1997] 1 WLR 632, CA.

2 As to the determination of the law of the contract see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 349 et seq. Where the law of a foreign country is the proper law, the legislation of that country may invalidate a gold clause: see *R v International Trustee for the Protection of Bondholders AG* [1937] AC 500, [1937] 2 All ER 164, HL.

3 *Feist v Société Intercommunale Belge d'Électricité* [1934] AC 161, HL (bonds issued by Belgian company for payment 'in sterling gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on 1st September 1928'); *Syndic in Bankruptcy of Salim Nasrallah Khoury v Khayat* [1943] AC 507, [1943] 2 All ER 406, PC (promissory note expressed in 'Turkish gold pounds'); *New Brunswick Rly Co v British and French Trust Corpn Ltd* [1939] AC 1, [1938] 4 All ER 747, HL (bonds issued by New Brunswick company repayable in 'gold coin of Great Britain of the present standard of weight and fineness').

4 See PARA 1298. See also *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd* [1934] AC 122 at 144, HL, per Lord Tomlin; *Treseder-Griffin v Co-operative Insurance Society Ltd* [1956] 2 QB 127 at 159–160, [1956] 2 All ER 33 at 45–46, CA, per Morris LJ.

5 *St Pierre v South American Stores (Gath and Chaves) Ltd and Chilean Stores (Gath and Chaves) Ltd* [1937] 3 All ER 349, CA; *Treseder-Griffin v Co-operative Insurance Society Ltd* [1956] 2 QB 127, [1956] 2 All ER 33, CA, where a covenant in English law to pay rent 'in gold sterling or in Bank of England notes to the equivalent value in gold sterling' was held merely to describe what was legal tender; *Campos v Kentucky and Indiana Terminal Railroad Co* [1962] 2 Lloyd's Rep 459.

1300. Measure of liability. Where on the proper construction of the contract a particular currency, whether English[1] or foreign[2], is referred to as providing the unit of account by reference to which the amount of the debt is to be measured, the measurement is to be made by reference to whatever at the time of payment is, according to the law of the country whose currency is referred to[3], legal currency of the same nominal amount, regardless of any rise[4] or fall[5] in the real value or exchange value of the currency[6]. However, the parties to a contract may agree to value a debt by reference to an index so that the liability reflects the real value and not the nominal value of the currency[7]. If the units referred to are common to the currency of several countries (for example, pounds[8], dollars[9] or francs[10]), including the country where payment is to be made, the contract will generally be construed as referring to the currency of the place of payment[11],

although this will not necessarily be so if there are other circumstances by reference to which the ambiguity can be resolved[12].

1 *Case of Mixed Money* (1604) Dav Ir 18, PC (Ir).
2 *Re Chesterman's Trusts, Mott v Browning* [1923] 2 Ch 466, CA. As to foreign currency liabilities see PARA 1302.
3 See *Société des Hôtels le Touquet Paris-Plage v Cumming* [1922] 1 KB 451, CA; *R v International Trustee for Protection of Bondholders AG* [1937] AC 500, [1937] 2 All ER 164, HL; and the cases cited in note 2.
4 See *Addison v Brown* [1954] 2 All ER 213 at 217, [1954] 1 WLR 779 at 785 per Streatfield J; *Re United Railways of Havana and Regla Warehouses Ltd, Tomkinson v First Pennsylvania Banking and Trust Co* [1961] AC 1007, [1960] 2 All ER 332, HL.
5 See *Re Chesterman's Trusts, Mott v Browning* [1923] 2 Ch 466, CA.
6 See *Treseder-Griffin v Co-operative Insurance Society Ltd* [1956] 2 QB 127 at 144, [1956] 2 All ER 33 at 36, CA, per Denning LJ; *Marrache v Ashton* [1943] AC 311, [1943] 1 All ER 276, PC; *Bonython v Commonwealth of Australia* [1951] AC 201, PC; *Lively Ltd v City of Munich* [1976] 3 All ER 851, [1976] 1 WLR 1004; and the cases cited in notes 4–8.
7 *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, [1978] 2 All ER 489 (dicta of Denning LJ in *Treseder-Griffin v Co-operative Insurance Society Ltd* [1956] 2 QB 127 at 145, [1956] 2 All ER 33 at 36, CA, not followed).
8 *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd* [1934] AC 122, HL (dividends payable in Australia by English company to English shareholders declared in pounds; held to mean Australian pounds); *De Bueger v J Ballantyne & Co Ltd* [1938] AC 452, [1938] 1 All ER 701, PC (contract made in England for payment in New Zealand by New Zealand company of salary expressed in pounds sterling; unit of account held to be British pounds); but cf *Bonython v Commonwealth of Australia* [1951] AC 201, PC (Australian government stock redeemable in England or in Australia expressed in pounds sterling; unit of account held to be Australian pounds); *National Bank of Australasia Ltd v Scottish Union and National Insurance Co Ltd* [1952] AC 493, PC (stock issued by Australian bank registered partly in Australia, partly in England, expressed in pounds; unit of account held to be Australian pounds); *National Mutual Life Association of Australasia Ltd v A-G for New Zealand* [1956] AC 369, [1956] 1 All ER 721, PC (New Zealand government stock and debentures expressed in pounds payable in Australia 'free of exchange'; these words held to show unit of account to be same as unit of payment, i e Australian pounds).
9 See *Bain v Field & Co Fruit Merchants Ltd* (1920) 5 Ll L Rep 16, CA.
10 *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd* [1934] AC 122 at 156, HL, per Lord Wright.
11 *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd* [1934] AC 122 at 156, HL, per Lord Wright; *Auckland Corpn v Alliance Assurance Co Ltd* [1937] AC 587, [1937] 1 All ER 645, PC.
12 See the cases cited in note 8.

1301. Mode of payment. Where English law is the proper law of the contract under which a debt is payable[1], the mode in which the debt is to be discharged (in the absence of express provision of another mode) is by payment in whatever at the time and place of payment is, according to the law of that place[2], legal currency and legal tender[3].

1 As to the determination of the law of the contract see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 349 et seq.
2 *British Bank for Foreign Trade Ltd v Russian Commercial and Industrial Bank* (1921) 38 TLR 65 (Russian roubles); *Anderson v Equitable Assurance Society of United States* (1926) 134 LT 557, CA (German marks); *Pyrmont Ltd v Schott* [1939] AC 145, [1938] 4 All ER 713, PC (Spanish pesetas); and see *Marrache v Ashton* [1943] AC 311, [1943] 1 All ER 276, PC.
3 *Ottoman Bank of Nicosia v Chakarian* [1938] AC 260, [1937] 4 All ER 570, PC; *Ottoman Bank, Haifa v Clement Menni* [1939] 4 All ER 9, PC; cf *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, [1972] 2 All ER 127, CA, where it was held that the vendors had waived their right to payment in Kenyan currency. See also *Schorsch Meier GmbH v Hennin* [1975] QB 416, [1975] 1 All ER 152, CA, where it was held that where the currency of the contract was a foreign currency the English courts had power to give judgment in that currency. As to legal tender in England see PARAS 1278–1279; and PARAS 796–797. As to payment by cheque see PARA 832 et seq. As to bank transfer see PARA 906.

1302. Foreign currency liabilities. Where a person brings a claim for a sum of money due under a contract he is entitled to claim[1] and obtain judgment for the amount of the debt expressed in the currency of a foreign country if the money of account and payment was of that country[2]. Where a charterparty provides for demurrage to be calculated in one currency, in the absence of any contrary provision it is a reasonable inference that it is to be paid in that currency[3]. The power to give judgment in a foreign currency is not confined to contracts whose proper law is the law of a foreign country[4]. The court also has power to award damages for negligence in a foreign currency where appropriate[5].

If an obligation in the currency of a foreign country, although sued upon in England, is payable in that country, payment in that country in the currency which will discharge the obligation there discharges the obligation for the purposes of the English claim[6].

1 As to pleading claims in foreign currency see *Practice Direction* [1976] 1 All ER 669, [1976] 1 WLR 83; *Practice Direction* [1977] 1 All ER 544, [1977] 1 WLR 197.

2 *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, [1975] 3 All ER 801, HL, overruling *Re United Railways of Havana and Regla Warehouses Ltd, Tomkinson v First Pennsylvania Banking and Trust Co* [1961] AC 1007, [1960] 2 All ER 332, HL; and see *The Despina R* [1978] QB 396 at 431–432, sub nom *Owners of the mv Eleftherotria v Owners of the mv Despina R, The Despina R* [1977] 3 All ER 874 at 897, CA, per Stephenson LJ (affd [1979] AC 685, [1979] 1 All ER 421, HL), where damages for breach of contract were awarded in a foreign currency. As to the appropriate currency in which a claimant's loss should be assessed see *A-G of the Republic of Ghana and Ghana National Petroleum Corpn v Texaco Overseas Tankships Ltd, The Texaco Melbourne* [1994] 1 Lloyd's Rep 473. See further *Schorsch Meier GmbH v Hennin* [1975] QB 416, [1975] 1 All ER 152, CA; and for comments on this case and the future approach of the courts see *Miliangos v George Frank (Textiles) Ltd* above at 465 and at 810 per Lord Wilberforce. See also *Jean Kraut AG v Albany Fabrics Ltd* [1977] QB 182, [1977] 2 All ER 116; *Services Europe Atlantique Sud (SEAS) v Stockholms Rederiaktiebolag SVEA, The Folias* [1979] QB 491, [1977] 3 All ER 945. As to arbitration see *Jugoslavenska Oceanska Plovidba v Castle Instrument Co Inc* [1974] QB 292, [1973] 3 All ER 498, CA.

As to awards made in a foreign currency see *Practice Direction—Judgments and Orders* PD 40B para 10; and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 1202. As to judgment, enforcement and interest on a judgment debt in a foreign currency see *Practice Direction* [1976] 1 All ER 669, [1976] 1 WLR 83; *Practice Direction* [1977] 1 All ER 544, [1977] 1 WLR 197. As to the enforcement of foreign judgments see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 139 et seq. As to judgments see further ENFORCEMENT.

3 *The Bellami* [1979] 1 All ER 380, [1979] 1 WLR 59, CA. The rate of exchange applicable to demurrage is that prevailing on the date of the payment: see *The Bellami*. See also *President of India v Lips Maritime Corpn, The Lips* [1985] 2 Lloyd's Rep 180 (affd sub nom *Lips Maritime Corpn v President of India* [1988] AC 395, [1987] 3 All ER 110, HL), where the rate of exchange was that prevailing at the bill of lading date.

4 *The Maratha Envoy* [1977] QB 324, [1977] 2 All ER 41, CA, where the proper law of the contract was English law; *Barclays Bank International Ltd v Levin Bros (Bradford) Ltd* [1977] QB 270, [1976] 3 All ER 900.

5 See *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 at 468, [1975] 3 All ER 801 at 813, HL, per Lord Wilberforce. This was subsequently affirmed by one of the leading cases on foreign currency damages: see *Owners of the mv Eleftherotria v Owners of the mv Despina R, The Despina R* [1979[AC 685, [1979] 1 All ER 421, HL.

6 *Société des Hotels le Touquet Paris-Plage v Cummings* [1922] 1 KB 451, CA; *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd* [1934] AC 122, HL; cf *The Baarn (No 2)* [1934] P 171, CA.

(ii) Interest on Money

A. THE RIGHT TO INTEREST

1303. Interest in general. Interest is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another[1].

Interest accrues from day to day even if payable only at intervals[2], and is, therefore, apportionable in respect of time between persons entitled in succession to the principal[3].

1 See *Re Farm Security Act 1944* [1947] SCR 394 at 411. See also *Dunn Trust Ltd v Feetham* [1936] 1 KB 22, CA; *Bennett v Ogston (Inspector of Taxes)* (1930) 15 TC 374; *Bond v Barrow Haematite Steel Co* [1902] 1 Ch 353; *Riches v Westminster Bank Ltd* [1947] AC 390, [1947] 1 All ER 469, HL. Money paid in lieu of interest is not itself interest: *Tomkins v Tomkins* (1978) Times, 24 May. See also *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 AC 481, [2002] 1 All ER 97 (contractual term that, if the borrower should default on his repayments, interest would continue to be payable at the contractual rate until any judgment obtained by the bank was discharged; held not to be unfair under the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159 (now revoked: see the Unfair Terms in Consumer Contracts Regulations 1999/2083)).

2 *Re Rogers' Trusts* (1860) 1 Drew & Sm 338.

3 See EQUITY vol 16(2) (Reissue) PARA 456. For the statutory provisions for the apportionment of rents, annuities, dividends and other periodical payments see the Apportionment Act 1870; and EXECUTORS AND ADMINISTRATORS; LANDLORD AND TENANT; RENTCHARGES AND ANNUITIES; SETTLEMENTS.

1304. Compound interest. Compound interest was not usually allowed except where there was an agreement, express or implied[1], to pay it[2], or where the debtor had employed the money in trade and had presumably earned it[3], or unless its allowance was in accordance with a usage of a particular trade or business[4]. However there are now indications that the courts have jurisdiction to award compound interest to a claimant seeking restitution of money paid under mistake when such an award would achieve a just result[5]. This is in line with a recommendation of the Law Commission and with Canadian authority on the matter[6].

1 *Morgan v Mather* (1792) 2 Ves 15; *Lord Clancarty v Latouche* (1810) 1 Ball & B 420; *Newell v Jones* (1830) 4 C & P 124; cf *Fergusson v Fyffe* (1841) 8 Cl & Fin 121, HL; *Crosskill v Bower, Bower v Turner* (1863) 32 Beav 86; *National Bank of Greece SA v Pinios Shipping Co* [1990] 1 AC 637, [1990] 1 All ER 78, HL. As to the charging of interest by a banker on an overdraft see PARA 968.

2 *Fergusson v Fyffe* (1841) 8 Cl & Fin 121, HL; *Boddam v Ryley* (1787) 4 Bro Parl Cas 561, HL; *Ex p Bevan* (1803) 9 Ves 223.

3 *A-G v Alford* (1855) 4 De GM & G 843; *Burdick v Garrick* (1870) 5 Ch App 233.

4 *Bruce v Hunter* (1813) 3 Camp 467; *Eaton v Bell* (1821) 5 B & Ald 34; *Fergusson v Fyffe* (1841) 8 Cl & Fin 121, HL; *Williamson v Williamson* (1869) LR 7 Eq 542; and see *Re Lloyd Edwards, Williams v Trench* (1891) 61 LJ Ch 22; *Silkstone and Haigh Moor Coal Co v Edey* [1900] 1 Ch 167.

5 See *Sempra Metals Ltd v IRC* [2007] UKHL 34, [2007] 4 All ER 657, [2007] All ER (D) 294 (Jul).

6 The Law Commission in its report, *Pre-judgment Interest on Debts and Damages* (Law Com No 287; February 2004), recommended that the court should have a discretion to award compound interest. A Canadian decision also points out that a sharp distinction between principal and interest may not be justifiable: see *Bank of America Canada v Mutual Trust Co* [2002] 2 SCR 601, Sup Ct of Canada.

1305. When interest is payable at common law. At common law interest is payable[1]: (1) where there is an express agreement to pay interest[2]; (2) where an agreement to pay interest can be implied from the course of dealing between the parties[3] or from the nature of the transaction[4] or a custom or usage of the trade or profession concerned[5]; and (3) in certain cases by way of damages for breach of a contract[6].

Except in the cases mentioned, debts do not carry interest at common law[7].

1 Generally, a claim for interest must be pleaded: see DAMAGES vol 12(1) (Reissue) PARA 849. As to the content of a claim form see CPR 16.2; and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 652.

2 *Page v Newman* (1829) 9 B & C 378; *London, Chatham and Dover Rly Co v South Eastern Rly Co* [1893] AC 429, HL; *Velchand v Atherton* (1917) 33 TLR 232, CA. See also *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 AC 481, [2002] 1 All ER 97; and PARA 1303 note 1. As to the payment of interest under the rules of a building society see PARA 1915. The right to and the rate of interest are governed by the law of the contract: see CONFLICT OF LAWS vol 8(3) (Reissue) PARAS 22, 365.

3 *Re Marquis of Anglesey, Willmot v Gardner* [1901] 2 Ch 548, CA; *Re WW Duncan & Co* [1905] 1 Ch 307. See also *Bruce v Hunter* (1813) 3 Camp 467; *Calton v Bragg* (1812) 15 East 223; *Denton v Rodie* (1813) 3 Camp 493; *Re Wilcocks, ex p Williams* (1813) 1 Rose 399; *Lawless v Bryce* (1870) IR 5 CL 190; *Great Western Insurance Co of New York v Cunliffe* (1874) 9 Ch App 525, CA; *Nichol v Thompson* (1807) 1 Camp 52n; *Admiralty Comrs v Ropner & Co Ltd* (1917) 86 LJKB 1030; and cf *Re Lloyd Edwards, Williams v Trench* (1891) 61 LJ Ch 22.

4 See eg DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 112.

5 See eg *Blaney v Hendricks* (1771) 2 Wm Bl 761 (interest payable on money lent between merchants); cf *Calton v Bragg* (1812) 15 East 223 (no interest payable on a loan); and see also *Eddowes v Hopkins* (1780) 1 Doug KB 376; *Ikin v Bradley* (1818) 2 Moore CP 206, Ex Ch; *Bruce v Hunter* (1813) 3 Camp 467. As to interest payable by the custom of bankers see PARA 968. As to the nature and effect of custom and usage see CUSTOM AND USAGE.

6 The courts were formerly reluctant to award interest by way of general damages for breach of an obligation to pay money: see *London, Chatham and Dover Rly Co v South Eastern Rly Co* [1893] AC 429, HL. However, artificialities of this kind have now been swept away by the House of Lords: see *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34, [2007] All ER (D) 294 (Jul). See also PARA 1304.

7 *President of India v La Pintada Cia Navigacion SA* [1985] AC 104, [1984] 2 All ER 773, HL; *Wadsworth v Lydall* [1981] 2 All ER 401, [1981] 1 WLR 598, CA; and see *London, Chatham and Dover Rly Co v South Eastern Rly Co* [1893] AC 429, HL; *Re Gosman* (1881) 17 ChD 771, CA; *Hill v South Staffordshire Rly Co* (1874) LR 18 Eq 154; *Rhodes v Rhodes* (1860) John 653; *Frühling v Schroeder* (1835) 2 Bing NC 77; *Foster v Weston* (1830) 4 Moo & P 589; *Page v Newman* (1829) 9 B & C 378; *Higgins v Sargent* (1823) 3 Dow & Ry KB 613; *Shaw v Picton* (1825) 7 Dow & Ry KB 201; *Calton v Bragg* (1812) 15 East 223; *De Bernales v Fuller* (1810) 2 Camp 426; *De Havilland v Bowerbank* (1807) 1 Camp 50; *Walker v Constable* (1798) 1 Bos & P 306. There is no rule that, where the Crown has had the benefit of money from the sale of property seized as prize and the proceeds of sale are released, the successful claimant is entitled to interest (*The Dirigo, The Hallingdal etc* [1919] P 204), although it may be awarded in cases of hardship (*The Kronprinz Gustav Adolf* (1917) 2 P Cas 418 at 423).

1306. Equitable right to interest. In equity interest may be recovered in certain cases where a particular relationship exists between the creditor and the debtor, such as mortgagor and mortgagee[1], obligor and obligee on a bond[2], personal representative and beneficiary[3], principal and surety[4], vendor and purchaser[5], principal and agent[6], solicitor and client[7], trustee and beneficiary[8], pawnbroker and pawnor[9], or where the debtor is in a fiduciary position to the creditor[10]. Interest is also allowed on pecuniary legacies not paid within a certain time[11], on the dissolution of a partnership[12], on the arrears of an annuity where there has been misconduct or improper delay in payment[13], or in the case of money obtained or retained by fraud[14]. It may also be allowed where the defendant ought to have done something which would have entitled the claimant to interest at common law[15], or has wrongfully prevented the claimant from doing something which would have so entitled him[16].

1 See eg *Mendl v Smith* (1943) 112 LJ Ch 279; and MORTGAGE.

2 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 93, 96, 112.

3 See EXECUTORS AND ADMINISTRATORS.

4 See PARA 1013 et seq.

5 The general rule (which extends to land and other property) is that a vendor is entitled to interest from the time the purchaser takes possession until payment of the purchase price

(*International Rly Co v Niagara Parks Commission* [1941] AC 328 at 344–348, [1941] 2 All ER 456 at 463–465, PC; *Birch v Joy* (1852) 3 HL Cas 565); and where the purchaser is entitled to rescind the contract and recover his deposit, he is entitled to interest on the deposit (*Day v Singleton* [1899] 2 Ch 320 at 327, CA). See SALE OF LAND. As to the payment of interest in the case of acquisitions under compulsory powers see COMPULSORY ACQUISITION OF LAND.

6 See AGENCY vol 2(1) (Reissue) PARAS 115, 121.

7 *Barclay v Harris and Cross* (1915) 85 LJKB 115; and see SOLICITORS vol 44(1) (Reissue) PARA 360.

8 See *Re Hulkes, Powell v Hulkes* (1886) 33 ChD 552; and CHARITIES vol 5(2) (2001 Reissue) PARA 396; TRUSTS vol 48 (2007 Reissue) PARA 1106.

9 See *Mathew v TM Sutton Ltd* [1994] 4 All ER 793, [1994] 1 WLR 1455; and PLEDGES AND PAWNS vol 36(1) (2007 Reissue) PARAS 3, 28.

10 *Burdick v Garrick* (1870) 5 Ch App 233; *Harsant v Blaine, Macdonald & Co* (1887) 56 LJQB 511, CA; *Dominion Coal Co Ltd v Maskinonge Steamship Co Ltd* [1922] 2 KB 132; *Wallersteiner v Moir (No 2)* [1975] QB 373, [1975] 1 All ER 849, CA (interest may be awarded under the court's equitable jurisdiction where a person had improperly profited from his fiduciary position). See also *John v James* [1986] STC 352 (deductions for tax not allowed in calculating compound interest payable on unpaid royalties).

11 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 421.

12 *Hugh Stevenson & Sons Ltd v AG für Cartonnagen-Industrie* [1918] AC 239 at 246, 256, HL. As to dissolution of partnerships see PARTNERSHIP vol 35 (Reissue) PARA 163 et seq.

13 See eg *Torre v Browne* (1855) 5 HL Cas 555 at 578–579; and RENTCHARGES AND ANNUITIES.

14 *Johnson v R* [1904] AC 817 at 822, PC. See also *Frühling v Schroeder* (1835) 2 Bing NC 77; *Sutton v South Eastern Rly Co* (1865) LR 1 Exch 32. The fraud must be proved in the claim in which the interest is sought to be recovered: *Johnson v R* above.

15 See PARA 1305.

16 *London, Chatham and Dover Rly Co v South Eastern Rly Co* [1892] 1 Ch 120 at 142, CA, per Lindley LJ; on appeal [1893] AC 429, HL, per Lord Watson, approving on this point *Mackintosh v Great Western Rly Co* (1865) 4 Giff 683. See also *Hull and Selby Rly Co v North Eastern Rly Co* (1854) 5 De G M & G 872; *Rhoades v Lord Selsey* (1840) 2 Beav 359; *Barclay v Harris and Cross* (1915) 85 LJKB 115. Where a contract has been executed there is, apart from fraud, nothing to attract the court's equitable jurisdiction: *Maine and New Brunswick Electrical Power Co v Hart* [1929] AC 631 at 640, PC.

1307. Interest under statute. A right to interest is conferred by statute in many cases, as, for example upon the late payment of some commercial debts[1], in the administration of bankrupt estates[2] and in the liquidation of companies[3]; and, by statute, the court has a general discretion to award interest in claims for debt or damages[4].

Subject to the rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages[5] simple interest[6] may be included in any sum for which judgment is given, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or where payment is made before judgment, for all or any part of the period between the date when the cause of action arose and: (1) in the case of any sum paid before judgment, the date of the payment; and (2) in the case of the sum for which judgment is given, the date of judgment[7]. Similarly, in any proceedings tried[8] in any court of record[9] for the recovery of any debt or damages the court may, if it thinks fit[10], order that there is to be included in the sum for which judgment is given interest at such rate as it thinks fit[11] on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment[12]. This power of the court is exercisable only if a claim for interest is specifically pleaded[13].

An arbitration tribunal may[14] award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case[15].

Every judgment debt[16] carries interest at eight per cent per annum from such time as prescribed by rules of court until it is satisfied[17]. The rules of court state that where interest is so payable[18] the interest begins to run from the date that judgment is given unless another rule or a practice direction makes different provision, or unless the court orders otherwise[19]. The court may order that interest is to begin to run from a date before the date that judgment is given[20].

A contract to pay a debt with interest at a certain rate does not entitle a claimant to levy under his execution more than the statutory rate; the contract must state specifically that any judgment obtained for the recovery of the debt carries interest at a higher rate and that higher rate should form part of the judgment[21].

Certain tribunals have special statutory powers to direct the payment of interest on their awards[22].

1 See the Late Payment of Commercial Debts (Interest) Act 1998; and SALE OF GOOD AND SUPPLY OF SERVICES.

2 As to the administration of bankrupt estates see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 390 et seq.

3 As to the liquidation of companies see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 432 et seq.

4 See the text and notes 5–13.

5 The words 'debt or damage' cover any sum recoverable by one party from another either at common law or in equity or under a statute such as the Law Reform (Frustrated Contracts) Act 1943: *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1983] 2 AC 352, [1982] 1 All ER 925, HL. A claim as a creditor, other than a judgment creditor, in a company's winding up is not a claim for the recovery of any debt or damage: *Re Fine Industrial Commodities Ltd* [1956] Ch 256, [1955] 3 All ER 707. A court ordering stamp duty to be repaid under the Stamp Act 1891 s 13(4) may order it to be repaid with such interest as it may determine (see the Finance Act 1965 s 91 (now repealed for some purposes); and STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1112) despite the fact that the repayment of duty is not a debt (*Western United Investment Co Ltd v IRC* [1958] Ch 392, [1958] 1 All ER 257). A fraudulent preference is a debt: *Re FP & CH Matthews Ltd* [1982] Ch 257, [1982] 1 All ER 338, CA.

6 For the principle that income tax is deductible on payment of interest awarded see INCOME TAXATION vol 23(1) (Reissue) PARA 464 et seq.

7 Supreme Court Act 1981 s 35A(1) (s 35A added by the Administration of Justice Act 1982 Sch 1 Pt I). Interest in respect of a debt may not be awarded for a period during which, for whatever reason, interest on the debt already runs: Supreme Court Act 1981 s 35A(4) (as so added). Interest may be calculated at different rates in respect of different periods: s 35A(6) (as so added). Nothing in s 35A affects the damages recoverable for the dishonour of a bill of exchange: s 35A(8) (as so added). As to damages for dishonour of a bill of exchange see PARA 1602. As from a day to be appointed, the Supreme Court Act 1981 is to be renamed as the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed.

8 As to the meaning of 'tried' and the power of the court to award interest in a judgment debt obtained in default of appearance see *Alex Lawrie Factors Ltd v Modern Injection Moulds Ltd* [1981] 3 All ER 658.

9 As to courts of record see COURTS vol 10 (Reissue) PARA 308.

10 For examples of the court's exercise of discretion see *Public Trustee v Pearlberg* [1940] 2 KB 1 at 22, 25, [1940] 2 All ER 270 at 283–284, CA; *H Cousins & Co Ltd v D and C Carriers Ltd* [1971] 2 QB 230, [1971] 1 All ER 55, CA.

11 As to the exercise of the court's discretion see *FMC (Meat) Ltd v Fairfield Cold Stores Ltd* [1971] 2 Lloyd's Rep 221; *Cremer v General Carriers SA* [1974] 1 All ER 1, [1974] 1 WLR 341. As to interest on a judgment debt expressed in foreign currency see *Miliangos v George Frank (Textiles) Ltd (No 2)* [1977] QB 489, [1976] 3 All ER 599; and PARA 1302.

12 Law Reform (Miscellaneous Provisions) Act 1934 s 3(1). This provision is repealed in its application to the High Court and the county courts by the Administration of Justice Act 1982 s 15(4), (5). It does not apply in relation to any debt upon which interest is payable as of right, whether by virtue of any agreement or otherwise; nor does it affect the damages recoverable for the dishonour of a bill of exchange, nor authorise the giving of interest upon interest: see the

Law Reform (Miscellaneous Provisions) Act 1934 s 3(1) proviso. Section 3(1) applies to judgments or proceedings by or against the Crown: see the Crown Proceedings Act 1947 s 24(3); and CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) PARA 135. Provision in a contract for payment in lieu of interest is not an interest payment and so statutory interest can be awarded: *Tomkins v Tomkins* (1978) Times, 24 May. As to damages and interest generally see DAMAGES vol 12(1) (Reissue) PARAS 848–850. As to damages for dishonour of a bill of exchange see PARA 1602.

13 Particulars of claim must include a statement to the effect that the claimant is seeking interest and containing details as to the basis on which he is seeking interest: see CPR 16.4; and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 654. There is no power to award interest on sums already paid out and which have not been the subject of the judgment: see *The Medina Princess* [1962] 2 Lloyd's Rep 17.

14 Ie unless the parties otherwise agree: see the Arbitration Act 1996 s 49(1), (2).

15 See the Arbitration Act 1996 s 49(3); and ARBITRATION vol 2(3) (Reissue) PARA 58.

16 As to judgment debts generally see ENFORCEMENT; PRACTICE AND PROCEDURE.

17 Judgments Act 1838 s 17(1) (amended by the Civil Procedure Acts Repeal Act 1879 Schedule Pt I; the Statute Law Revision (No 2) Act 1888; SI 1993/564; and SI 1998/2940). Rules of court may provide for the court to disallow all or part of any interest otherwise payable under the Judgments Act 1838 s 17(1): see s 17(2) (added SI 1998/2940). The amending orders were made under the Administration of Justice Act 1970 s 44. As to interest on judgment debts expressed in currencies other than sterling see s 44A; and ENFORCEMENT vol 17(1) (Reissue) PARA 25.

18 Ie on a judgment pursuant to the Judgments Act 1838 s 17: see the text to note 17.

19 See CPR 40.8(1); and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 1208.

20 See CPR 40.8(2); and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 1208.

21 See *Re European Central Rly Co, ex p Oriental Financial Corpn* (1876) 4 ChD 33, CA; *Re Sneyd, ex p Fewings* (1883) 25 ChD 338, CA; *Arbuthnot v Bunsilall* (1890) 62 LT 234; *Economic Life Assurance Society v Usborne* [1902] AC 147, HL. See also *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 AC 481, [2002] 1 All ER 97.

22 Eg the Lands Tribunal: see COMPULSORY ACQUISITION OF LAND vol 8(1) (2003 Reissue) PARA 228.

1308. Default interest. As a means of ensuring prompt payment it is not uncommon for loan agreements to provide for a specified default interest rate, that a higher rate of interest would apply in the event of default by the borrower[1]. There has been some consideration as to whether such a default rate of interest constitutes a penalty; and it seems that it does not, provided that the higher rate is a reasonable reflection of the increased credit risk which flows from the default[2].

1 See PARA 968; and MORTGAGE vol 32 (2005 Reissue) PARAS 418, 934.

2 See *Wallingford v Mutual Society* (1880) 5 App Cas 685; *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205, [1983] 1 WLR 399, HL; *The Angelic Star* [1988] 1 Lloyd's Rep 122; CA; *Lordsvale Finance plc v Bank of Zambia* [1996] QB 752, [1996] 3 All ER 156. See also EQUITY vol 16(2) (Reissue) PARAS 801, 802.

B. THE RATE AND RECOVERY OF INTEREST

1309. No limit to agreed rate. Subject to the statutory power of the court to set aside or vary a transaction in the case of certain unfair credit agreements[1], there is no restriction on the terms which may be agreed between a borrower and a lender for the payment of interest, and the ordinary principles of the law of contract govern any such agreement[2]. The same principles apply to interest upon other debts.

1 See now the provisions on relationships that are unfair to the debtor in the Consumer Credit Act 1974 ss 140A–140C (added by the Consumer Credit Act 2006 ss 19–21) (see CONSUMER CREDIT) replacing the former provisions on extortionate credit bargains (i e the Consumer Credit Act 1974 ss 137–140 (repealed)). See also *Wilson v First County Trust Ltd (No 2)* [2003] UKHL

40, [2004] 1 AC 816, sub nom *Wilson v First County Trust Ltd* [2003] 4 All ER 97 (extortionate credit bargain; compatibility of the Consumer Credit Act 1974 s 127(3) (now repealed) and human rights legislation).

2 See generally CONTRACT. See also *Provincial North West plc v Bennett* (1999) Times, 11 February, CA, where reference in a facility letter from a bank to '3% above the bank's base rate' was to be taken to mean the bank's base rate for the time being and from time to time, there being no necessity to give notice to vary such base rate.

1310. Amount usually allowed by courts. Where the rate of interest is not fixed by statute, agreement, or usage, there is no hard and fast rule as to the amount that will be allowed[1]; and the rate may vary according to the practice of the particular court, the value of money for the time being and the circumstances of the particular case[2]. In the past the usual practice, apart from special circumstances, was to allow five per cent in cases where the interest was partly in the nature of a penalty[3], and in commercial and speculative transactions[4], and three or four per cent in others[5], but more realistic rates based on modern conditions are now awarded[6].

Where there is a contract for the payment of money on a fixed day, with interest at a fixed rate down to that day, and default is made in payment of the principal, the rate of interest mentioned in the contract is the rate usually allowed from the time of default[7], without there being a general rule of law to that effect[8].

1 *Re Metropolitan Coal Consumers' Association Ltd, ex p Wainwright's Case* (1889) 62 LT 30 at 33 per Kay J; *Cook v Fowler* (1874) LR 7 HL 27 at 32–33 per Lord Cairns LC; *London, Chatham and Dover Rly Co v South Eastern Rly Co* [1892] 1 Ch 120 at 133, CA, per Lindley LJ.

2 *Re Metropolitan Coal Consumers' Association Ltd, ex p Wainwright's Case* (1889) 62 LT 30; *Re Roberts, Goodchap v Roberts* (1880) 14 ChD 49, CA; *Capel & Co v Sim's Ships Compositions Co Ltd* (1888) 57 LJCh 713 at 718; *Re Unsworth's Trust* (1865) 2 Drew & Sm 337; *FMC (Meat) Ltd v Fairfield Cold Stores Ltd* [1971] 2 Lloyd's Rep 221; *Cremer v General Carriers SA* [1974] 1 All ER 1, [1974] 1 WLR 341.

3 See eg (former) CPR Sch 1 RSC Ord 30 r 6(2); and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 876. See also *Gluckstein v Barnes* [1900] AC 240 at 255, HL; and PARA 1602.

4 *Lord Rokeby v Elliot* (1879) 13 ChD 277 at 281–282, CA; *Re Beulah Park Estate, Sargood's Claim* (1872) LR 15 Eq 43; *Dreyfus v Peruvian Guano Co* (1889) 42 ChD 66 at 74 (on appeal sub nom *Peruvian Guano Co Ltd v Dreyfus Bros & Co* [1892] AC 166 at 188, HL).

5 Interest at the rate of 4% has usually been allowed in the Chancery Division: see *Calcraft v Roebuck* (1790) 1 Ves 221 at 226 (interest on unpaid purchase money on sale of land); *Turner v Newport* (1846) 2 Ph 14 (adjustment between tenant for life and remainderman in relation to unauthorised investments); *Brown v Gellatly* (1867) 2 Ch App 751; *Re Owen, Slater v Owen* [1912] 1 Ch 519; *Re Beech, Saint v Beech* [1920] 1 Ch 40; *Re Baker, Baker v Public Trustee* [1924] 2 Ch 271; *Re Fawcett, Public Trustee v Dugdale* [1940] Ch 402; *Re Parry, Brown v Parry* [1947] Ch 23, [1946] 2 All ER 412 (adjustments between tenant for life and remainderman); *Re Davy, Hollingsworth v Davy* [1908] 1 Ch 61, CA (interest on advancements brought into hotchpot). When general rates of interest are low, interest has sometimes been given at 3% (see *Re Rowlls, Rowlls v Bebb, Walters v Treasury Solicitor* [1900] 2 Ch 107, CA; *Re Goodenough, Marland v Williams* [1895] 2 Ch 537; *Re Lambert, Middleton v Moore* [1897] 2 Ch 169), or 3.5% (see *Neumann v IRC* (1933) 148 LT 457 at 461, CA).

6 See eg *The Funabashi, Sycamore Steamship Co Ltd v Owners of SS White Mountain* [1972] 2 All ER 181, [1972] 1 WLR 666 (Admiralty); *FMC (Meat) Ltd v Fairfield Cold Stores Ltd* [1971] 2 Lloyd's Rep 221 (Commercial Court); *Cremer v General Carriers SA* [1974] 1 All ER 1, [1974] 1 WLR 341 (Commercial Court); *Jefford v Gee* [1970] 2 QB 130, [1970] 1 All ER 1202, CA; *Birkett v Hayes* [1982] 2 All ER 710, [1982] 1 WLR 816, CA (personal injuries); *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515, [1980] 2 All ER 92 (compensation for trustee).

7 *Price v Great Western Rly Co* (1847) 16 M & W 244; *Morgan v Jones* (1853) 8 Exch 620.

8 *Cook v Fowler* (1874) LR 7 HL 27; *Morgan v Jones* (1853) 8 Exch 620; *Keene v Keene* (1857) 3 CBNS 144; *Orme v Galloway* (1854) 23 LJ Ex 118; and see *Countess of Kildare v Hopson*

(1734) 4 Bro Parl Cas 550, HL; *Parker v Hutchinson* (1796) 3 Ves 133 at 134; *Re Lane, ex p Hodge* (1857) 26 LJ Bcy 77; *Re Roberts, Goodchap v Roberts* (1880) 14 ChD 49, CA; *Arbuthnot v Bunsilall* (1890) 62 LT 234.

1311. Proceedings for recovery of interest. Interest, where there is a contract to pay it, may be recovered in a claim brought for interest only[1]; but interest payable by way of damages[2] is not a debt, and can only be recovered in proceedings for payment of the principal[3].

1 *Hudson v Fawcett* (1844) 7 Man & G 348; *Nordenstrom v Pitt* (1845) 13 M & W 723; *Re King, ex p Furber* (1881) 17 ChD 191. See also *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 AC 481, [2002] 1 All ER 97.
2 See PARA 1305.
3 *Re Churcher and Stringer* (1831) 2 B & Ad 777; *Cameron v Smith* (1819) 2 B & Ald 305.

1312. Discharge of interest by discharge of principal. If the principal debt is merged in a judgment[1] or discharged by payment, or if the amount due is tendered[2], interest ceases to run from that date, but outstanding arrears may still be claimed if they could not have been recovered in the claim[3]. If the principal is barred by a statute of limitation, the interest is, as a general rule[4], barred also[5].

If the principal remains unpaid by reason of the creditor's delay[6], or from any cause outside the debtor's control[7], interest may not be claimed.

1 *Florence v Jenings* (1857) 2 CBNS 454; and see CONTRACT vol 9(1) (Reissue) PARA 1063.
2 *Gyles v Hall* (1726) 2 P Wms 378; *Norton v Ellam* (1837) 2 M & W 461.
3 *Florence v Jenings* (1857) 2 CBNS 454.
4 See PARA 1099.
5 *Hollis v Palmer* (1836) 2 Bing NC 713; *Clark v Alexander* (1844) 8 Scott NR 147 at 165; *Parkes v Smith* (1850) 15 QB 297; *Cheang Thye Phin v Lam Kin Sang* [1929] AC 670, PC; *Elder v Northcott* [1930] 2 Ch 422, where the statement in the text was approved. See also LIMITATION OF ACTIONS vol 28 (Reissue) PARA 1105.
6 *Edwards v Warden* (1876) 1 App Cas 281, HL; *Webster v British Empire Mutual Life Assurance Co* (1880) 15 ChD 169, CA; *Merry v Ryves* (1757) 1 Eden 1; *Duchess of Marlborough v Strong* (1723) 4 Bro Parl Cas 539, HL; *Laing v Stone* (1828) Mood & M 229n; *Cameron v Smith* (1819) 2 B & Ald 305; *Jones v Gardiner* [1902] 1 Ch 191. See also *Bann v Dalzel* (1828) Mood & M 228.
7 *Sterling v Wynne* (1834) 1 Jo Ex Ir 51; *Scott v Sandeman* (1852) 1 Macq 293; *Bushnan v Morgan* (1833) 5 Sim 635; *A-G v Ludlow Corpn* (1849) 1 H & Tw 216. See also *Rishton v Grissell* (1870) LR 10 Eq 393; *Caledonian Rly Co v Carmichael* (1870) LR 2 Sc & Div 56, HL.

(2) LOANS OF MONEY

(i) In general

1313. Nature of loans and contracts for loans. A loan of money generally creates a debt[1] and not an obligation to return the specific coins lent[2]. At common law money constituting a debt is not regarded as identifiable, but in equity sums representing an original fund may in certain circumstances be traced into other property and other hands[3]. Where a loan is made by two or more persons jointly, whether or not they advance equal amounts, they are treated as tenants in common in equity with respect to their rights[4].

A contract to lend money is, subject to certain provisions[5] and possibly to special rules as to the measure of damages for its breach[6], governed by the ordinary law relating to contracts[7].

The mere payment of a sum of money or a cheque is not evidence of the creation of a loan[8]; nevertheless there is a prima facie obligation to repay[9] in the absence of circumstances giving rise to a presumption of advancement. Payment

of sums equal to interest is evidence of a loan[10] and an 'IOU' is sufficient prima facie evidence although not addressed to anyone[11].

1 Eg a deposit in a bank account renders the banker his customer's debtor: see PARA 839. As to satisfaction of a debt see *Pinnel's Case* (1602) 5 Co Rep 117a; *Foakes v Beer* (1884) 9 App Cas 605, HL (as a general rule, a debt can only be discharged by payment of the sum owed). There may be a loan even though the person providing the money advanced could in law sue for its recovery as money lent: *De Vigier v IRC* [1964] 2 All ER 907, [1964] 1 WLR 1073, HL. To lend money is not the same thing as to carry on the business of moneylending: *Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] AC 209 at 218, [1961] 3 All ER 1163 at 1168, PC. Note that the Moneylenders Acts 1900 to 1927 are now wholly repealed.
2 As to the bailment of money regarded as a specific chattel see BAILMENT vol 3(1) (2005 Reissue) PARA 20.
3 See PARA 857; CHARITIES vol 5(2) (2001 Reissue) PARA 384; EQUITY vol 16(2) (Reissue) PARA 861 et seq.
4 See EQUITY vol 16(2) (Reissue) PARA 557. As to tenancy in common see REAL PROPERTY vol 39(2) (Reissue) PARA 207 et seq.
5 See PARAS 1314–1316.
6 As to damages for breach of contract see DAMAGES vol 12(1) (Reissue) PARA 941 et seq.
7 See generally CONTRACT. As to the assignment of the benefit of a contract to lend money see CHOSES IN ACTION vol 6 (2003 Reissue) PARA 15. As to a loan to discharge an obligation under an illegal contract see *Spector v Ageda* [1973] Ch 30, [1971] 3 All ER 417; and PARA 1315.
8 *Cary v Gerrish* (1801) 4 Esp 9; *Aubert v Walsh* (1812) 4 Taunt 293; *Welch v Seaborn* (1816) 1 Stark 474; *Pearce v Davis* (1834) 1 Mood & R 365; *Graham v Cox* (1848) 2 Car & Kir 702; *Chow Yoong Hong v Choong Far Rubber Manufactory* [1962] AC 209, [1961] 3 All ER 1163, PC. However, see *Seldon v Davidson* [1968] 2 All ER 755, [1968] 1 WLR 1083, CA; and EVIDENCE.
9 *Seldon v Davidson* [1968] 2 All ER 755, [1968] 1 WLR 1083, CA.
10 *Howard v Danbury* (1846) 2 CB 803.
11 *Douglas v Holme* (1840) 12 Ad & El 641.

1314. Security for loans. The repayment of a loan may be secured by the giving of security in various forms, for example: (1) by the giving of a bill of sale over goods intended to remain in the borrower's possession[1]; (2) by the mortgage of land or property other than personal chattels[2]; (3) by the pawn or pledge of goods[3]; (4) by the giving of a bottomry bond on a ship and cargo or a respondentia bond on the cargo alone[4]; (5) by the issue of debentures or debenture stock[5] or of a certificate of deposit[6]; (6) by the deposit of bills of exchange, stocks and shares, life assurance policies or documents of title to goods[7]. A bill of exchange or promissory note may itself be prima facie evidence of a loan having been made by the payee, if payment is not contingent on some event inconsistent with such a presumption[8].

Where a person has a claim against another, there may be circumstances under which a third person may have the benefit of enforcing the claim under the doctrine of subrogation[9].

1 See PARA 1674 et seq. A bill of sale given by way of security for the payment of money is void if it is not in accordance with the statutory form and is not registered: see PARA 1711 et seq.
2 See generally MORTGAGE. As to the position of persons joining in a mortgage as sureties see PARA 1019. Where a mortgage deed contains no express covenant for repayment, a personal covenant to repay is implied: see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 181–182.
3 See generally PLEDGES AND PAWNS.
4 See ADMIRALTY vol 1(1) (2001 Reissue) PARA 345; SHIPPING AND NAVIGATION vol 43(1) (Reissue) PARA 474.
5 As to club debentures see CLUBS vol 6 (2003 Reissue) PARAS 144–146; and as to company debentures see COMPANIES vol 7(2) (2004 Reissue) PARA 1552 et seq.
6 See INCOME TAXATION vol 23(1) (Reissue) PARA 568.
7 See generally PARA 860 et seq.

8 See *Clerke v Martin* (1702) 2 Ld Raym 757 at 758 per Holt CJ; *Carter v Palmer* (1700) 12 Mod Rep 380; *Grant v Vaughan* (1764) 3 Burr 1516 at 1525 per Lord Mansfield CJ; *Thompson v Morgan* (1811) 3 Camp 101; *Morgan v Jones* (1830) 1 Cr & J 162; *Early v Bowman* (1831) 1 B & Ad 889.

9 See *Coptic Ltd v Bailey* [1972] Ch 446, [1972] 1 All ER 1242; *Congresbury Motors Ltd v Anglo-Belge Finance Co Ltd* [1971] Ch 81, [1970] 3 All ER 385, CA; *Paul v Speirway Ltd* [1976] Ch 220, [1976] 2 All ER 587; and EQUITY vol 16(2) (Reissue) PARA 770 et seq.

1315. Irrecoverable loans. A loan made for an illegal purpose cannot be recovered after the purpose has been wholly or partly carried out[1].

Loans made knowingly for the purpose of unlawful gaming were previously irrecoverable[2]; and other loans made for betting or for paying betting debts are in general recoverable so long as the borrower is not actually bound by the terms of the loan to apply the money to these purposes[3], and securities for betting loans are not invalidated[4].

Loans made to minors are voidable[5].

A loan made to another for the purpose of discharging an obligation which had arisen under a transaction which, to the knowledge of the person making the loan, was illegal, taints the loan itself with illegality and renders it unenforceable[6].

1 As to the effect of illegality and unenforceability on securities for the repayment of a loan see CONTRACT vol 9(1) (Reissue) PARAS 839, 880 et seq. As to contracts governed by foreign law see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 359 et seq.

2 But see now the Gambling Act 2005 repealing the Gaming Act 1710 s 1 and the Gaming Act 1835 s 1. See BETTING, GAMING AND LOTTERIES.

3 *Saxby v Fulton* [1909] 2 KB 208, CA; *Re O'Shea, ex p Lancaster* [1911] 2 KB 981, CA; and see BETTING, GAMING AND LOTTERIES vol 4(1) (2002 Reissue) PARA 29.

4 See BETTING, GAMING AND LOTTERIES vol 4(1) (2002 Reissue) PARA 32.

5 See PARA 1320.

6 See *Spector v Ageda* [1973] Ch 30, [1971] 3 All ER 417.

1316. Relief of borrowers. A borrower of money may obtain relief on the ground that the contract is void or illegal[1], or has been procured by misrepresentation or is affected with fraud[2] or is otherwise unconscionable[3]. Where relief is sought under the equitable jurisdiction of the court, relief will not normally be granted except upon the terms that the applicant for relief should himself do that which the court considers fair and equitable in the matter[4]. Relief is also available to debtors and sureties in appropriate cases where the court regards a credit agreement as unfair to the debtor[5].

1 See *Horwood v Millar's Timber and Trading Co Ltd* [1917] 1 KB 305, CA; and CONTRACT vol 9(1) (Reissue) PARAS 842, 877.

2 See generally MISREPRESENTATION AND FRAUD.

3 As to relief in the case of usurious loans of the security of reversionary interests see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 854 et seq.

4 *Samuel v Newbold* [1906] AC 461 at 468, HL; and see EQUITY vol 16(2) (Reissue) PARA 560; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 854 et seq.

5 See now the provisions on relationships that are unfair to the debtor in the Consumer Credit Act 1974 ss 140A–140C (added by the Consumer Credit Act 2006 ss 19–21) (see CONSUMER CREDIT) replacing the former provisions on extortionate credit bargains (i e the Consumer Credit Act 1974 ss 137–140 (repealed)).

(ii) Loans to and by Particular Persons

1317. Borrowing by the government, local authorities etc. The methods by which the government[1] and local authorities[2] may borrow money, and the borrowing powers of various public bodies[3], are discussed elsewhere in this work.

1 See CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 701 et seq. As to the National Debt and government securities see PARA 1325 et seq.
2 See LOCAL GOVERNMENT; LONDON GOVERNMENT. As to borrowing from the Public Works Loans Commissioners see PARA 1334 et seq.
3 The borrowing powers of particular bodies, industries and undertakings are covered in the title relevant to the body, industry or undertaking in question.

1318. Borrowing by companies, partners and other associations. The borrowing powers of a company regulated by the Companies Act 1985 are determined by that Act and by the constitution of the company[1]. Certain charges given by such a company to secure borrowings are void if not registered; but the contract to repay the money borrowed is not affected by non-registration of the charge, and the loan becomes repayable as soon as the charge is avoided[2]. Other commercial or trading corporations have implied power to borrow[3]. Where a loan is made to a company which the company has not power to borrow, and is properly spent by the company in paying its creditors, the lender may be subrogated to the rights of the creditors[4].

In the case of a trading partnership or any other partnership carrying on a business which requires the borrowing of money, a partner has implied power to borrow on behalf of the partnership for the purposes of the business[5], but if a partner borrows money in his own name on his own security the fact that it is used for partnership purposes with the knowledge of the other partners will not make them liable to the lender[6].

The borrowing powers of friendly societies[7], industrial and provident societies[8] and building societies[9] are dealt with elsewhere in this title.

1 See COMPANIES vol 7(2) (2004 Reissue) PARA 1517.
2 See the Companies Act 1985 ss 395–399 (prospectively repealed); and COMPANIES vol 7(2) (2004 Reissue) PARA 1584 et seq (as to the replacement provisions see the Companies Act 2006 ss 860, 861, 863, 864, 866, 867, 870, 874).
3 See *Re Badger, Mansell v Viscount Cobham* [1905] 1 Ch 568; and CORPORATIONS vol 9(2) (2006 Reissue) PARA 1238.
4 See EQUITY vol 16(2) (Reissue) PARA 774.
5 *Bank of Australasia v Breillat* (1847) 6 Moo PCC 152 at 194; but see *Greenslade v Dower* (1828) 1 Man & Ry KB 640; *Re Worcester Corn Exchange Co* (1853) 3 De GM & G 180 at 187. See further PARTNERSHIP.
6 *Bevan v Lewis* (1827) 1 Sim 376.
7 See PARA 2193.
8 See PARA 2453.
9 See PARA 1916 et seq.

1319. Loans to or by married women. There is no presumption that a married woman living with her husband has his authority to borrow in his name; and a husband is not liable to repay loans borrowed by his wife in his name without authority, even where she has been deserted or turned out by him, and has borrowed the money for, and spent it on, necessaries[1].

1 See MATRIMONIAL LAW vol 29(3) (Reissue) PARA 205.

1320. Minors. The Infants Relief Act 1874 provided that all contracts entered into by minors for the repayment of money lent or for goods supplied or to be supplied (other than contracts for necessaries[1]), and all accounts stated with minors were absolutely void, with the exception of contracts which might be entered into by minors under another rule of law[2]. However, that Act[3] does not apply to any contract made by a minor after 9 June 1987[4]. As a result of the disapplication of the Infants Relief Act 1874 the contracts in question are subject to the rules of common law, which provide that, subject to certain exceptions, a child's contract is generally voidable at the instance of the child, although it is binding upon the other party[5].

1 See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 18.
2 See the Infants Relief Act 1874 s 1 (repealed); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 14.
3 See also the Betting and Loans (Infants) Act 1892 s 5 (repealed), which invalidated contracts to repay loans advanced during minority.
4 Minors' Contracts Act 1987 ss 1, 5.
5 See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 12 et seq. As to contract law generally see CONTRACT.

1321. Loans by particular persons and bodies. The Consumer Credit Act 1974 regulates certain credit agreements, and for the purposes of that Act, 'credit' includes a cash loan and any other form of financial accommodation[1]. The Act also provides a new code for pawnbroking[2]. Loans by building societies[3] and friendly societies[4] are subject to special statutory provisions.

There are a number of public bodies concerned with the lending of money for particular purposes, for example the Public Works Loan Commissioners, who lend to local authorities[5], and the Agricultural Mortgage Corporation Limited, which lends to farmers[6].

1 As to consumer credit see generally CONSUMER CREDIT. As to the meaning of 'credit' see the Consumer Credit Act 1974 ss 9(1), 189(1); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 83. As to the main classification of agreements see CONSUMER CREDIT vol 9(1) (Reissue) PARA 79 et seq.
2 See the Consumer Credit Act 1974 ss 114–121; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 208 et seq; PLEDGES AND PAWNS vol 36(1) (2007 Reissue) PARA 41.
3 See PARA 2005 et seq.
4 See PARA 2105 et seq.
5 See PARA 1334 et seq.
6 See AGRICULTURAL LAND vol 1 (2008) PARA 618.

(iii) Offences

1322. Offences in connection with loans. It is an offence for any person to make a gain for himself or any other person by dishonestly making a false representation[1]. In addition to this general offence, there are various offences specifically associated with loans[2]; for example, a bankrupt is guilty of an offence if he obtains credit to the extent of the prescribed amount or more without giving the person from whom he obtains it the relevant information about his status[3].

1 See the Fraud Act 2006 s 2; and CRIMINAL LAW, EVIDENCE AND PROCEDURE.
2 For full coverage of such offences see further PARA 1952 et seq; BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANIES.
3 See the Insolvency Act 1986 s 360(1)(a); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 721.

1323. Unlawful harassment of debtors. A person commits an offence[1] if, with the object of coercing another person to pay money claimed from the other as a debt due under a contract, he: (1) harasses the other with demands for payment which are calculated to subject him or members of his family or household to alarm, distress or humiliation; (2) falsely represents that criminal proceedings lie for failure to pay money claimed; (3) falsely represents himself to be authorised to claim or enforce payment; or (4) utters a document falsely represented by him to have some official character which he knows it has not[2].

1 Ie under the Administration of Justice Act 1970 s 40(1): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 828. A person guilty of an offence under s 40 is liable on summary conviction to a fine of not more than level 5 on the standard scale: s 40(4) (amended by virtue of the Criminal Justice Act 1982 ss 35, 38, 46). As to the standard scale see PARA 27 note 21.

2 See the Administration of Justice Act 1970 s 40; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 838.

1324. Offences in relation to minors. It is an offence for any person with a view to financial gain to send to a minor any document inviting him: (1) to borrow money; (2) to obtain goods on credit or hire; (3) to obtain services on credit; or (4) to apply for information or advice on borrowing money or otherwise obtaining credit or hiring goods[1].

1 See the Consumer Credit Act 1974 s 50(1)(a); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 153.

(3) THE NATIONAL DEBT

(i) Constitution of the National Debt

1325. Origin and subdivision of the National Debt. The National Debt of the United Kingdom in its present form had its origin in a loan of £1,200,000 at eight per cent made to the Crown in 1694 on the security of the public funds, the subscribers being incorporated as the Bank of England[1]. Now the National Loans Fund, for which the Treasury is responsible, is held as an account at the Bank of England[2]. Money paid into this account forms one general fund to meet all outgoings from the fund[3]. Excess of payments out of the National Loans Fund over receipts into it are provided for by money being raised in such manner and on such terms and conditions as the Treasury thinks fit[4].

The National Debt of the United Kingdom is divided into the External Debt, consisting of money borrowed from the governments of Canada, the United States of America and other overseas countries[5], and the Internal Debt, consisting of the Funded Debt[6] and the Unfunded Debt[7].

1 See the Bank of England Act 1694 s 19; and PARA 793. The capital of the bank and the amounts advanced by it to the government were increased under subsequent enactments (now repealed). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the Bank of England PARA 793 et seq.

2 As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

3 See CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq.

4 See the National Loans Act 1968 s 12(1); and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 728.

5 Debt payable in sterling to overseas governments and international institutions is sometimes treated as part of the Unfunded Debt, e g loans from the International Bank for Reconstruction and Development and from the International Monetary Fund: see PARA 1391.

6 See PARA 1326.
7 See PARA 1327.

1326. The Internal Debt: Funded Debt. The Funded Debt is debt the principal of which the government need not repay until it wishes. It consists of the debts to the Banks of England[1] and Ireland[2] and, for the greater part, of undated government securities, that is to say securities not redeemable at any fixed date, for example, 2½ per cent Consolidated Stock ('Consols')[3], 2¾ and 2½ per cent Perpetual Annuities[4], and 3½ per cent War Loan[5] and 3 per cent Treasury Stock issued in exchange for Bank of England stock[6]. The process of reborrowing for a longer period, thus moving towards having no fixed date of redemption, is usually described as funding.

1 See PARA 1325.
2 See 21 & 22 Geo 3 c 16 (1782), 37 Geo 3 c 50 (1797), the Bank of Ireland Act 1808, and the Bank of Ireland Act 1821.
3 See the National Debt (Conversion) Act 1888 s 2(1) (amended by the Statute Law Revision Act 1908; and the Decimal Currency Act 1969 s 10(1)); and the National Debt (Conversion) Act 1888 s 2(2) (amended by the Statute Law (Repeals) Act 1986). The stock is to form part of the National Debt and annuities are payable by equal quarterly dividends on 5 January, 5 April, 5 July and 5 October in every year: National Debt (Conversion) Act 1888 s 2(3) (amended by the Statute Law Revision Act 1908). The 2½% consolidated stock is redeemable by Parliament on such notice, at such times and in such manner as Parliament may direct: see the National Debt (Conversion) Act 1888 s 2(2) (amended by the Statute Law (Repeals) Act 1986). The dividends on the stock are charged on the National Loans Fund with recourse to the Consolidated Fund: see the National Debt (Conversion) Act 1888 s 2(5) (amended by the Statute Law Revision Act 1959; the National Loans Act 1968 Sch 5; and the Statute Law (Repeals) Act 1986). As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq. As to the Consolidated Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 34 (Reissue) PARA 952 et seq.
4 The 2½% annuities were issued under 16 & 17 Vict c 23 (National Debt) (1853) (repealed), and the 2¾% annuities were issued under the National Debt (Conversion of Stock) Act 1884 s 1(1) (repealed). Both form part of the National Debt and are charged on the National Loans Fund with recourse to the Consolidated Fund: see the National Debt Act 1870 s 5 (amended by the Statute Law Revision Act 1950); the National Debt Act 1870 s 6 (amended by the National Loans Act 1968 s 13(6), Sch 5); and the National Debt (Conversion of Stock) Act 1884 s 1(4), (5) (amended by the National Loans Act 1968 Sch 5, Sch 6 Pt I; and the Statute Law (Repeals) Act 1986). As to their redemption see the National Debt (Conversion of Stock) Act 1884 s 1(2), (3) (s 1(2) amended by the Statute Law (Repeals) Act 1986).
5 This loan was raised under the War Loan Act 1916 s 1 (repealed). The principal of and interest on this 3½% War Loan Stock, together with the expenses incurred in connection with its redemption, are charged on the National Loans Fund with recourse to the Consolidated Fund: National Debt Act 1972 s 13.
6 Bank of England Act 1946 s 1(1)(b). The principal of and interest on the stock, and issue and redemption expenses, are charged on the National Loans Fund with recourse to the Consolidated Fund: s 1(5), Sch 1 para 1 (amended by the Statute Law Revision Act 1963; and the National Loans Act 1968 Sch 5).

1327. The Internal Debt: Unfunded Debt. The Unfunded Debt is debt the principal of which must be repaid at a definite date. It consists of all government internal borrowing apart from the Funded Debt[1], including, for example, savings bonds and defence bonds[2], funding stocks[3], premium savings bonds[4], savings certificates[5] and certificates of tax deposit[6], and what is often referred to as the Floating Debt, which is made up of Treasury bills[7] and Ways and Means advances from the Bank of England[8], the Paymaster General[9], the National Debt Commissioners[10] and certain other departments[11]. Government stocks issued to the former owners of certain nationalised industries are also included in the Unfunded Debt[12].

1 As to the Funded Debt see PARA 1326.
2 These were issued under the National Loans Act 1939 ss 1, 2 (repealed). The principal of and interest on them are charged on the National Loans Fund with recourse to the Consolidated Fund: s 3(3) (amended by the National Loans Act 1968 Sch 5). As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq. As to the Consolidated Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 34 (Reissue) PARA 952 et seq.
3 Eg 3½% Funding Stock 1999–2004 and 5½% Funding Stock 1982–1984 were issued under the National Loans Act 1939 s 1 (repealed), the principal, interest and management expenses being charged on the National Loans Fund with recourse to the Consolidated Fund: see s 3(3) (as amended: see note 2).
4 Premium savings bonds are issued under the Treasury's general powers to borrow pursuant to the National Loans Act 1968 s 12: see s 12(6)(a); the Premium Savings Bonds Regulations 1972, SI 1972/765; and PARA 1362 et seq. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
5 As to savings certificates see PARA 1352 et seq.
6 These are issued under the Treasury's general powers to borrow pursuant to the National Loans Act 1968 s 12, and replace the former tax reserve certificates: see INCOME TAXATION vol 23(2) (Reissue) PARA 1798.
7 As to Treasury bills see the Treasury Bills Act 1877 ss 4, 8, 9; the Treasury Bills Regulations 1968, SI 1968/414; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 730. See also PARA 1612.
8 See PARA 1326.
9 As to the Paymaster General see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 714.
10 As to the National Debt Commissioners see PARA 1332.
11 See the Exchequer and Audit Departments Act 1866 s 15; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 513.
12 Eg the coal industry (see the Coal Industry Nationalisation Act 1946 ss 32, 33 (repealed)). As to the coal industry see MINES, MINERALS AND QUARRIES.

1328. The Contingencies Fund. A fund known as the Contingencies Fund[1] exists for providing temporary advances for the provision of any necessary working cash balances for various government requirements[2]. The fund has a permanent capital[3], which may be increased by the Treasury issuing out of the National Loans Fund such sums as may be required for the purpose of temporarily increasing the capital of the Contingencies Fund[4]. The Treasury may direct when such sums are to be repaid[5], and the sums remaining unpaid together with the permanent capital must not exceed an amount equal to two per cent of the authorised supply expenditure[6] for the year ending on the previous 31 March[7].

1 See the Contingencies Fund Act 1970 s 1(1). The fund was formerly known as the Civil Contingencies Fund: see s 1(1), (2).
2 See the Miscellaneous Financial Provisions Act 1946 s 3(1). These include the requirements of the navy, army and air services: Contingencies Fund Act 1970 s 1(1).
3 Contingencies Fund Act 1974 s 1(1). The permanent capital is an amount of £1½ million: see s 1(1).
4 Miscellaneous Financial Provisions Act 1946 s 3(1). As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
5 Miscellaneous Financial Provisions Act 1946 s 3(1) proviso (a) (amended by the Miscellaneous Financial Provisions Act 1955 Sch 2 Pt I; and the Contingencies Fund Act 1974 Schedule).
6 In relation to any year ending on 31 March, 'authorised supply expenditure' means the total of the sums which Acts passed before the end of that year have authorised the Treasury to issue out of the Consolidated Fund and apply towards making good the supply granted for that year: Contingencies Fund Act 1974 s 1(2). As to the Consolidated Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 34 (Reissue) PARA 952 et seq.
7 Contingencies Fund Act 1974 s 1(1).

1329. Treasury power to issue securities. For the purpose of providing for the National Debt[1], providing any working balance in the National Loans Fund[2] and raising money which the Treasury considers it expedient to raise for the purpose of promoting sound monetary conditions in the United Kingdom[3], the Treasury may create and issue such securities, at such rates of interest and subject to such conditions as to repayment, redemption and other matters, including provision for a sinking fund, as it thinks fit[4].

1 Ie for providing sums required to meet excesses of payments out of the National Loans Fund over receipts into it: National Loans Act 1968 s 12(1)(a). As to the provision made for the National Debt as it existed on 31 March 1968 see s 13; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 728. As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq.
2 National Loans Act 1968 s 12(1)(b).
3 National Loans Act 1968 s 12(1) (amended by the Finance Act 1982 s 152(1)). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
4 National Loans Act 1968 s 12(2).

1330. Guarantees in respect of loans. Guarantees of Her Majesty's United Kingdom government have been given in respect of various loans, including:

(1) loans made to the governments of colonial territories by the International Bank for Reconstruction and Development[1];
(2) tithe redemption stock[2];
(3) stock and temporary borrowings of certain nationalised industries[3]; and
(4) certain borrowings of a new town development corporation or the Commission for the New Towns[4].

Where a loan which may be redeemed before maturity at the option of the borrower is guaranteed by the Treasury, the Treasury may also guarantee a conversion loan issued solely for the redemption of the first loan[5].

1 See the Overseas Development and Co-operation Act 1980 ss 5, 8 (repealed). As to the provision of assistance to countries outside the United Kingdom see now the International Development Act 2002; PARAS 1391–1393; and COMMONWEALTH vol 6 (2003 Reissue) PARA 825; CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 462; FOREIGN RELATIONS LAW. As to the meaning of 'United Kingdom' see PARA 2 note 3.
2 See ECCLESIASTICAL LAW.
3 See eg the Transport Act 1962 s 21; and RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 476.
4 See the New Towns Act 1981; and TOWN AND COUNTRY PLANNING. The Commission for the New Towns has been merged with the Urban Regeneration Agency under the name English Partnerships: see TOWN AND COUNTRY PLANNING.
5 See the Finance Act 1934 s 25 (amended by the Statute Law Revision Act 1963). As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

1331. Contingent liabilities. Contingent or nominal liability rests upon the Consolidated Fund[1] in respect of:

(1) funds due to suitors in the Supreme Court[2] and the county courts[3] and unpaid by the Accountant General;
(2) deficiencies in the Court of Session Consignations Account[4];
(3) unclaimed stock and dividends transferred by the Bank of England or the Bank of Ireland to the National Debt Commissioners to which a title may subsequently be established, and deficiencies on the commissioners' account of unclaimed dividends[5];
(4) costs, charges, expenses and claims which would have been chargeable on the Naval Prize Fund[6];

(5) any deficiency of the Government Annuities Investment Fund[7];
(6) any insufficiency of the funds held by the National Debt Commissioners to meet the claims of depositors in the National Savings Bank[8].

1 As to the Consolidated Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 34 (Reissue) PARA 952 et seq.
2 See *Re Williams' Settled Estates* [1910] 2 Ch 481. Where in the opinion of the Accountant General the cash balance in his account at the Bank of England exceeds the amount required to satisfy current demands, he must remit the excess to the National Debt Commissioners; and where in his opinion the balance is insufficient to meet those demands, they must remit to that account such sums as he requests in writing: Court Funds Rules 1987, SI 1987/821, r 56(1). As to the Accountant General see COURTS vol 10 (Reissue) PARA 663. As to the Bank of England see PARA 793 et seq. As to the National Debt Commissioners see PARA 1332 et seq.
3 See the Administration of Justice Act 1982 s 43; and COURTS; PRACTICE AND PROCEDURE. As to the investment of money transferred under funds rules to the National Debt Commissioners see s 45; and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 1382.
4 See the Court of Session Consignations (Scotland) Act 1895 ss 13, 14.
5 See PARA 1346.
6 See the Naval Agency and Distribution Act 1864 s 17 (amended by the Statute Law Revision Act 1893; and the Armed Forces Act 1981 Sch 5 Pt II); and ARMED FORCES; PRIZE.
7 See the Government Annuities Act 1929 s 67(5). As to government annuities see PARA 1371 et seq.
8 See the National Savings Bank Act 1971 s 25; and PARA 813. As to the National Savings Bank see PARA 810 et seq.

(ii) Reduction of the National Debt

1332. The National Debt Commissioners. The Commissioners for the Reduction of the National Debt of the United Kingdom[1] (generally known as the National Debt Commissioners[2]) are: the Speaker of the House of Commons[3], the Chancellor of the Exchequer[4], the Master of the Rolls[5], the Lord Chief Justice[6], the Accountant General of the Supreme Court[7], and the Governor and Deputy Governors of the Bank of England[8]. Any three commissioners may act for all of them[9]. Their functions are in fact exercised by the Comptroller General of the National Debt Office[10]. The National Debt Office is subject to investigation by the Parliamentary Commissioner for Administration[11].

1 The name was first used in the Consolidated Fund Act 1816 s 13 (amended by the Statute Law Revision Act 1873; and the Statute Law Revision Act 1888). As to the meaning of 'United Kingdom' see PARA 2 note 3.
2 See the Interpretation Act 1978 ss 5, 22(1), Schs 1, 2 para 4(1)(b) (amended by the Family Law Reform Act 1987 Sch 2 para 74, Sch 4).
3 As to the Speaker of the House of Commons see PARLIAMENT vol 34 (Reissue) PARA 637 et seq.
4 As to the Chancellor of the Exchequer see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 514.
5 As to the Master of the Rolls see CONSTITUTIONAL LAW AND HUMAN RIGHTS; COURTS.
6 As to the Lord Chief Justice see CONSTITUTIONAL LAW AND HUMAN RIGHTS; COURTS. The Lord Chief Justice became a commissioner in place of the Lord Chief Baron of the Exchequer, who was added to the number of commissioners by the Life Annuities Act 1808 s 32 (as originally enacted).
7 As to the Accountant General see COURTS vol 10 (Reissue) PARA 663. The place of the Accountant General of the Supreme Court was originally held by the Accountant General of the Court of Chancery, whose office was abolished and whose powers were transferred to the Paymaster General by the Court of Chancery (Funds) Act 1872 ss 4, 6 (repealed). These powers were transferred by the Administration of Justice Act 1925 s 11 (repealed) to the newly created Accountant General of the Supreme Court.
8 National Debt Reduction Act 1786 s 14 (amended by the Statute Law Revision Act 1871; the Statute Law Revision Act 1888; and the Bank of England Act 1998 s 9(1)). As to the Governor and Deputy Governors of the Bank of England see PARA 793 et seq.
9 National Debt Commissioners Act 1818 s 1.

10 The commissioners may appoint and employ such clerks and other officers as may be necessary: National Debt Reduction Act 1786 s 15 (amended by the Statute Law Revision Act 1888). They may also appoint persons to purchase public debts and annuities on their behalf: see the National Debt Reduction Act 1786 s 16 (amended by the Statute Law Revision Act 1888). As to the commissioners' functions in relation to the Insolvency Services Account and the Insolvency Services Investment Account see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 26–30. As to their functions in connection with the National Insurance Fund see the Social Security Administration Act 1992 s 161(3), (4); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 8. As to the Comptroller General see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 724–726.

11 See the Parliamentary Commissioner Act 1967 s 4(1), Sch 2; and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 41 et seq.

1333. Sinking funds. The National Debt Commissioners[1] operate a number of specific sinking funds[2] issued to them for the redemption of specific securities out of the Consolidated Fund[3]. These funds are used for the discharge of the capital of terminable annuities charged upon the Consolidated Fund[4], in providing for the sinking funds in respect of certain bonds and loans[5]. The National Debt Commissioners also operate the Account of Donations and Bequests towards reducing the National Debt[6], which is used to purchase stock for cancellation[7].

1 As to the National Debt Commissioners see PARA 1332.

2 There is now no general sinking fund. The Old Sinking Fund established under the Sinking Fund Act 1875 s 5 (repealed) and the New Sinking Fund (1928) established under the Finance Act 1928 s 23 (repealed) ceased to operate in 1954: see the Finance Act 1954 s 34 (as originally enacted).

3 See the National Loans Act 1968 ss 13(4), 17(2). As to the Consolidated Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 34 (Reissue) PARA 952 et seq.

4 These annuities were issued under the Government Annuities Act 1929: cf PARA 1371.

5 See eg the Finance Act 1921 s 45 (amended by the Statute Law Revision Act 1968; and the National Loans Act 1968 Sch 5, Sch 6 Pt I).

6 See the National Debt Reduction Act 1823 s 8 (amended by the Statute Law Revision Act 1873; and the Statute Law Revision Act 1890). As to the validity of trusts for the reduction of the National Debt where the income is directed to be accumulated for a period which would otherwise offend against the rule against perpetuities see the Superannuation and other Trust Funds (Validation) Act 1927 s 9(1); and TRUSTS vol 48 (2007 Reissue) PARA 686. Income arising from property held upon trust in accordance with directions which are valid under s 9 is exempt from income and corporation tax: see the Income and Corporation Taxes Act 1988 ss 9(4); and INCOME TAXATION vol 23(2) (Reissue) PARA 1224.

7 See the National Debt Reduction Act 1866 s 6 (amended by the Statute Law Revision Act 1893).

(iii) The National Loans Fund and the Consolidated Fund

1334. The National Loans Fund and the Consolidated Fund. The National Loans Fund exists as a general fund for all central government borrowing operations and certain domestic lending transactions[1], including the issuing of such sums as are required by the Public Works Loan Commissioners[2]. The National Loans Fund is closely linked with the Consolidated Fund, and both funds are operated by the Treasury[3]. All public moneys payable to the Exchequer are paid into the Consolidated Fund[4], which is balanced daily by means of a transfer to or from the National Loans Fund; and where liabilities of the National Loans Fund exceed its assets or where its costs exceed its income, the Consolidated Fund may be called on.

1 See the National Loans Act 1968 s 1; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq.

2 See the National Loans Act 1968 s 3(1); and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 736. See also PARA 1325. As to the Public Works Loan Commissioners see PARA 1377. The Local Loans Fund, which was established by the National Debt and Local Loans Act 1887, was wound up on 31 March 1968; certain loans were written off, and the cash balance was paid into the National Loans Fund: see the National Loans Act 1968 s 3(8), (9), (10), Sch 3 (all repealed).

3 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

4 See the Exchequer and Audit Departments Act 1866 s 10; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 34 (Reissue) PARA 952 et seq.

(4) GOVERNMENT SECURITIES

(i) Government Stock

1335. Regulations as to registration, transfer and certificates. The Treasury[1] has provided by regulations for the registration and transfer[2] of, and the issue of documents of title to, certain government securities[3]. The power to make regulations, and the regulations themselves, do not apply to government stock represented by any outstanding stock certificate issued under the National Debt Act 1870[4] or any other bearer security[5], or to premium savings bonds[6]. The Treasury may also make regulations for, inter alia, the transfer in law by instrument in writing or otherwise of certain government securities and as to the issue, except in such cases as appear to the Treasury to be appropriate, of documents of title[7]. Further, the Treasury may make provision by regulations for the operation of a computer-based system for the transfer of securities issued by the government to be established by the Bank of England[8], and for the paperless transfer of title to securities, including government securities[9].

The Treasury may also by regulations[10] provide:

(1) for the administration of such stock and bonds (including the registration of holders) by such one or more persons as the Treasury may appoint in accordance with the regulations and the closure of any register[11];

(2) for the redemption of such stock and bonds[12];

(3) for the exchange of any such stock and bonds (whenever issued) for strips of them[13];

(4) for exchanges by which such strips (whether deriving from the same security or from different securities) are consolidated into a single security of a specified description[14];

(5) as to the issue except in such cases as appear to the Treasury to be appropriate of documents of title relating to such stock and bonds and as to evidence of title to them[15]; and

(6) for any incidental, supplementary or transitional matters relating to such stock and bonds, and to transactions connected with them, for which it appears to the Treasury to be necessary or expedient to provide[16].

Regulations made by virtue of head (3) or head (4) above[17] may: (a) provide, for the purpose of authorising the making of exchanges, for any stock or bonds to be treated as issued on such terms as may be specified in the regulations[18]; (b) contain such provision as the Treasury thinks fit about the circumstances in which and the conditions subject to which exchanges may be effected[19]; and (c) contain any such provision as could be contained in the Treasury rules as to

exchange of securities[20]. However, the regulations made by virtue of head (3) or head (4) above may not make provision for the exchange of any stock or bonds, or of any strips, in any cases other than those where the exchange is at the request of the holder or in accordance with an order made by a court[21].

Persons appointed for the administration of stock and bonds[22] are appointed on such terms (including terms as to the making of payments by the Treasury) as the Treasury considers appropriate, and the persons so appointed include the Bank of England[23].

Regulations[24] may make different provision for different cases and contain such exceptions and exclusions as the Treasury thinks fit[25]. When the Treasury proposes to make any such regulations[26], it must lay a draft before Parliament; and if either House of Parliament within the period of 40 days beginning with the day on which the draft of the regulations is laid before it resolves that the regulations are not to be made, no further proceedings may be taken, but without prejudice to the laying of new draft regulations before Parliament[27].

The Treasury may also make regulations modifying enactments which apply in relation to government securities or to any description of such securities, or for any other purpose refer to such securities or to any description of them, in connection with the issue or transfer of strips or the consolidation of strips into other securities, and such regulations may, inter alia, impose a charge to tax[28]. Any statutory provision applying in relation to all or any strippable government securities also applies in relation to every strip of any government securities[29]. This, however, does not apply to any statutory provision relating to any tax under the care and management of the Commissioners for Her Majesty's Revenue and Customs[30], or where the context otherwise requires[31].

1 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

2 As to the purposes for which the Treasury may create and issue securities see PARA 1329. As to the transfer of stock see PARA 1339.

3 See the Finance Act 1942 s 47(1)(a), (2) (s 47(1)(a) amended by the Stock Transfer Act 1982 Sch 2 para 2); the Finance Act 1942 Sch 11 Pt I (amended by the Finance Act 1963 Sch 14 Pt VII; the National Loans Act 1968 Sch 6 Pt II; the Statute Law (Repeals) Act 1986; and the Finance Act 1989 Sch 17 Pt XIV); and the Government Stock Regulations 2004, SI 2004/1611. The regulations apply to stock. 'Stock' means any amount of stock or registered bonds of any of the descriptions specified in the Finance Act 1942 Sch 11 Pt I: Government Stock Regulations 2004, SI 2004/1611, reg 2(1). Those descriptions are: 2½% and 2¾% Annuities, 2½% Consolidated Stock, 3½% Conversion Loan, 3½% War Loan, 4% Consolidated Loan, Guaranteed 4½% Bonds, stock and registered bonds issued or deemed to be issued under the National Loans Act 1939: Finance Act 1942 Sch 11 Pt I. However, in the Government Stock Regulations 2004, SI 2004/1611, reg 7(1) (see PARA 1337), regs 12–15 (see PARAS 1339–1342), and reg 29 (see PARA 1345), 'stock' does not include any strip: reg 2(1). For these purposes, 'strip' means a security representing any amount, being one penny or any multiple thereof, payable under one or more strips within the meaning of the Finance Act 1942 s 47 (see note 13), of any stock, regardless whether that amount corresponds to the total amount payable under any security issued for the purpose of effecting any particular exchange of stock for strips: Government Stock Regulations 2004, SI 2004/1611, reg 2(1).

4 Ie under the National Debt Act 1870 Pt V (ss 26–42) (repealed).

5 See the Finance Act 1942 s 47(4)(a).

6 National Loans Act 1968 s 16(3). As to premium savings bonds see PARA 1362.

7 See the Stock Transfer Act 1982 s 3; and COMPANIES vol 7(1) (2004 Reissue) PARA 873.

8 See the Stock Transfer Act 1982 ss 1, 3; and COMPANIES vol 7(1) (2004 Reissue) PARA 873.

9 See the Companies Act 2006 ss 783–787 (formerly the Companies Act 1989 s 207); and COMPANIES.

10 Regulations under the Finance Act 1942 s 47(1) may make provision with respect to the purchase and sale of such stock and bonds by any person, or any description of person, through the person or persons appointed in accordance with regulations under s 47(1)(b) (see the text to

note 11) and, in relation to purchase or sale under the regulations, may: (1) make provision with respect to the commission and fees payable; and (2) make provision limiting the amount which any person, or any description of person, may purchase or sell on any day: s 47(1ZA) (added by the Bank of England Act 1998 s 34; and amended by SI 2004/1486). Regulations under the Finance Act 1942 s 47(1) may also make provision authorising the person or persons appointed in accordance with regulations under s 47(1)(b) (see the text to note 11), in such circumstances and subject to such conditions as may be prescribed in the regulations, to transfer stock and bonds in the name of a deceased person into the name of another person without requiring the production of probate, confirmation or letters of administration: s 47(1A) (added by the Finance Act 1989 s 183(1); and amended by SI 2004/1486).

11 Finance Act 1942 s 47(1)(b) (substituted by the Finance Act 2002 s 140(1)(a)).

12 Finance Act 1942 s 47(1)(bb) (added by the Finance Act 1989 s 183(1)). As to the redemption of government stock see PARA 1351.

13 Finance Act 1942 s 47(1)(bc) (added by the Finance Act 1996 s 202(1)). For the Finance Act 1942 s 47(1), 'strip', in relation to any stock or bond, means a security issued under the National Loans Act 1968 which: (1) is issued for the purpose of representing the right to, or of securing: (a) a payment corresponding to a payment of interest or principal remaining to be made under the stock or bond; or (b) two or more payments each corresponding to a different payment remaining to be so made; (2) is issued in conjunction with the issue of one or more other securities which, together with that security, represent the right to, or secure, payments corresponding to every payment remaining to be made under the stock or bond; and (3) is not itself a security that represents the right to, or secures, payments corresponding to a part of every payment so remaining: s 47(1B) (s 47(1B)–(1F) added by the Finance Act 1996 s 202(2)). For these purposes, where the balance has been struck for a dividend on any stock or bond, any payment to be made in respect of that dividend is, at times falling after that balance has been struck, to be treated as not being a payment remaining to be made under the stock or bond: Finance Act 1942 s 47(1C) (as so added). As to the meaning of 'strip' see also the Income Tax (Trading and Other Income) Act 2005 s 444(1)–(4); and INCOME TAXATION.

14 Finance Act 1942 s 47(1)(bd) (added by the Finance Act 1996 s 202(1)). The text refers to a security of a description specified in the Finance Act 1942 Sch 11 Pt I: see note 3.

15 Finance Act 1942 s 47(1)(c) (amended by the Stock Transfer Act 1982 Sch 2 para 2).

16 Finance Act 1942 s 47(1)(e).

17 Ie by virtue of the Finance Act 1942 s 47(1)(bc) (see the text and note 13) or s 47(1)(bd) (see the text and note 14).

18 Finance Act 1942 s 47(1D)(a) (as added: see note 13).

19 Finance Act 1942 s 47(1D)(b) (as added: see note 13).

20 Finance Act 1942 s 47(1D)(c) (as added: see note 13). The rules referred to in the text are those made under the National Loans Act 1968 s 14(3): see PARA 1345.

21 Finance Act 1942 s 47(1E) (as added: see note 13).

22 Ie under the Finance Act 1942 s 47(1)(b) (see the text to note 11).

23 Finance Act 1942 s 47(1EA) (added by the Finance Act 2002 s 140(1)(b)). As to the Bank of England see PARA 793 et seq.

24 Ie under the Finance Act 1942 s 47(1).

25 Finance Act 1942 s 47(1F) (as added: see note 13). The powers of the Treasury to make regulations under s 47(1) are without prejudice to any of its powers under the National Loans Act 1968: Finance Act 1942 s 47(1F) (as so added).

26 Ie under the Finance Act 1942 s 47(1).

27 Finance Act 1942 s 47(3). In reckoning any such period of 40 days no account is to be taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days: s 47(3).

28 See the Finance Act 1996 s 202(5)–(7).

29 See the Gilt Strips (Consequential Amendments) Regulations 1997, SI 1997/2646, regs 3, 4 (amended by SI 2004/3327)

30 Note that the Inland Revenue has merged with Her Majesty's Customs and Excise to form Her Majesty's Revenue and Customs: see the Commissioners for Revenue and Customs Act 2005. As to the Commissioners for Her Majesty's Revenue and Customs see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) para 900 et seq.

31 See the Gilt Strips (Consequential Amendments) Regulations 1997, SI 1997/2646, reg 5; and see also the Commissioners for Revenue and Customs Act 2005 s 50.

1336. Appointment of registrar. The Treasury[1] may from time to time appoint a person for the purposes of the administration of stock[2], including the

registration of holders[3]. A person so appointed is known from the date on which the appointment takes effect (the 'transfer day'), as the 'Registrar of Government Stock' (the 'registrar')[4].

From the transfer day, the new registrar[5] must administer stock and maintain the register[6]. Save where the previous registrar[7] has been appointed as the new registrar, the previous registrar must, before the beginning of the transfer day, transfer to the person appointed to become the new registrar:

(1) the register; and

(2) the record of uncertificated general public sector securities[8],

as at the close of the last business day preceding that transfer day[9].

Where, before the transfer day, a valid instrument in writing for the transfer of stock has been delivered to the previous registrar but the previous registrar has not given effect to the transfer, the instrument is deemed to have been delivered to the new registrar on the day of its delivery to the previous registrar[10].

Where the previous registrar has not been appointed as the new registrar, the previous registrar must, as soon as is reasonably practicable on or following the transfer day, provide to the new registrar all relevant records[11] which:

(a) are in the possession of the previous registrar immediately before the transfer day[12]; and

(b) are reasonably required by the new registrar for the purposes of the administration of stock, including the registration of holders[13].

Any relevant records which are received by the previous registrar on or after the transfer day must, as soon as is reasonably practicable, be forwarded to the new registrar[14].

The previous registrar must provide to the person appointed to become the new registrar such relevant records at such time or times before the transfer day as that person may reasonably require, in order to ensure that he can properly commence the administration of stock (including the registration of holders) on the transfer day[15].

1 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

2 As to the meaning of 'stock' see PARA 1335 note 3.

3 Government Stock Regulations 2004, SI 2004/1611, reg 3(1). Appointments made under this provision take effect from the date specified by the Treasury in, or for the purpose of, that appointment: reg 3(3).

4 Government Stock Regulations 2004, SI 2004/1611, regs 2(1), 3(2). The Bank of England was deemed appointed by the Treasury as the first registrar on 1 July 2004 (see regs 1, 3(4)), but Computershare Investment Services PLC took over as the registrar on 20 December 2004. As to the Bank of England see PARA 793 et seq.

5 'New registrar' means a person appointed as the registrar with effect from the transfer day: Government Stock Regulations 2004, SI 2004/1611, reg 2(1).

6 See the Government Stock Regulations 2004, SI 2004/1611, reg 4(1). For the purposes of Pt II, 'register' means the registers required by reg 7 (see PARA 1337) to be kept in respect of each description of stock: reg 2(1).

7 'Previous registrar' means: (1) in relation to the first transfer day, the Bank of England; and (2) in relation to any subsequent period, a person holding the appointment as the registrar immediately before the transfer day: Government Stock Regulations 2004, SI 2004/1611, reg 2(1). 'First transfer day' means the day on which the first appointment made by the Treasury under reg 3 took effect (see the text and note 4): reg 2(1).

8 Ie within the meaning of the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 21(2) (see COMPANIES vol 7(2) (2004 Reissue) PARA 1563): see the Government Stock Regulations 2004, SI 2004/1611, reg 4(2)(b).

9 Government Stock Regulations 2004, SI 2004/1611, reg 4(2). 'Business day' means any day other than: (1) a Saturday or Sunday; (2) Good Friday or Christmas Day; (3) a day which, in England and Wales, is a bank holiday under the Banking and Financial Dealings Act 1971 (see

PARA 832); (4) a day specified in an order under the Banking and Financial Dealings Act 1971 s 2(1) (see PARA 832) and declared by that order to be a non-business day; or (5) a day appointed by Royal proclamation as a public fast or thanksgiving day: Government Stock Regulations 2004, SI 2004/1611, reg 2(1).

10 Government Stock Regulations 2004, SI 2004/1611, reg 5.

11 In the Government Stock Regulations 2004, SI 2004/1611, reg 6, 'relevant records' includes any records, data, documents, information or communications (including any electronic communication) or copies of the same in the possession of the previous registrar, which relate to the transfer or registration of stock or to any associated transaction or to the record of uncertificated public sector securities referred to in reg 4(2)(b) (see note 8): reg 6(5).

12 See the Government Stock Regulations 2004, SI 2004/1611, reg 6(1), (2)(a).

13 See the Government Stock Regulations 2004, SI 2004/1611, reg 6(1), (2)(b).

14 See the Government Stock Regulations 2004, SI 2004/1611, reg 6(3).

15 Government Stock Regulations 2004, SI 2004/1611, reg 6(4).

1337. Stock registers. The registrar[1] must keep in respect of each description of stock[2] registers wherein is entered the name and address of each person who is for the time being a holder of stock of that description and the amount of that stock which he holds, but, if more than four persons are joint holders of any stock, the names and addresses of only four such persons are required to be entered in the register[3].

The registrar must keep in respect of each description of strips[4] registers wherein is entered the name and address of each person who is for the time being a holder of a strip of that description and the amount payable under that strip[5].

Where the terms subject to which the relevant strips are held provide for the members of any class of strips described therein (or in accordance therewith) to be indistinguishable one from another, or to become so indistinguishable on the happening of some contingency, each such class, the members of which are for the time being required to be so indistinguishable in accordance with those terms, is treated as a separate description of strips[6] and, accordingly[7]:

(1) separate registers must not be kept in respect of different categories of strips comprised within any description, whether by reference to the description of the parent stock or any other circumstance[8]; and

(2) where, in accordance with those terms, strips of any description are required to become indistinguishable from strips of any other description, the registers of those descriptions are to be amalgamated and a single register kept thenceforth in respect of the new description[9].

Any register so kept[10] is prima facie evidence of any matters directed or authorised[11] to be entered therein and of the title of the persons whose names are entered therein as holders of stock[12].

In the event of the redemption of any stock[13] the register relating to that stock may be closed for transfers for not more than one month immediately preceding the redemption date[14].

Every register required to be kept under these provisions[15] must be made of paper or of any material in or on which the information required can be recorded and from which such information can be reproduced on paper, or partly of paper and partly of any such other material; any information required to be entered in a register under these provisions must be so entered or recorded[16].

1 As to the registrar see PARA 1336.

2 As to the meaning of 'stock' see PARA 1335 note 3.

3 Government Stock Regulations 2004, SI 2004/1611, reg 7(1). The account may be designated in such manner as the stockholder may specify (see reg 23(1)), but the bank may decline to register an unreasonably long or elaborate designation (see reg 23(3)(a)). The stockholder may be

described in the register as trustee of a specified trust, or as trustee without specifying a trust, or in any other manner indicating the capacity in which he holds the stock: reg 23(1). Where he occupies an office or official position, his official description may be registered in lieu of his name: see reg 23(2). The bank need not register both the official description and the name: see reg 23(3)(b). Apart from this, no notice of any trust may be entered in any register, or in any certificate, or be receivable by the registrar: see reg 24. Notwithstanding that the stockholder is described as mentioned in reg 23, the registrar is not required to inquire into the propriety of anything done in relation to the stock: see reg 24.

4 As to the meaning of 'strips' see PARA 1335 note 3.

5 Government Stock Regulations 2004, SI 2004/1611, reg 7(2).

6 Ie for the purposes of the Government Stock Regulations 2004, SI 2004/1611, reg 7(2) (see the text and notes 4–5).

7 Government Stock Regulations 2004, SI 2004/1611, reg 7(3).

8 Government Stock Regulations 2004, SI 2004/1611, reg 7(3)(a).

9 Government Stock Regulations 2004, SI 2004/1611, reg 7(3)(b).

10 Ie under the provisions of the Government Stock Regulations 2004, SI 2004/1611, reg 7(1), (2): see the text and notes 1–5.

11 Ie by the provisions of the Government Stock Regulations 2004, SI 2004/1611.

12 Government Stock Regulations 2004, SI 2004/1611, reg 7(4). The Bankers' Books Evidence Act 1879 (see PARA 907 et seq) applies to the register as if the registrar were a bank and a banker within the meaning of that Act and as if the register entry were an entry in a banker's book: see the Government Stock Regulations 2004, SI 2004/1611, reg 7(7).

13 As to the redemption of stock see PARA 1351.

14 Government Stock Regulations 2004, SI 2004/1611, reg 7(5).

15 Ie under the Government Stock Regulations 2004, SI 2004/1611, reg 7(1), (2): see the text and notes 1–5.

16 See the Government Stock Regulations 2004, SI 2004/1611, reg 7(6). Where any information is recorded in a register otherwise than in readable form and is later transcribed into readable form, the transcribed version of such information is deemed to be part of the register: reg 7(6).

1338. Stock certificates. Every person whose name is entered in a register as a holder of stock[1] is entitled, without payment, to a certificate representing that stock[2]. This certificate is prima facie evidence of the title of the person named in it to the stock specified in it[3]. Where there is more than one joint holder only one certificate is issued[4]. On a transfer of part of a holding, the holder is entitled to a certificate representing the part retained[5]. If a certificate is lost or destroyed, the registrar may, on receipt of such evidence and indemnity as the registrar may require, and on the surrender of the certificate in a case in which the certificate is defaced, issue a duplicate of it, and may charge a fee[6].

Stock or registered bonds issued under the National Loans Act 1968 are subject to the provisions of the National Debt Act 1870[7].

The Treasury is empowered to make regulations in respect of all or any description of government securities for which bearer bonds are available[8].

1 As to the meaning of 'stock' see PARA 1335 note 3.

2 Government Stock Regulations 2004, SI 2004/1611, reg 8(1). As to the form of the certificate see reg 9(1), (2).

3 Government Stock Regulations 2004, SI 2004/1611, reg 9(3).

4 Government Stock Regulations 2004, SI 2004/1611, reg 8(5). Delivery of a certificate to one of several joint holders is sufficient delivery to all of them: reg 8(5).

5 See the Government Stock Regulations 2004, SI 2004/1611, reg 8(3).

6 See the Government Stock Regulations 2004, SI 2004/1611, reg 8(3). The fee is £20: reg 8(3). As to the registrar see PARA 1336.

7 National Loans Act 1968 s 16(4). References to stock or registered bonds issued under the National Loans Act 1968 include references to a strip (within the meaning of the Finance Act 1942 s 47: see PARA 1335 note 13) of any stock or bond (whether the stock or bond is issued under the National Loans Act 1968 or otherwise): s 16(4A) (added by the Finance Act 1996 s 202(4)).

8 See the Finance Act 1963 s 71 (amended by the Statute Law Revision Act 1986; and the Finance Act 1987 Sch 16 Pt XI). As to regulations made under the Finance Act 1963 s 71 see the

Government Bearer Bond (Prescribed Securities) Order 1963, SI 1963/1701, the Government Bearer Bond (Prescribed Securities) (No 2) Order 1963, SI 1963/1958, the Government Bearer Bond (Prescribed Securities) Order 1964, SI 1964/1883 and the Government Bearer Bond (Prescribed Securities) Order 1965, SI 1965/212. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

1339. Transfer of stock. Government stock[1] is generally transferable by instrument in writing in accordance with the Stock Transfer Act 1963[2] delivered to the registrar[3]. However, units of stock which are recorded on a register kept by the operator of a relevant system under the Uncertificated Securities Regulations 2001[4] are transferable only by means of that system[5]. A strip[6] is transferable only by means of a relevant system operated by an operator in accordance with those regulations[7].

The registrar gives effect to a transfer by entering the requisite particulars in the appropriate register[8]. The registrar need not give effect to a transfer until the expiration of ten clear days after the day on which the registrar receives the written instrument of transfer[9]. The transferor remains the holder until the transfer is effected[10]. The registrar may decline to give effect to a transfer unless evidence of the transferor's right to make the transfer is produced[11]. The registrar may also decline to give effect to a transfer of any stock by instrument in writing unless: (1) the transfer is accompanied by the certificate showing that the transferor is the holder of the stock[12]; or (2) evidence of the certificate's loss or destruction is furnished to the registrar together with an indemnity[13]; or (3) the transfer is accompanied by a certificate showing that the transferor is the holder of part of the stock being transferred, and as to the residue there is furnished to the registrar such evidence as the registrar may require that a certificate showing that the transferor is the holder of such residue has been lost or destroyed and there is given to the registrar such indemnity in respect of such lost or destroyed certificate as he may require[14]. These rights and duties are modified in the case of stock transferred by means of a relevant system[15].

Stock registered in the name of a deceased person is transferable by his personal representative[16], but if there is more than one personal representative the registrar may require all of them to execute the transfer[17]. Where any stock is entered in a register in the name of a deceased person the production to the registrar of any document which is by the law of the place where the register is kept sufficient evidence of probate of the will, or of letters of administration of the estate, or confirmation as executor to the estate, of that person having been granted to some person, is to be accepted by the registrar as sufficient evidence of the grant[18]. Where the total value of all holdings of stock entered in the register in the name of a deceased person at the time of his death does not exceed £5,000, and probate of his will, or letters of administration of his estate, or confirmation as executor to the estate is not or are not produced to the registrar within such time as the registrar thinks reasonable in the circumstances of the case, the registrar may transfer the stock or any part of it: (a) to a person appearing to the registrar to be entitled to take out such probate, letters of administration or confirmation; or (b) to any other person appearing to the registrar to be a fit and proper person to receive it[19].

Special provisions apply to the transfer of registered bonds transferable in fixed denominations[20].

The certification by the registrar of a transfer of any stock or of a stock transfer or broker's transfer under the Stock Transfer Act 1963 relating to any stock is to be taken as a representation by the registrar to any person acting on

the faith of the certification that documents showing a prima facie title to the stock in the transferor have been produced to the registrar, but not as a representation that the transferor has any title to the stock[21].

The transfer of stock may in appropriate circumstances be restrained by a charging order or by a stop order or stop notice[22].

1 As to the stock to which these provisions apply see PARA 1335 note 3.
2 The simplified form of transfer under the Stock Transfer Act 1963 applies to all securities issued by the United Kingdom government except stock or bonds in the National Savings Stock Register and except national savings certificates: see s 1(4)(c) (amended by the Finance Act 1964 Sch 8 para 10, Sch 9; and the Post Office Act 1969 s 108(1)(f)). See COMPANIES vol 7(1) (2004 Reissue) PARA 873. As to the National Savings Stock Register see PARA 1347. As to National Savings Certificates see PARA 1352 et seq. As to the meaning of 'United Kingdom' see PARA 2 note 3.
3 Government Stock Regulations 2004, SI 2004/1611, reg 15(1). The registrar must retain any such instrument that is delivered to him: reg 15(1). Any instrument retained may be destroyed at any time after the expiry of 12 years after the date when particulars of the stock transfer were entered in the register: reg 15(2). As to the registrar see PARA 1336.
4 Ie the Uncertificated Securities Regulations 2001, SI 2001/3755, which provide for paperless transfers: see COMPANIES. As to the meaning of 'operator of a relevant system' see COMPANIES vol 7(1) (2004 Reissue) PARA 592; definition applied by the Government Stock Regulations 2004, SI 2004/1611, reg 2(2). CRESTCo has been approved as an operator of a relevant system: see PARAS 75–76.
5 See the Government Stock Regulations 2004, SI 2004/1611, reg 15(3).
6 As to the meaning of 'strip' see PARA 1335 note 3.
7 See the Government Stock Regulations 2004, SI 2004/1611, reg 15(4).
8 Government Stock Regulations 2004, SI 2004/1611, reg 22.
9 Government Stock Regulations 2004, SI 2004/1611, reg 21.
10 Government Stock Regulations 2004, SI 2004/1611, reg 20.
11 See the Government Stock Regulations 2004, SI 2004/1611, reg 16.
12 See the Government Stock Regulations 2004, SI 2004/1611, reg 19(a).
13 See the Government Stock Regulations 2004, SI 2004/1611, reg 19(b).
14 See the Government Stock Regulations 2004, SI 2004/1611, reg 19(c).
15 See the Uncertificated Securities Regulations 2001, SI 2001/3755; and COMPANIES. See also the text and note 4.
16 Government Stock Regulations 2004, SI 2004/1611, reg 17(1).
17 Government Stock Regulations 2004, SI 2004/1611, reg 17(2).
18 Government Stock Regulations 2004, SI 2004/1611, reg 17(3). As to deaths in the United Kingdom see also the Finance (No 2) Act 1915 s 48 (amended by the Post Office Act 1968 s 108(1)(a); the Statute Law (Repeals) Act 1986, SI 2001/3755; and SI 2004/1662); and as to deaths in the Isle of Man or the Channel Islands see the Finance Act 1949 s 48 (amended by the Statute Law (Repeals) Act 1986; SI 2001/3755; and SI 2004/1662).
19 Government Stock Regulations 2004, SI 2004/1611, reg 17(4).
20 See the Government Stock Regulations 2004, SI 2004/1611, reg 28.
21 See the Government Stock Regulations 2004, SI 2004/1611, reg 18.
22 As to charging orders and stop notices on government stock see ENFORCEMENT vol 17(1) (Reissue) PARA 303 et seq.

1340. Purchase of stock on application to registrar. Stock[1] in the register[2] may be purchased on application to the registrar[3]. The Treasury[4] may from time to time indicate the descriptions of stock available for purchase by: (1) notice in writing sent to each person who is for the time being registered as a holder of stock, which: (a) is sent to his address for the time being recorded on a relevant register[5]; and (b) where stock is registered in the names of more than one person being joint holders, is sent to all such persons; or (2) notice published in the London, Edinburgh and Belfast Gazettes[6]. Application to purchase stock must be made by delivering to the registrar an application in the approved form accompanied, except where the registrar otherwise directs, by a sum sufficient to include the purchase price of the stock and the proper amount payable[7] by way

of commission on the purchase[8]. As soon as practicable after receiving such an application, the registrar must give instructions to the Treasury, which must[9] effect the purchase of the stock[10].

If the sum received by the registrar in respect of an application to purchase stock is insufficient to defray the aggregate of the purchase price of the stock and the commission payable, the Treasury is not required to effect the purchase of the stock; however, if the Treasury does so, the registrar must send to the applicant a notification of the amount of the deficiency, and, if that amount is not received within seven days after the day on which the notification was sent, the Treasury may effect the sale of the stock and may, before paying the proceeds of that sale to the applicant, deduct from those proceeds the amount of the deficiency, and the amount payable by way of commission on the sale[11]. If the sum received by the registrar in respect of an application to purchase stock exceeds the sum required to defray the amount of the purchase price of the stock and the commission payable in respect of the purchase, the registrar must return to the applicant the amount of the excess[12].

1 As to the meaning of 'stock' see PARA 1335 note 3.
2 As to the registers see PARA 1337.
3 See the Government Stock Regulations 2004, SI 2004/1611, reg 12(1). As to the registrar see PARA 1336.
4 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
5 Ie a register referred to in the Government Stock Regulations 2004, SI 2004/1611, reg 11(2): see PARA 1351 note 3.
6 Government Stock Regulations 2004, SI 2004/1611, reg 12(2).
7 Ie under the provisions of the Government Stock Regulations 2004, SI 2004/1611, reg 14: see PARA 1342.
8 Government Stock Regulations 2004, SI 2004/1611, reg 12(3). An application or tender for stock made in pursuance of a prospectus issued by the Treasury is not revocable between:
   (1) in the case of an application, the time specified in the prospectus for the opening of the application lists for the stock; or
   (2) in the case of a tender, the time specified in the prospectus as the latest time by which tenders for the stock must be lodged,

   and 10 am on the day following the second clear day thereafter: see reg 10(1). In reckoning any period for the purposes of reg 10(1) any day, which is not a business day, must be disregarded: see reg 10(2).
9 Ie subject to the Government Stock Regulations 2004, SI 2004/1611, reg 12(5): see the text to note 11.
10 Government Stock Regulations 2004, SI 2004/1611, reg 12(4).
11 Government Stock Regulations 2004, SI 2004/1611, reg 12(5).
12 Government Stock Regulations 2004, SI 2004/1611, reg 12(6). The registrar may return any such excess by means of a warrant sent by post and, in the absence of special instructions, any such warrant may be sent to any address given in the application to purchase the stock: reg 12(7). This does not affect the right of the registrar to return the excess by any other means of payment for which the approved form may provide or which may otherwise be agreed between the applicant and the registrar: reg 12(8).

1341. Sale of stock on application to registrar. Stock[1] in the register[2] may be sold on application to the registrar[3]. The Treasury[4] may from time to time indicate the descriptions of stock available for sale by: (1) notice in writing sent to each person who is for the time being registered as a holder of stock, which: (a) is sent to his address for the time being recorded on a relevant register[5]; and (b) where stock is registered in the names of more than one person being joint holders, is sent to all such persons; or (2) notice published in the London, Edinburgh and Belfast Gazettes[6]. Application to sell stock must be made by sending to the registrar an application in the approved form accompanied,

except where the registrar otherwise directs, by any certificate relating to the stock[7]. As soon as practicable after receiving such an application, the registrar must give instructions to the Treasury and as soon as practicable thereafter the Treasury must effect the sale of the stock[8], but the registrar may decline to give such instructions to the Treasury unless there is furnished to the registrar such evidence as he may require of the right of the applicant to authorise the sale[9].

On completion of the sale of any stock, the registrar must, before paying the proceeds of the sale to the person entitled to it, deduct the amount payable[10] by way of commission on the sale[11].

1 As to the meaning of 'stock' see PARA 1335 note 3.
2 As to stock registers see PARA 1337.
3 Government Stock Regulations 2004, SI 2004/1611, reg 13(1). As to the registrar see PARA 159.
4 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
5 Ie a register referred to in the Government Stock Regulations 2004, SI 2004/1611, reg 11(2): see PARA 1351 note 3.
6 See the Government Stock Regulations 2004, SI 2004/1611, reg 13(2).
7 Government Stock Regulations 2004, SI 2004/1611, reg 13(3).
8 Government Stock Regulations 2004, SI 2004/1611, reg 13(4).
9 Government Stock Regulations 2004, SI 2004/1611, reg 13(5).
10 Ie under the provisions of the Government Stock Regulations 2004, SI 2004/1611, reg 14: see PARA 1342.
11 Government Stock Regulations 2004, SI 2004/1611, reg 13(6). The registrar may pay the net proceeds of the sale by means of a warrant sent by post and, in the absence of special instructions, any such warrant may be sent to any address given in the application to sell the stock or to the address specified in the register in relation to the person who, immediately before the sale was effected, was registered as the holder of the stock: reg 13(7). This does not affect the right of the registrar to pay the net proceeds of sale by any other means of payment for which the approved form may provide or which may otherwise be agreed between the applicant and the registrar: reg 13(8).

1342. Commission payable on purchase or sale of stock on application to registrar. Commission is payable to the registrar[1] on behalf of the Treasury[2] in respect of the purchase or sale of stock[3] at the specified rates[4].

1 As to the registrar see PARA 1336.
2 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
3 Ie in accordance with the provisions of the Government Stock Regulations 2004, SI 2004/1611, regs 12, 13: see PARAS 1340–1341.
4 Government Stock Regulations 2004, SI 2004/1611, reg 14. As to the specified rates see Schedule.

1343. Payments. When the Treasury imprest for the payment out of the National Loans Fund has been issued[1], the registrar must without delay apply the money in payment of dividends on the stock[2]. Where a dividend warrant is sent by post to a stockholder in accordance with regulations[3], the posting of the warrant is, as respects the liability of the registrar, the Bank of England or any previous registrar, equivalent to delivery of the warrant to the stockholder[4].

The registrar, the Bank of England and any previous registrar is not liable in respect of any payment duly made or act duly done in accordance with the Government Stock Regulations 1965[5] or the Government Stock Regulations 2004[6]; and any such payment, subject to the provisions for saving the rights of third parties[7], is deemed to have been a valid payment, and the receipt of the person to whom the money was paid is a full discharge to the registrar, the Bank of England or, as the case may be, any previous registrar, for

the amount of the payment[8]. Where a warrant for payment of any amount payable in respect of any stock is sent by post in accordance with the provision relating to the redemption of stock by the registrar[9], the posting of the letter containing the warrant is, as respects the liability of the registrar, the Bank of England or, as the case may be, any previous registrar, equivalent to the delivery of the warrant to the person entitled to receive it[10].

An order or decree of any court in the United Kingdom is sufficient authority to the registrar to pay dividends in accordance with that order or decree[11].

1 Sufficient money to pay dividends is issuable out of the National Loans Fund and payable on the order of the Treasury: see the National Debt Act 1870 s 12 (amended by the National Loans Act 1968 Sch 5), and the National Debt Act 1870 s 14(1) (s 14 substituted by SI 2004/2744). As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq. As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq.

2 National Debt Act 1870 s 15 (substituted by SI 2004/2744). Any person who, at the time of the balance being struck for a dividend on stock, is entered in a relevant register as a stockholder is, as between himself and any transferee of the stock, entitled to the then current half-year's or quarter's dividend: see the National Debt (Stockholders Relief) Act 1892 s 2 (substituted in relation to dividends for which the balance is struck on or after 21 March 1997 by the Finance Act 1997 s 108; and amended by SI 2001/3755; and by SI 2004/1662). Where any stock is exchanged for strips of that stock and that exchange takes place after the balance has been struck for a dividend on that stock but before the day on which that dividend is payable, any person who would have been entitled to that dividend but for the exchange remains entitled to that dividend notwithstanding the exchange: see the National Debt (Stockholders Relief) Act 1892 s 2A (added by the Finance Act 1996 s 202(3)). As to the registrar see PARA 1336.

3 The Treasury may from time to time make regulations for the payment of dividends on stock either by sending warrants by post or by payment through a banker: National Debt Act 1889 s 4(1) (substituted by SI 2004/1662). These provisions apply to all stock of any company or corporation, funds or annuities, transferable in the registers kept by the registrar in accordance with regulations under the Finance Act 1942 s 47 (see the Government Stock Regulations 2004, SI 2004/1611, reg 7; and PARA 1337), or in the manner provided by those regulations: National Debt Act 1889 s 4(6) (amended by SI 2004/1662).

4 National Debt Act 1889 s 4(2) (amended by SI 2004/1662). As to the Bank of England see PARA 793 et seq.

5 Ie the Government Stock Regulations 1965, SI 1965/1420 (revoked).

6 Ie the Government Stock Regulations 2004, SI 2004/1611.

7 Nothing in the regulations for the protection of the registrar, the Bank of England, or any previous registrar in respect of any act done or any money paid operates to prevent the recovery by any person or his representative of any stock or money lawfully due to him from the person to whom that stock was transferred or that money was paid by or under the direction of the registrar, the Bank of England, or any previous registrar, or from the representatives of that person, or affect the rights which any person or his representatives may have in respect of any stock against a third party: see the Government Stock Regulations 1965, SI 1965/1420, reg 22B (revoked); and the Government Stock Regulations 2004, SI 2004/1611, reg 33.

8 See the Government Stock Regulations 2004, SI 2004/1611, reg 32.

9 Ie the Government Stock Regulations 1965, SI 1965/1420, reg 3B (revoked); and the Government Stock Regulations 2004, SI 2004/1611, reg 11. See PARA 1351.

10 See the Government Stock Regulations 2004, SI 2004/1611, reg 32(2).

11 See the Finance Act 1916 s 66 (amended by SI 2004/1662). As to the meaning of 'United Kingdom' see PARA 2 note 3.

1344. Government stock held by minors. Where the holder or a joint holder of government stock[1] is a minor, the registrar may, if he thinks fit, pay the dividends on it in accordance with the written instructions of a parent or guardian of the minor[2]. If satisfied that the minor has attained the age of seven[3], the registrar may pay any redemption money payable in respect of the stock in accordance with the written instructions of the minor and of a parent or guardian of his[4], and may give effect to a transfer of the stock in accordance with

such instructions[5]. Any such payment discharges the bank's liability[6], and any such transfer is not revocable at the minor's instance except where it would be revocable apart from the minority[7].

Where a minor is the sole survivor in an account, or where a minor holds stock jointly with a person under disability, or where stock has by mistake been brought in or transferred into the sole name of a minor, the registrar, at the request in writing of the minor's parent, guardian or litigation friend, may receive the dividends and apply them to the purchase of like stock which must be added to the original investment[8].

1 'Government stock' means any registered securities issued by the United Kingdom government: see the Finance (No 2) Act 1975 s 73(4). As to the meaning of 'United Kingdom' see PARA 2 note 3.
2 Finance (No 2) Act 1975 s 73(1)(a) (s 73(1)–(3) amended by SI 2004/1662). As to the registrar see PARA 1336. 'Minor' means a person under the age of 18: see the Family Law Reform Act 1969 s 1; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 1.
3 Finance (No 2) Act 1975 s 73(2) (as amended: see note 2).
4 Finance (No 2) Act 1975 s 73(1)(b) (as amended: see note 2).
5 Finance (No 2) Act 1975 s 73(1)(c) (as amended: see note 2). In the case of units of stock which are recorded on a register kept by the operator of a relevant system: (1) the reference to the registrar in s 73(1) so far as it relates to s 73(1)(c); (2) the references to the registrar in s 73(2), (3) so far as they apply for the purposes of s 73(1)(c), are to be taken to be reference to that operator; and (3) 'operator' and 'relevant system' have the same meanings as in the Uncertificated Securities Regulations 2001, SI 2001/3755 (see COMPANIES vol 7(1) (2004 Reissue) PARA 592): Finance (No 2) Act 1975 s 73(4A) (added by SI 2001/3755; and amended by SI 2004/1662).
6 Finance (No 2) Act 1975 s 73(3)(a) (as amended: see note 2).
7 Finance (No 2) Act 1975 s 73(3)(b) (as amended: see note 2).
8 See the National Debt (Stockholders Relief) Act 1892 s 3 (amended by SI 2004/1662). Note that the term 'next friend' (which is used in the National Debt (Stockholders Relief) Act 1892) has been replaced by 'litigation friend': see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1411 et seq; PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 266.

1345. Exchange of securities. For the purpose of carrying out any arrangement made by it for the exchange of any government securities, whether on or before maturity, and whether with or without any further payment, the Treasury[1] may create and issue such other securities[2] as it thinks fit[3]. The Treasury has made rules with respect to the surrender, issue or exchange of securities in pursuance of such arrangements[4]. These rules prescribe the procedure for the acceptance of offers of exchange[5], the person by whom acceptance may be made in special cases[6] and the persons to whom acceptances must be made[7], and prescribe for the application to the new securities of trusts, charges, rights, stop notices and restraints affecting the old securities[8]. Protection is also given to the registrar, the Bank of England and any previous registrar in relation to acting on evidence authorised by the rules[9].

1 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
2 Ie securities under the National Loans Act 1968 s 12: see PARA 1329.
3 National Loans Act 1968 s 14(2).
4 See the Exchange of Securities (General) Rules 1979, SI 1979/1678, made under the National Loans Act 1968 s 14(3). Note that the Exchange of Securities (General) Rules 1979, SI 1979/1678, do not apply to the exchange of any stock for strips, or to the exchange of any strips for stock: Government Stock Regulations 2004, SI 2004/1611, reg 29. As to the meanings of 'stock' and 'strip' see PARA 1335 note 3. Rules may require holders of securities which are to be redeemed desiring cash repayment to apply accordingly (National Loans Act 1968 s 14(4)(a)), and may secure that if no application is duly made the holder is to be deemed to have accepted the offer of securities in exchange for the securities which are to be redeemed (s 14(4)(b)).

5 See the Exchange of Securities (General) Rules 1979, SI 1979/1678, r 6 (amended by SI 1985/1147; SI 1998/2505; SI 1999/1207; SI 2001/3755; SI 2004/1662).

6 See the Exchange of Securities (General) Rules 1979, SI 1979/1678, r 7 (amended by SI 2004/1662). Acceptance on behalf of joint holders may be made by a majority of them: Exchange of Securities (General) Rules 1979, SI 1979/1678, r 8. Acceptance where a stop order is in force may be made by any person who would be entitled to accept if the notice were not in force: r 9. As to stop orders see ENFORCEMENT vol 17(1) (Reissue) PARA 321.

7 Acceptances in respect of securities registered with the registrar and bearer bonds are to be lodged with the registrar; acceptances in respect of all securities registered in the National Savings Stock Register are to be lodged with the Director of Savings: see the Exchange of Securities (General) Rules 1979, SI 1979/1678, r 5(1) (amended by SI 1998/2505; SI 2004/1662). Acceptance forms may be lodged with the Treasury for onward transmission to the person to whom the acceptance is required to be lodged; and where acceptances are required to be lodged by any particular time, it is sufficient if the acceptance is lodged with the Treasury by that time: Exchange of Securities (General) Rules 1979, SI 1979/1678, r 5(2) (added by SI 1998/2505). The person to whom the acceptance is to be made may accept, as evidence of any fact on which the validity of an acceptance depends, a statutory declaration of that fact made by one or more competent persons, but this imposes no obligation to require proof by statutory declaration of any fact of which he has other satisfactory evidence: Exchange of Securities (General) Rules 1979, SI 1979/1678, r 10. As to the Director of Savings see PARA 810 et seq.

8 See the Exchange of Securities (General) Rules 1979, SI 1979/1678, r 11.

9 See the Exchange of Securities (General) Rules 1979, SI 1979/1678, r 12 (substituted by SI 2004/1662). As to the registrar see PARA 1336. As to the Bank of England see PARA 793 et seq.

1346. Unclaimed dividends and redemption money. The registrar[1] must from time to time pay to the National Debt Commissioners[2] the balance of all money due on government stock[3] which has been entrusted to him for payment but which is unclaimed[4]. Where the registrar, having paid unclaimed money to the commissioners, subsequently pays it to the person entitled, the commissioners must repay it to the registrar[5].

Unclaimed redemption money paid to the commissioners must be invested by them in such government stock as the Treasury directs and the investments must be placed to the credit of their account of unclaimed redemption money[6]. The commissioners also keep an account of unclaimed dividends to which there must be paid all unclaimed sums paid to the commissioners by the registrar, other than unclaimed redemption money[7], and all dividends on the investments of the commissioners' account of unclaimed redemption money[8]. Any deficiency on the account of unclaimed dividends is to be issued out of the National Loans Fund, and any surplus[9] is to be paid into the National Loans Fund[10].

Certain provisions of the National Debt Act 1870 and other enactments continue to have effect in relation to the retransfer of stock transferred as being unclaimed to the commissioners[11] before 27 July 1955[12], and unclaimed dividends and sums unclaimed on coupons paid to the commissioners before that date[13].

1 As to the registrar see PARA 1336.

2 As to the National Debt Commissioners see PARA 1332.

3 'Government stock' includes 2½% Consolidated Stock ('Consols'); 2½% and 2¾% Annuities; Guaranteed 2¾% and 3% Stock; 3½% War Loan; Guaranteed 4½% Bonds; any securities issued under the War Loan Act 1919 (repealed); the National Loans Act 1939; Finance Act 1935 s 28 (repealed) or s 29 (repealed); the Bank of England Act 1946 s 1; the Coal Industry Nationalisation Act 1946 s 21 (repealed) or s 32 (repealed); or the Cable and Wireless Act 1946; any such stock as is mentioned in the Iron and Steel Act 1967 s 26(1) (repealed); and any securities issued under the National Loans Act 1968 other than national savings certificates, premium savings bonds, national savings stamps, national savings gift tokens and such securities as the Treasury may specify by order: National Debt Act 1972 s 15(1) (amended by the Finance

Act 1989 Sch 17 Pt XIV); definition applied by the National Debt Act 1972 s 15(2). As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

4 See the Miscellaneous Financial Provisions Act 1955 s 5(2) (s 5(1)–(5), (8) amended by SI 2004/1662). For this purpose money must be treated as unclaimed if it has not been claimed for five years or, in the case of redemption money, two years after it fell due and may be so treated earlier: see the Miscellaneous Financial Provisions Act 1955 s 5(3) (as so amended). The Treasury may empower the registrar to investigate the title to unclaimed sums, and may allow just compensation for the registrar's trouble and expense: see s 5(8) (as so amended).

5 See the Miscellaneous Financial Provisions Act 1955 s 5(4) (as amended: see note 4). Repayments in respect of dividends come out of the commissioners' account of unclaimed dividends (s 5(5) (as so amended)), and repayments in respect of redemption money out of their account of unclaimed redemption money or, if that is insufficient, out of the unclaimed dividend account (s 5(7)).

6 Miscellaneous Financial Provisions Act 1955 s 5(6). Investments made under the Finance Act 1921 Sch 3 para 6 (repealed) also stand to the credit of this account: Miscellaneous Financial Provisions Act 1955 s 5(6).

7 Miscellaneous Financial Provisions Act 1955 s 5(5) (as amended: see note 4).

8 Miscellaneous Financial Provisions Act 1955 s 5(7).

9 Ie any surplus above £100,000, or such other figure as the Treasury may determine: Miscellaneous Financial Provisions Act 1955 s 5(9).

10 Miscellaneous Financial Provisions Act 1955 s 5(9) (amended by the National Loans Act 1968 Sch 5). As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq.

11 Ie transferred under the National Debt Act 1870 s 51 (repealed), and former Acts: see s 67. Dividends on stock so transferred are payable to the commissioners and must be held by them for the public subject to the claims of parties entitled to them: s 54 (amended by the Finance Act 1949 Sch 11 Pt VII). The registrar may re-transfer any stock transferred under the National Debt Act 1870 Pt VII (ss 54–67) to any person showing his right to it to the registrar's satisfaction, and pay the dividends due on it, as if the stock or dividends had not been transferred or paid to the National Debt Commissioners: see s 55 (amended by SI 2004/1662). If the claim is not admitted by the registrar, the claimant may apply for an order by petition served on the Attorney General and on the National Debt Commissioners, and the court may make such order, including costs, as seems to be just: National Debt Act 1870 s 55 (as so amended). As to advertisements of claims exceeding £20, and the withholding of payment for three months after advertisement, on the direction of the registrar see the Finance Act 1937 s 28(1) (amended by SI 2004/1662).

The following cases have been decided under the National Debt Act 1870 s 55, or the enactment which s 55 replaces: *Re Bigg* (1835) 1 Y & C Ex 245 (title to be proved); *Howard v Kay* (1857) 4 Drew 151 (evidence in support of title); *Ex p Jameson* (1875) LR 19 Eq 430 (transfer to beneficiary); *Re Ashmead's Trust* (1872) 8 Ch App 113 (legal owner a necessary party to claim by beneficiary: right to accumulations); *Re National Debt Act 1870, ex p Byrne* [1897] 1 IR 61 (terms of transfer of stock and dividends into court); *Re May* (1885) 28 ChD 516, CA (leave of court to fresh petition); *Lawrence v Maule* (1859) 4 Drew 472 (capacity of Attorney General in proceedings); *Hunt v Peacock* (1848) 6 Hare 361 (form of proceedings); *Re Ackland's Trusts* (1872) 26 LT 418 (retransfer to executor). As to ordering inquiries as to beneficiaries see *Ex p Gillett, ex p Bacon* (1818) 3 Madd 28; *Ex p Lavell* (1820) 2 Jac & W 397; *Ex p Ram* (1837) 3 My & Cr 25; *Re Bishton and Crockett* (1858) 27 LJ Ch 168; *Re Molony* (1860) 3 LT 465 (inquiry directed); *Ex p Nicholl* (1823) Turn & R 119; *Re Avery* (1830) 1 Russ & M 356; *Ex p Bouts* (1859) 5 Jur NS 951 (inquiry not directed). In the absence of special circumstances, the taxed costs of the Attorney General and the commissioners are directed to be paid out of the fund recovered: see *Ex p Martin* (1821) Jac 55; *Re Holland* (1844) 1 Ph 379; *Re Ackland's Trusts* above; and see the National Debt Act 1870 s 55 (as so amended). As to applications to rescind or vary an order for retransfer or payment see s 58. As to the non-liability of the registrar to a second claimant after retransfer or payment see s 59 (amended by SI 2004/1662). As to orders in favour of a second claimant showing title, who is unable to recover from a first claimant see the National Debt Act 1870 s 60 (amended by the Finance Act 1949 Sch 11 Pt VII). As to indemnity in respect of retransfers and payments see the National Debt Act 1870 s 66 (amended by SI 2004/1662). As to the transfer of stock on authority of court order see the Finance Act 1916 s 66; and PARA 1343.

12 Ie the date on which the Miscellaneous Financial Provisions Act 1955 s 5 (as originally enacted) came into force.

13 See the National Debt Act 1870 ss 61, 62 (both repealed except as respects stock transferred and dividends paid before 27 July 1955); the Finance Act 1921 s 49(2) (repealed except as respects money paid before 27 July 1955); the Finance Act 1949 s 52(10), Sch 11 Pt VII (repealed); and the Miscellaneous Financial Provisions Act 1955 s 5(1) (amended by SI 2004/1662). Where any principal money which became payable on the redemption of any government stock was not claimed by the stockholder within one year from the date of redemption, the unclaimed money was paid to the commissioners, and held and dealt with by them in like manner as dividends under the National Debt Act 1870 s 61 (repealed with savings): Finance Act 1921 s 50, Sch 3 para 6 (repealed).

1347. The National Savings Stock Register. The Director of Savings[1] must cause such entries to be made in the National Savings Stock Register[2] as are necessary to show the name and address of every holder of stock and the denomination of stock held by him[3].

Certain government stock[4] may be registered in the National Savings Stock Register[5]. The register is governed by regulations made by the Treasury[6]. Since 1 July 2004 the registrar has been required to keep a register of persons holding strips of government stock[7].

Since 20 July 1998 the National Savings Stock Register has been closed to gilts[8]. All gilts registered in the register at the beginning of that day were transferred to the books of the Bank of England[9]. Similarly, all the rights and duties of the Director of Savings arising before 20 July 1998 in relation to the registration of gilts or any associated transaction with them were transferred to the Bank of England[10].

1 As to the Director of Savings see PARA 810 et seq.

2 The register was originally established as the Post Office Register by the War Loan (Supplemental Provisions) Act 1915 s 1 (repealed). Such stock registers as by virtue of the Savings Banks Act 1880 (repealed) had been established by savings bank authorities were amalgamated with the Post Office Register by the Savings Banks Act 1929 s 12(2) (repealed), and its name was changed to the National Savings Stock Register by the Post Office Act 1969 s 108(1). It is continued in existence by the National Debt Act 1972 s 2(1). As to the Post Office see POST OFFICE.

3 National Savings Stock Register Regulations 1976, SI 1976/2012, reg 4(1). On 20 July 1986 the parts of the register kept by the trustee savings banks had to be closed and all the stock registered in those parts had to be transferred to that part of the register kept by the Director of Savings: Trustee Savings Banks Act 1985 s 3(9), Sch 1 para 13; Trustee Savings Bank Act 1985 (Appointed Day) Order 1986, SI 1986/1219.

4 Ie any description of government stock which is not for the time being included in the Finance Act 1942 s 47(1)(a), Sch 11 Pt I (see PARA 1335): National Debt Act 1972 s 2(3) (substituted by SI 1998/1446). As to the meaning of 'government stock' see PARA 1346 note 3.

5 See the National Debt Act 1972 s 2(3) (as substituted: see note 4). In practice, the range of stock and securities on the register is limited, largely to those issued through the Post Office, being stock or securities not inscribed or registered in the holders' names in the books of the Bank of England. As to the Bank of England see PARA 793 et seq.

6 See the National Savings Stock Register Regulations 1976, SI 1976/2012 (as originally enacted); and PARA 1348. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

7 See the Government Stock Regulations 2004, SI 2004/1611; and PARA 1335 et seq. The definition of 'stock' in the Government Stock Regulations 2004, SI 2004/1611, includes for most purposes strips of gilts: see note 8; and PARA 1335 note 3. As to the registrar see PARA 1336.

8 See the Bank of England Act 1998 s 33; and the National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, arts 2(1), 3. 'Gilts' means stock or bonds of any of the descriptions included in the Finance Act 1942 Sch 11 Pt I (see PARA 1335 note 3): National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, art 2(1).

9 See the National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, art 4. The National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, also makes consequential, incidental and supplementary provisions in connection with the closure of the register to gilts and includes provision amending primary

and secondary legislation. In particular the order makes provision for: applications and proceedings relating to gilts (see arts 6–15); existing rules and arrangements to be preserved in certain cases (see arts 16–21 (arts 16, 18–20 amended by SI 2004/1662)); unclaimed gilts and moneys (see the National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, arts 22–24); existing certificates to be imputed to the registrar (see art 25 (substituted by SI 2004/1662)); previously issued warrants (see the National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, art 26); payment without grant of representation where the holder dies before 20 July 1998 (see art 27); the Director of Savings to provide relevant records to the Bank of England (see art 28); indemnity (see art 29 (amended by SI 2004/1662)); and various consequential amendments, repeals and revocations (see the National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, art 30, Schs 1, 2).

10 See the National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, art 5.

1348. Regulations as to the National Savings Stock Register. The National Savings Stock Register Regulations[1] govern subscriptions for and the transfer[2] and redemption of stock and securities registered in the National Savings Stock Register[3]. Provision is made for the keeping of the register[4] and the subscription for stock[5], conversion[6], redemption[7], and transfer[8] of stock[9], and the issue of certificates and subscription books[10]. Provision is also made for dividends[11] and payments[12], for nominations[13], for payments from and into National Savings Bank accounts[14], as to joint holders[15], trustees and beneficiaries under trusts[16] and persons under disability[17], as to powers of attorney[18], as to the death of the holder[19], as to unclaimed dividends and redemption money[20], as to lost documents[21] and the rectification of mistakes[22], as to evidence of identity[23] and the obligation of secrecy[24], for the indemnification of the Treasury[25], the National Debt Commissioners and the Director of Savings and his officers[26], savings for rights of third parties[27] and for fees[28].

1 Ie the National Savings Stock Register Regulations 1976, SI 1976/2012, made under the National Debt Act 1972 s 3 (amended by the Trustee Savings Banks Act 1976 Sch 5 para 19, Sch 6; the Finance Act 1989 s 183(2); and SI 1998/1446). As to the application of the National Savings Stock Register Regulations 1976, SI 1976/2012, to Northern Ireland see reg 60 (amended by SI 1986/2001); as to their application to the Isle of Man see the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 61 (amended by SI 2007/1898); and as to their application to the Channel Islands see the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 62 (amended by SI 1986/2001; and SI 2007/1898).

2 Where the stock is uncertificated, the Uncertificated Securities Regulations 2001, SI 2001/3755, will govern the transfer of stock: see COMPANIES.

3 As to the National Savings Stock Register see PARA 1347.

4 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 4(1), (2) (amended by SI 1998/1446).

5 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 5 (amended by SI 1987/1635; SI 1998/1446).

6 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 13.

7 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 14 (amended by SI 2004/1662).

8 See the National Savings Stock Register Regulations 1976, SI 1976/2012, regs 15, 18, 20 (reg 15 amended by SI 1998/1446).

9 As to the limit on the total holding of certain stock see the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 8 (amended by SI 1987/1635). As to the forfeiture of stock see the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 9. As to the commission payable see reg 12.

10 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 10.

11 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 21.

12 See the National Savings Stock Register Regulations 1976, SI 1976/2012, regs 22, 24, 25, 28 (reg 22 amended by SI 2001/2616; and the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 24 amended by SI 1986/2001). See also note 26.

13 See the National Savings Stock Register Regulations 1976, SI 1976/2012, regs 32–39A (regs 32, 34 amended by SI 1981/485; the National Savings Stock Register Regulations 1976, SI 1976/2012, regs 35, 36 amended by SI 1981/485; SI 1998/1446; SI 2005/2114; the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 39 amended by SI 1998/1446; and the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 39A added by SI 1998/1446; and amended by SI 2004/1662).
14 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 45 (amended by SI 1989/2046).
15 See the National Savings Stock Register Regulations 1976, SI 1976/2012, regs 26, 27.
16 See the National Savings Stock Register Regulations 1976, SI 1976/2012, regs 28, 29.
17 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 30 (amended by SI 1989/2046; SI 1998/1446; SI 2001/3649) (minors); and the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 31 (amended by SI 1989/2046; SI 2007/1898).
18 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 50.
19 See the National Savings Stock Register Regulations 1976, SI 1976/2012, regs 40, 41 (amended by SI 1984/600; SI 2004/1662); the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 42 (amended by SI 1993/3131; SI 2004/1662; SI 2005/2114).
20 See the National Savings Stock Register Regulations 1976, SI 1976/2012, regs 43, 44; and PARA 1349.
21 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 46. As to the form of documents see reg 55.
22 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 48. As to persons unable to write see reg 47.
23 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 56.
24 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 57 (amended by SI 1988/1355; SI 1989/2046; SI 1997/1864).
25 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
26 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 53. As to the Director of Savings see PARA 810 et seq. As to receipts for payment being a good discharge to the Treasury or Director of Savings see reg 58.
27 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 54.
28 Eg fees on the reference of disputes (see the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 49) and for birth, death and marriage certificates (see reg 52 (amended by SI 2005/2114)).

1349. Redemption; unclaimed securities. In the event of the redemption of any government stock[1], the National Savings Stock Register[2] may be closed for transfers of the stock for not more than one month immediately preceding the redemption date[3].

Sums equal to the amount of all money due on stock and unclaimed for certain periods must be paid to the National Debt Commissioners by the Director of Savings[4].

1 As to the meaning of 'government stock' see PARA 1346 note 3.
2 As to the National Savings Stock Register see PARA 1347.
3 National Debt Act 1972 s 4.
4 See the National Savings Stock Register Regulations 1976, SI 1976/2012, regs 43, 44. As to the National Debt Commissioners see PARA 1332. As to the Director of Savings see PARA 810 et seq.

1350. Nomination and payment out on death. A holder of stock[1] registered on the National Savings Stock Register, if he was a holder who had attained the age of 16, had power to make a nomination before 1 May 1981 directing that, on his death, his interest in any stock then held by him and registered in his name should devolve on the persons specified, and in the portions or fractions specified, in the nomination[2]. Where, on the death of the holder of any stock so registered, any payment is made in accordance with the law of the place where the holder resided at the date of his death, the payment is to be deemed to have been duly made unless, before the payment was made, the Director of Savings

had been notified in writing that the holder was at that time domiciled elsewhere[3]. Subject to certain exceptions, the production of a statement from the Commissioners for Her Majesty's Revenue and Customs as to the payment of tax chargeable on death is required before any payment or transfer may be made on the death of a holder the aggregate value of whose specified assets exceeds £50,000[4].

In the case of stock so registered the Director of Savings may require evidence to be given to his satisfaction of the identity of any person or the title of any person to any stock, document or money[5]. A statement or information that a person has not been heard of for seven years or more may be accepted as conclusive proof of death[6].

Where the value of the holding at the time of the holder's death does not exceed £5,000 or, as the case may be, the amount due to the depositor at the time of his death does not exceed £5,000 exclusive of interest, payment may be made to the appropriate person entitled without requiring probate or letters of administration[7].

1 For these purposes, 'stock' means stock or securities registered in the National Savings Stock Register: National Savings Stock Register Regulations 1976, SI 1976/2012, reg 2(1). As to the National Savings Stock Register see PARA 1347.

2 National Savings Stock Register Regulations 1976, SI 1976/2012, reg 32(1) (amended by SI 1981/485). A nomination made after 30 April 1981 is of no effect: National Savings Stock Register Regulations 1976, SI 1976/2012, reg 32(1) (as so amended). A nomination may provide: (1) that the interest of the nominator in the whole of the stock registered in his name at the date of his death is to devolve on any one or more persons specified in the nomination; or (2) that the interest of the nominator in any specified portion or fraction of the stock is to devolve on any nominee or nominees so specified; or (3) where there is more than one nominee, that the interest of the nominator in different specified portions or fractions of the stock is to devolve on different nominees: reg 32(2). The nomination must be in a form approved by the Director of Savings, must be signed by the nominator and witnessed, and must be dispatched to the Director of Savings during the nominator's lifetime: reg 33. It is revoked, inter alia, by the nominee's death in the nominator's lifetime, by the nominator's marriage or formation of a civil partnership, by written notice of revocation or by a subsequent inconsistent nomination: see reg 36 (amended by SI 1981/485; SI 1998/1446; SI 2005/2114). As to the record of nominations see the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 34 (amended by SI 1981/485). As to the effect on nomination of transfer of stock to another part of the register see the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 35. As to the particulars to be furnished by the nominator to the Director of Savings see reg 37. As to the operation of nomination see reg 38. As to nominations made before 1 October 1921 see reg 39 (amended by SI 1998/1446). As to the Director of Savings see PARA 810 et seq.

No nomination may be effected after 30 April 1979 in respect of stock in that part of the register kept by the trustees of trustee savings banks: see the Trustee Savings Banks Regulations 1972, SI 1972/583, reg 11 (amended by SI 1975/1802; SI 1979/259). That part of the register kept by the trustees savings banks was closed on 20 July 1986: see PARA 1347 note 2.

3 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 40.

4 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 42 (amended by SI 1993/3131; SI 2004/1662; SI 2005/2114); and see also the Commissioners for Revenue and Customs Act 2005 s 50. Note that the Inland Revenue has merged with Her Majesty's Customs and Excise to form Her Majesty's Revenue and Customs: see the Commissioners for Revenue and Customs Act 2005. See CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) para 900 et seq; INCOME TAXATION.

5 National Savings Stock Register Regulations 1976, SI 1976/2012, reg 56(1).

6 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 56(2).

7 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 41 (amended by SI 1984/600; SI 2004/1662).

1351. Redemption of stock by registrar. When the registrar is carrying out the redemption of any stock the following procedure is to be followed[1]. Not less

than eight weeks before the redemption date of stock of a particular description the registrar must[2] send to each person who is for the time being registered as a holder of stock of that description at his registered address[3] a notice in writing containing the following particulars[4]: (1) the redemption date of the stock[5]; and (2) notice[6] that, unless a request[7] to the contrary in writing signed by the holder is received by the registrar on or before a date[8] specified in the notice, a warrant[9] in respect of the redemption moneys drawn in favour of the holder will be sent to him by post at his registered address[10].

The registrar has a right in any case to require the consent in writing of the holder or holders of any stock before making any payment in respect of the redemption of the stock[11].

1 See the Government Stock Regulations 2004, SI 2004/1611, reg 11(1). As to the meaning of 'stock' see PARA 1335 note 3. As to the registrar see PARA 1336.
2 Ie subject to the Government Stock Regulations 2004, SI 2004/1611, reg 11(5): see the text to notes 6–9.
3 Ie his address for the time being recorded on: (1) a register under the Government Stock Regulations 2004, SI 2004/1611, reg 7(1), (2) (see PARA 1337); or (2) a register kept by the operator of a relevant system under the Uncertificated Securities Regulations 2001, SI 2001/3755 (see COMPANIES vol 7(1) (2004 Reissue) PARA 592): see the Government Stock Regulations 2004, SI 2004/1611, reg 11(2).
4 Government Stock Regulations 2004, SI 2004/1611, reg 11(2).
5 Government Stock Regulations 2004, SI 2004/1611, reg 11(3)(a).
6 Where any stock falling to be redeemed is registered in the names of more than one person, being joint holders of the stock, the notice must be sent to all such persons: Government Stock Regulations 2004, SI 2004/1611, reg 11(5)(a).
7 Where any stock falling to be redeemed is registered in the names of more than one person, being joint holders of the stock, any such request must be signed by each person registered as a joint holder of the stock: Government Stock Regulations 2004, SI 2004/1611, reg 11(5).
8 This date must in no case be more than four weeks before the redemption date: Government Stock Regulations 2004, SI 2004/1611, reg 11(4).
9 Where any stock falling to be redeemed is registered in the names of more than one person, being joint holders of the stock, the notice must state that the warrant will be drawn in favour of the first named such person: Government Stock Regulations 2004, SI 2004/1611, reg 11(5)(b).
10 Government Stock Regulations 2004, SI 2004/1611, reg 11(3)(b).
11 Government Stock Regulations 2004, SI 2004/1611, reg 11(6).

(ii) Savings Certificates

1352. National savings certificates. The Treasury's power to borrow[1] extends to raising money under the auspices of the Director of Savings, including the issue under his auspices of national savings certificates[2], bearing such rate of interest[3] and subject to such conditions as to repayment or otherwise as the Treasury thinks fit[4]. The principal of, interest[5] on, and issuing expenses of the certificates are chargeable on the National Loans Fund with recourse to the Consolidated Fund[6]. The Treasury may direct that the expiration date of any savings certificates be prolonged to such extent and on such conditions as to interest as it directs[7].

The Treasury may make regulations with respect to the manner in which and the conditions under which money may be raised under the auspices of the Director of Savings by (among other things) the issue of national savings certificates[8].

1 Ie under the National Loans Act 1968 s 12: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 728–729. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

2 Post Office Act 1969 s 109 (amended by the Income and Corporation Taxes Act 1988 Sch 16). National savings certificates were originally issued under the Finance Act 1920 s 59 (repealed), and subsequently under the National Debt Act 1958 s 7(1) (repealed) and the National Loans Act 1968 s 12(5)(a) (see note 1). Money raised by the issue of certificates under those provisions by the Post Office is treated as having been raised under the National Loans Act 1968 under the auspices of the Director of Savings: National Debt Act 1972 s 11(3)(c). See also the National Loans Act 1968 s 12(6)(b). As to the Director of Savings see PARA 810 et seq. As to the Post Office see POST OFFICE.

3 National Debt Act 1972 s 8(1).

4 National Debt Act 1972 s 8(2).

5 As to the exemption from corporation tax for income from savings certificates see the Income and Corporation Taxes Act 1988 s 46; and INCOME TAXATION vol 23(2) (Reissue) PARA 1225.

6 National Debt Act 1972 s 8(1). As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq. As to the Consolidated Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 34 (Reissue) PARA 952 et seq.

7 National Debt Act 1972 s 8(2). This does not, however, prejudice the holder's right to have the amount payable under the certificate paid to him on or before maturity: s 8(3).

8 See the National Debt Act 1972 s 11(1)(a); the Savings Certificates Regulations 1991, SI 1991/1031 (amended by SI 1992/2835; SI 1992/3115; SI 1993/3133; SI 1994/343; SI 1997/1859; SI 2005/2114); and the Savings Certificates (Children's Bonus Bonds) Regulations 1991, SI 1991/1407 (amended by SI 1992/3113; SI 1997/1860; SI 2005/2114; SI 2007/1898).

1353. War savings certificates. War savings certificates[1] held immediately before 9 August 1972 continue to be held on the conditions applicable to them before that date[2]. The principal of, interest on[3], and redemption expenses of war savings certificates are chargeable on the National Loans Fund with recourse to the Consolidated Fund[4].

1 'War savings certificates' means the certificates issued by that name under the War Loan Act 1915 s 1 (repealed) or the Finance Act 1916 s 58 (repealed): National Debt Act 1972 s 9(3).

2 National Debt Act 1972 s 9(1). The Savings Certificates Regulations 1991, SI 1991/1031 (see PARA 1353 note 8) apply to war savings certificates, for 'certificate' in the regulations includes a war savings certificate: see reg 2(1); and PARA 1354 note 1.

3 As to the exemption from corporation tax see the Income and Corporation Taxes Act 1988 s 46; and INCOME TAXATION vol 23(2) (Reissue) PARA 1225.

4 National Debt Act 1972 s 9(2). As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq. As to the Consolidated Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 34 (Reissue) PARA 952 et seq.

1354. Purchase of savings certificates. Applications to purchase a certificate[1] must be made in such manner as the Director of Savings may approve[2] and certificates are to be issued at such places as the Director of Savings determines and by such persons as he authorises[3]. A savings certificate may be purchased and held by any person[4] aged seven or upwards who is under no legal disability other than by reason of age[5], by a friendly society[6], or by any other body of persons approved for the purposes by the Director of Savings[7], or by any two or more such persons or bodies jointly[8]. Subject to these provisions, a certificate may be purchased:

(1) on behalf of and in the name of any person or persons entitled[9] to purchase and hold a certificate, by any other person or persons[10];

(2) on behalf of and in the name of a person or persons under the age of seven years, by any other person or persons[11]; and

(3) on behalf of and in the name of a person who lacks capacity[12], by his deputy[13],

and any certificate so purchased is deemed to be held by the person or persons on whose behalf it is purchased[14]. However, no certificate may be purchased under head (1) above by any person or persons on behalf of any body of persons (other than a friendly society), whether corporate or unincorporate, without the approval (either general or limited) of the Director of Savings[15].

Further, a certificate may be purchased and held by a trustee or by two or more trustees jointly[16]. A certificate may also be purchased by a person acting as trustee on behalf of any person not under disability otherwise than by reason of his age, and in the joint names of the trustee and beneficiary, in which case the certificate is to be held by them jointly[17]. Savings certificates may also be purchased in instalments[18].

An index-linked national savings certificate issued before 7 September 1981 may be purchased and held only by a person who, if a man, has attained the age of 65 or, if a woman, has attained the age of 60, or by two or more such persons jointly[19]. These age restrictions no longer apply.

A certificate purchased or held by any person not so entitled to do so or in excess of the maximum holding[20] may be forfeited at the discretion of the Director of Savings[21].

1 'Certificate' means a certificate issued under the name of a war savings certificate or a national savings certificate by the Treasury through the department of the Postmaster General or under the auspices of the Director of Savings for the purpose of raising money authorised to be raised by any Act: Savings Certificates Regulations 1991, SI 1991/1031, reg 2(1). As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq. As to the transfer of functions from the Postmaster General see POST OFFICE vol 36(2) (Reissue) PARAS 1–4. As to the Director of Savings see PARA 810 et seq.

2 See the Savings Certificates Regulations 1991, SI 1991/1031, reg 3(2). The applicant must deliver such documents and other information to the Director of Savings in writing as he may require: reg 3(2). As to the manner approved by the Director of Savings see PARA 1359.

3 Savings Certificates Regulations 1991, SI 1991/1031, reg 3(1). The names of all holders of certificates must be recorded: reg 3(3).

4 As to the restrictions which apply to the persons entitled to hold index-linked certificates purchased before 7 September 1981 see the Savings Certificates Regulations 1991, SI 1991/1031, reg 4(6), Sch 1 Pt I (amended by SI 2007/1898). 'Index-linked certificate' means a certificate issued under the name of an index-linked national savings certificate: Savings Certificates Regulations 1991, SI 1991/1031, reg 2(1).

5 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(1)(a).

6 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(1)(b). For these purposes, 'friendly society' means a friendly society registered under the Friendly Societies Act 1974 or a branch registered under it of a friendly society so registered: reg 2(1); and see reg 34(a). As to friendly societies see further PARA 2081 et seq.

7 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(1)(c).

8 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(1). When a holder attains the age of seven the Director of Savings may subsequently require a specimen signature: reg 4(5).

9 Ie entitled under the Savings Certificates Regulations 1991, SI 1991/1031, reg 4(1): see the text to notes 4–8.

10 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(2)(a).

11 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(2)(b).

12 'Person who lacks capacity' means a person who lacks capacity within the meaning of the Mental Capacity Act 2005 (see MENTAL HEALTH): Savings Certificates Regulations 1991, SI 1991/1031, reg 2(1) (definition added by SI 2007/1898); and see the Savings Certificates Regulations 1991, SI 1991/1031, regs 34(b), 35(2)(a), 36(2)(a), (3)(a) (all amended by SI 2007/1898). If any person holding, or having an interest in, any certificate is a person who lacks capacity or is under legal disability for any other reason except his age alone, anything which under the regulations is required or authorised to be done by or to the holder of the certificate must or may be done by or to the deputy (see note 13) or other person having power in law to administer his estate: Savings Certificates Regulations 1991, SI 1991/1031, reg 18 (amended by SI 2007/1898).

13 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(2)(c) (amended by SI 2007/1898). 'Deputy', in relation to England and Wales, means, in relation to any decision made by a person who lacks capacity, a deputy appointed by the Court of Protection (see MENTAL HEALTH vol 30(2) (Reissue) PARAS 676, 681 et seq) for that purpose with power to make decisions in relation to the matters in question: Savings Certificates Regulations 1991, SI 1991/1031, reg 2(1) (definition added by SI 2007/1898); and see the Savings Certificates Regulations 1991, SI 1991/1031, regs 34(c), 35(2)(b), 36(2)(b), (3)(b) (all amended by SI 2007/1898).

14 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(2).

15 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(2) proviso.

16 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(3)(a). However, no certificate may be purchased under reg 4(3)(a) by a trustee or trustees on behalf of any body of persons (other than a friendly society), whether corporate or unincorporate, without the approval (either general or specific) of the Director of Savings: reg 4(3) proviso. The regulations do not affect the mutual rights of joint holders (reg 32(1)) or authorise trustees to act otherwise than in accordance with the trust instrument and the law relating to the trust (reg 32(2)). The records kept by the Director of Savings may describe a trustee under reg 4(3)(a) as such, with or without specifying the trust (reg 4(4)), but otherwise no notice of a charge, trust or other equitable interest is receivable by the Director of Savings who is not affected by notice of any trust or of the fiduciary character of the holder (see reg 25(1), (2)).

17 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(3)(b).

18 See the Savings Certificates (Yearly Plan) Regulations 1984, SI 1984/779 (amended by SI 1985/1035; SI 1986/2001; SI 1988/1357; SI 1989/1521; SI 1991/75; SI 1992/3114; SI 1993/3132, SI 1997/1863; SI 2004/1662; SI 2005/2114; SI 2007/1898).

19 See the Savings Certificates Regulations 1991, SI 1991/1031, Sch 1 Pt I para 1. Such a certificate may be purchased on behalf of such a person, if he is a person who lacks capacity, by his deputy, and is then deemed to be held by that person: see reg 4(2) (amended by SI 2007/1898); and the text to note 14.

20 As to the maximum holding see PARA 1355.

21 See the Savings Certificates Regulations 1991, SI 1991/1031, reg 21 (amended by SI 1994/343).

1355. Maximum holding. A person may not purchase any certificates[1] of a unit series[2] or hold any such certificates purchased on his behalf[3], if the total number of units which will be held by him[4] immediately after the purchase, whether solely or jointly with any person, will exceed the prescribed limits[5].

1 As to the meaning of 'certificate' see PARA 1354 note 1.

2 'Unit series' means any series of certificates which is not a money value series: Savings Certificates Regulations 1991, SI 1991/1031, reg 2(1) (definition added by SI 1994/343). 'Money value series' means any series of certificates issued under a prospectus which permits certificates to be issued for amounts which are neither a unit nor a multiple of a unit; and 'money value certificate' means a certificate of such a series: Savings Certificates Regulations 1991, SI 1991/1031, reg 2(1) (definition added by SI 1994/343). 'Unit' means, in relation to certificates of any series, the minimum amount for which a certificate of that series may be issued (regardless of whether, in particular circumstances, a certificate may be issued only for a greater amount) or would, apart from the minimum purchase requirement applicable to non index-linked certificates issued after 31 March 1977 but not later than 28 January 1979, have been issued: Savings Certificates Regulations 1991, SI 1991/1031, reg 2(1) (definition amended by SI 1992/1835).

3 Ie under the Savings Certificates Regulations 1991, SI 1991/1031, reg 4(2) or under Sch 1 Pt I para 2: see PARA 1354.

4 As to the calculation of the total number of units that a person holds see the Savings Certificates Regulations 1991, SI 1991/1031, reg 5(5). Trusteeship is treated separately from personal capacity: see reg 5(2). For the purposes of reg 5, each holding of certificates in the name of the Accountant General of the Supreme Court is to be treated separately: reg 5(4).

5 See the Savings Certificates Regulations 1991, SI 1991/1031, reg 5(1) (amended by SI 1994/343). The limit depends on the date of issue. In the case of index linked certificates issued after 30 June 1985 and certificates, not being index linked certificates, issued after 25 September 1985, the maximum number of units which may be purchased is that specified in the prospectus relating to the certificates: Savings Certificates Regulations 1991, SI 1991/1031, reg 5(1)(a), (b). In the case of other certificates, the maximum number of certificates which may be purchased is set out in Sch 1 Pt II. As to the forfeiture of excess holdings see reg 21; and PARA 1354. A person may not purchase any money value certificates, or hold any such certificates

purchased on his behalf under reg 4(2) (see PARA 1354) if, immediately after the purchase, he will hold (whether solely or jointly with any person) certificates the aggregate purchase price of which will exceed the sum specified by or in accordance with the prospectus as the maximum value of certificates, in terms of purchase price, which may be held by any one person in relation to that description of certificate (and such prospectus may provide that different maximum values are to apply in different circumstances): see reg 5(1A), (1B) (added by SI 1994/343).

The Savings Certificates Regulations 1991, SI 1991/1031, reg 5(1) does not apply to the transfer of a certificate to a person in accordance with reg 13(7) (see PARA 1356), but in relation to any subsequent purchase by him or on his behalf certificates so transferred are be included for the purpose of calculating the number of units he holds: reg 5(3).

1356. Transfer of certificates; nominations. Every transfer of a certificate[1] must be effected, on written application[2], by the Director of Savings causing the name of the transferee to be recorded as the holder[3].

Since 1 May 1981 it has not been possible for the holder of a certificate to make a nomination directing that on his death his interest in any certificate is to devolve on persons specified by him in his nomination[4].

1 As to the meaning of 'certificate' see PARA 1354 note 1. The Director of Savings may in his discretion refuse to transfer a certificate, but if he does so he must send an intimation of his refusal to the person desiring the transfer: Savings Certificates Regulations 1991, SI 1991/1031, reg 13(2). As to the Director of Savings see PARA 810 et seq.

2 See the Savings Certificates Regulations 1991, SI 1991/1031, reg 13(3). Application must be made by the holder in a manner approved by the Director of Savings and accompanied, save where the Director of Savings otherwise directs, by the certificate: reg 13(3). As to the manner approved by the Director of Savings see PARA 1359.

3 Savings Certificates Regulations 1991, SI 1991/1031, reg 13(1). See also reg 13(4). The holder may also apply for other persons to be recorded as joint holders with him: see reg 13(5). As to transfers between trustees and beneficiaries see reg 13(6). So far as applicable, reg 13 applies to transfers on death: see reg 13(7).

4 As to nominations made before 1 May 1981 see the Savings Certificates Regulations 1991, SI 1991/1031, reg 37, Sch 2 (amended by SI 2005/2114).

1357. Repayment of certificates. The holder of a certificate[1] may apply in a manner approved by the Director of Savings for the payment of the amount repayable[2] in respect of it[3], or, subject to the Director of Savings' approval, may authorise another person to apply for or receive that amount[4]. Payment is made by means of a warrant except to the extent that:

(1) payment is made by any other means in accordance with the terms and conditions subject to which the certificate is held;

(2) the Director of Savings otherwise directs; or

(3) the applicant requests that all or part of the amount repayable be used to purchase another certificate, or a national savings bond,

and the Director of Savings consents[5]. Any such warrant which is crossed ranks as a cheque drawn on the Director of Savings, but is not negotiable[6]. An uncrossed warrant must not be paid until the receipt for the amount payable has been duly signed by the payee or some person authorised by him to receive payment[7]. Except where the Director of Savings otherwise directs, a warrant may not be paid until the certificate in respect of which the repayment is to be made has been delivered to him[8]. An uncrossed warrant is payable at the place named in it or otherwise in accordance with the directions contained in it[9]. Where the Director of Savings is unable for any reason to obtain a valid discharge for any payment he may open an account in the National Savings Bank in the recipient's name and retain the amount due in that account[10].

1 As to the meaning of 'certificate' see PARA 1354 note 1.

2 'Amount repayable' includes: (1) in relation to any money value certificate, any part of the purchase price of that certificate which is repayable separately from the rest of that price under the relevant prospectus, and any interest or bonus or other sum which has accrued due in respect of that certificate or that part of the purchase price which is to be repaid as the case may be; and (2) in relation to any certificate of a unit series, any interest or bonus or other sum which has accrued due in respect of that certificate: Savings Certificates Regulations 1991, SI 1991/1031, reg 2(1) (definition substituted by SI 1994/343). As to the meaning of 'money value certificate' see PARA 1355 note 2. For the purpose of determining the amount repayable, the payment of that amount is deemed to be effected on the date appearing on the warrant: Savings Certificates Regulations 1991, SI 1991/1031, reg 7(7). That date will not be more than 21 days from the date on which application for payment is received by the Director of Savings, unless the holder has requested a later date: reg 7(8). If the Director is satisfied that it is or was not practicable to dispatch the warrant to enable payment to be made in time, then the date appearing on the warrant will be no later than the earliest date by which he is satisfied it would be practicable for the payee to obtain payment: see reg 7(7), (9), (10). As to the Director of Savings see PARA 810 et seq.

Where, in accordance with the prospectus relating to any money value series, a partial repayment of the purchase price is made (together with payment of such interest or bonus or other sum which may have accrued due in respect of the portion repaid under that prospectus), a replacement certificate must be issued showing as its purchase price the amount of the original purchase price that has not been repaid: reg 6(2A) (added by SI 1994/343).

3 Savings Certificates Regulations 1991, SI 1991/1031, reg 6(1). Where repayment is requested on a specified date the application may not, unless the Director of Savings otherwise agrees, be made more than two months before that date: see reg 6(1). Unless the Director otherwise directs or agrees, applications must be made to Savings Certificates and SAYE Office, Durham: reg 6(1). In the case of a multiple certificate, application may be made for the repayment of any number of the units: reg 6(2). 'Multiple certificate' means a certificate representing more than one unit certificate: see reg 2(1). In general, no repayment may be made if the holder is under the age of seven: reg 9(1). Where the holder is a person who lacks capacity his deputy must apply for repayment: reg 9(2) (amended by SI 2007/1898). As to the meaning of 'person who lacks capacity' see PARA 1354 note 12. As to the meaning of 'deputy' see PARA 1354 note 13. Where the holder is under seven the Director of Savings has a discretion to make a repayment to any proper person: see the Savings Certificates Regulations 1991, SI 1991/1031, reg 9(3). Where the Director is satisfied that any person holding, or having an interest in, a certificate is a person who lacks capacity in respect of whom no deputy has been appointed, the Director may, if he thinks fit, pay the whole or part of the amount repayable in respect of the certificate to any person who satisfies him that he will apply the payment for the maintenance or otherwise for the benefit of the person who lacks capacity: reg 9(4) (amended by SI 2007/1898). As to repayment of certificates held jointly see the Savings Certificates Regulations 1991, SI 1991/1031, reg 10 (amended by SI 2007/1898). As to repayment to friendly societies and other bodies see the Savings Certificates Regulations 1991, SI 1991/1031, reg 11. As to repayment to the official receiver or trustee in bankruptcy where the holder is bankrupt see reg 12. The Director of Savings may require evidence of the identity or title of any person: see reg 30(1). As to the official receiver see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 503 et seq. As to the trustee in bankruptcy see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 316 et seq.

4 Savings Certificates Regulations 1991, SI 1991/1031, reg 6(3). Where a warrant is issued in good faith and without negligence to some person other than the holder or person entitled, and the issue is attributable to some act or omission on the part of the holder or person entitled, it is deemed to have been duly issued to a person entitled, but subject to reg 28 (which saves the rights of third persons): reg 27(2).

5 Savings Certificates Regulations 1991, SI 1991/1031, reg 7(1) (substituted by SI 2000/3110). In the absence of such a request or direction, and subject to the terms and conditions subject to which the certificate is held, every application for payment of the amount repayable in respect of a certificate is treated as implying an authority to the Director of Savings to issue a warrant for that amount and pay it in accordance with the terms of the warrant, or to make payment by such other means as may be provided for in those terms and conditions: Savings Certificate Regulations 1991, SI 1991/1031, reg 7(1A) (added by SI 2000/3110). The death of any person who made an application for payment of the amount repayable in respect of a certificate does not of itself determine such authority, but if the Director of Savings receives notice that the applicant has died or has countermanded such authority, the Director of Savings: (1) may not issue a warrant, or, if such warrant has already been issued, he must take all reasonable steps to stop repayment of it; and (2) may not initiate the making of payment by other means or, if such

payment has already been initiated, must take all reasonable steps (if any) as may, having regard to the nature of the means of payment concerned, be within his power to prevent completion of the payment: Savings Certificate Regulations 1991, SI 1991/1031, reg 7(1B) (added by SI 2000/3110).

For the purposes of determining the amount repayable in respect of a certificate where repayment is not made by warrant because the proceeds are used to purchase another certificate or a national savings bond, repayment will be deemed to be effected on the date entered in the records kept by the Director of Savings as the date of purchase of the new certificate or bond: Savings Certificate Regulations 1991, SI 1991/1031, reg 8.

6 See the Savings Certificates Regulations 1991, SI 1991/1031, reg 7(2), which applies the Bills of Exchange Act 1882 ss 76, 77(1), (3)–(6), 78–81 (see PARAS 1411, 1499, 1560, 1575; and also PARAS 838, 839, 880); and the Cheques Act 1957 ss 3, 4 (see PARAS 900–901).

7 Savings Certificates Regulations 1991, SI 1991/1031, reg 7(3). The receipt operates as a full discharge to the Treasury and the Director of Savings, subject to reg 28 (which saves the rights of third persons): reg 27(1). Where an uncrossed warrant is paid to a person purporting to be the payee or his authorised agent then, even if the receipt is signed by someone else, the making of the payment is a full discharge to the Treasury and the Director of Savings if the payment is made in good faith and without negligence and the making of the payment is attributable to some act or omission on the part of the holder, the payee or authorised agent: reg 7(3) proviso. Where an uncrossed warrant is made payable to the holder, it may be paid to another person who signs the receipt and forthwith reinvests the money in certificates in the name of the holder: reg 7(4). As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

8 Savings Certificates Regulations 1991, SI 1991/1031, reg 7(5).

9 Savings Certificates Regulations 1991, SI 1991/1031, reg 7(6). The Director of Savings may dispatch the warrant to the place named in it, and where he does so he must dispatch a notice informing the payee that he has done so: reg 7(6). The posting of a warrant or the notice referred to in reg 7(6) to any person at the last address furnished to the Director of Savings will, as regards the liability of the Treasury or the Director of Savings, be equivalent to the delivery of the warrant or notice to that person: see reg 7(11).

10 See the Savings Certificates Regulations 1991, SI 1991/1031, reg 19(1). However: (1) if the person to whom the payment is due has an account in the National Savings Bank, the Director of Savings may, if he thinks fit, instead of opening a new account, credit the amount payable to the existing account; and (2) in the case of an account opened by the Director of Savings: (a) no sum is to be received by way of deposit for the credit of the account except in pursuance of the Savings Certificates Regulations 1991, SI 1991/1031; and (b) the regulations requiring a declaration to be made by a depositor in the National Savings Bank do not apply with respect to any payment into the account by the Director of Savings: reg 19(1) proviso. Any sum credited under reg 19(1) is ignored in relation to the rule limiting the amount which may be deposited in a savings bank account: see reg 19(2). As to the National Savings Bank see PARA 810 et seq.

1358. Death of holder. On the death of the holder of a certificate[1], the production of probate or letters of administration, or a certified copy, granted in respect of personal estate including the certificate by a court in the United Kingdom[2], the Isle of Man[3] or the Channel Islands[4] is sufficient authority to the Director of Savings to pay the amount repayable[5] on the certificate, or to transfer the certificate to or to the direction of the grantee[6].

On the death of the sole holder of certificates in respect of which the amount repayable does not exceed £5,000, the Director of Savings may pay the amount repayable, without the production of probate or letters of administration[7], to the person appearing to him to be entitled to take out probate or letters of administration[8], or, where the holder made a will[9], to the person to whom, in the Director of Savings' opinion, the amount would be repayable on probate or administration with the will annexed[10], or to a person who satisfies the Director of Savings that he is entitled to receive the amount or any part of it in right of his being the person who paid the funeral expenses, or a creditor, or a person having a beneficial interest in the estate[11], or to some other specified person[12].

Where the aggregate value of specified assets[13] of a deceased holder of certificates, not being a person holding solely as a trustee, exceeds £50,000, the

Director of Savings must, before payment or transfer, and subject to certain exceptions[14], require the production of a statement as to payment of inheritance tax on death[15].

1 As to the meaning of 'certificate' see PARA 1354 note 1.
2 As to the meaning of 'United Kingdom' see PARA 2 note 3.
3 As to the application of the Savings Certificates Regulations 1991, SI 1991/1031, to the Isle of Man see reg 35 (amended by SI 2007/1898).
4 As to the application of the Savings Certificates Regulations 1991, SI 1991/1031, to the Channel Islands see reg 36 (amended by SI 2007/1898).
5 As to the meaning of 'amount repayable' see PARA 1357 note 2. As to the Director of Savings see PARA 810 et seq.
6 Savings Certificates Regulations 1991, SI 1991/1031, reg 14(1). If it subsequently appears that the grant was invalid or deficient, the payment or transfer is nevertheless deemed to have been duly made: reg 14(2). The Director of Savings may require evidence of the identity or title of a payee: see reg 30(1). He may accept as conclusive proof of the holder's death any evidence establishing that the holder has not been heard of for at least seven years; and 'holder of the certificate' includes any person beneficially interested at any time, whether absolutely or contingently, in the personal estate of the deceased holder of a certificate: reg 30(2).
7 Savings Certificates Regulations 1991, SI 1991/1031, reg 15(1).
8 Savings Certificates Regulations 1991, SI 1991/1031, reg 15(1)(a).
9 'Will' includes a codicil: Savings Certificates Regulations 1991, SI 1991/1031, reg 15(4).
10 Savings Certificates Regulations 1991, SI 1991/1031, reg 15(1)(b). Recipients under reg 15(1)(b) or reg 15(1)(c) (see the text and note 11) who are aged 16 or over may give valid receipts: see reg 15(2). In making any payment under reg 15(1)(b) or reg 15(1)(c), the Director of Savings must in general have regard to the rules of law as to the distribution of estates of deceased persons, but, if he is of the opinion that hardship or inconvenience would be thereby caused, he may depart from those rules in such manner and to such extent as he considers just: reg 15(3). Where a person to whom reg 15(1)(b) or reg 15(1)(c) applies has died before payment has been made to him, that sum or any part of it may be paid to any person to whom it might have been paid if the first mentioned person had, immediately before his death, been the sole holder of the certificates in question: reg 15(3) proviso. As to distribution on intestacy and as to administration with the will annexed see EXECUTORS AND ADMINISTRATORS.
11 Savings Certificates Regulations 1991, SI 1991/1031, reg 15(1)(c). See note 10.
12 As to the recipient where the deceased was a British citizen whose next of kin reside outside the United Kingdom, the Isle of Man and the Channel Islands see the Savings Certificates Regulations 1991, SI 1991/1031, reg 15(1)(d). As to the recipient where the deceased was a foreign seaman or foreign subject see reg 15(1)(e), (f). As to the recipient where the estate devolves on the Crown see reg 15(1)(g). Payment made in accordance with the law of the holder's residence at the time of his death is deemed to have been duly made unless before making payment the Director of Savings received notice that the holder was at the time of his death domiciled elsewhere: reg 16. As to British citizenship generally see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 7 et seq.
13 The 'specified assets' are the following assets (not being assets in respect of which it is shown to the satisfaction of the Director of Savings that the deceased holder had no interest otherwise than as a trustee):
   (1) the total amount which would have been repayable (if repayment had been demanded) at the date of the death of the holder in respect of all certificates recorded in his name alone or in his name jointly with any other person (Savings Certificates Regulations 1991, SI 1991/1031, reg 17(2)(a));
   (2) the total amount (including interest) which, at the date of the death of the holder, stands to the credit of all accounts in his name alone, or in his name jointly with any other person, in the National Savings Bank (reg 17(2)(b));
   (3) all stock and securities registered on the National Savings Stock Register at the date of the death of the holder in his name alone or in his name jointly with any other person (reg 17(2)(c));
   (4) any amount repayable and any other sum payable in respect of all premium savings bonds recorded in the holder's name (reg 17(2)(d));
   (5) the total amount (including any bonus or interest) which would have been repayable (if repayment had been demanded) at the date of the death of the holder in respect of all savings contracts entered into by him and registered by the Director of Savings under a contractual savings scheme certified by the Treasury in accordance with the Income and

Corporation Taxes Act 1988 s 326(2) (repealed) (see now the Income Tax (Trading and Other Income) Act 2005 ss 703(2), (3), 704(2), 705(1)) (see INCOME TAXATION) (Savings Certificates Regulations 1991, SI 1991/1031, reg 17(2)(e));

(6) the total amount (including interest) which would have been repayable (if repayment had been demanded) at the date of the death of the holder in respect of all agreements entered into or certificates held by the holder in accordance with the Savings Certificates (Yearly Plan) Regulations 1984, SI 1984/779 (see PARA 1354 note 18) (Savings Certificates Regulations 1991, SI 1991/1031, reg 17(2)(f)).

For these purposes, the value of the stock and securities referred to in head (3) above is: (a) in the case of stock which is of a description corresponding to stock or securities transferable in the registers kept by the Government Stock in accordance with regulations under the Finance Act 1942 s 47 (see the Government Stock Regulations 2004, SI 2004/1611; and PARA 1335 et seq), the market value thereof at the date of the death of the holder; and (b) in all other cases, the total amount (including interest and any other sum payable) which would have been repayable (if repayment had been demanded) at the date of the death of the holder: Savings Certificates Regulations 1991, SI 1991/1031, reg 17(3) (amended by SI 2004/1662). As to the National Savings Bank see PARA 810 et seq. As to the National Savings Stock Register see PARA 1347. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

14 See the Savings Certificates Regulations 1991, SI 1991/1031, reg 17(1) proviso (amended by SI 2005/2114).

15 Savings Certificates Regulations 1991, SI 1991/1031, reg 17(1) (amended by SI 1993/3133). As to inheritance tax see INHERITANCE TAXATION.

1359. Documents. The loss or destruction of any document issued by or under the auspices of the Director of Savings in pursuance of the Savings Certificates Regulations 1991[1] must be notified in writing to him as soon as practicable by the person entitled to possession of the document[2]. If it appears to the Director of Savings that any document so issued has been issued in error, lost, destroyed or tampered with, or is in such a condition as to render it desirable that it should be replaced by a new document, he may issue[3] a new document in lieu of the old document to any person who satisfies him that he is entitled to the possession of the document[4].

Where any application is required[5] to be made in a manner approved by the Director of Savings, the document in which the application is made must contain a full and specific statement of the particulars required to be given, and any such document which is required by the Director of Savings to be signed by any person must be signed by that person[6]. Where any document is required[7] to be signed by any person and that person is unable to write, it is sufficient if the document is marked by that person in the presence of a witness in such manner as the Director of Savings may require[8]. Any mistake in any document received from the Director of Savings must, as soon as practicable, be notified in writing to the Director of Savings by the person receiving the document[9]. If the Director of Savings is satisfied that any transaction effected or thing done, or purporting to have been effected or done has been effected or done in error, he may cancel the transaction and may take all such steps as are, in his opinion, necessary to rectify the error, and may for that purpose require the surrender to him of any certificate or other document[10].

1 Ie the Savings Certificates Regulations 1991, SI 1991/1031. As to the Director of Savings see PARA 810 et seq.

2 Savings Certificates Regulations 1991, SI 1991/1031, reg 20(1).

3 The Director of Savings may attach to the issue of any new document such conditions as to indemnity or otherwise as he thinks fit: Savings Certificates Regulations 1991, SI 1991/1031, reg 20(2).

4 Savings Certificates Regulations 1991, SI 1991/1031, reg 20(2).

5 Ie by the Savings Certificates Regulations 1991, SI 1991/1031.

6 Savings Certificates Regulations 1991, SI 1991/1031, reg 29.

7 Ie by the Director of Savings or by the Savings Certificates Regulations 1991, SI 1991/1031.
8 Savings Certificates Regulations 1991, SI 1991/1031, reg 22.
9 Savings Certificates Regulations 1991, SI 1991/1031, reg 23(1).
10 Savings Certificates Regulations 1991, SI 1991/1031, reg 23(2).

1360. Obligation of secrecy. A person employed in connection with business arising under the Savings Certificates Regulations 1991[1] must not disclose to any person, other than the Director of Savings[2] or a person employed in carrying the regulations into execution, the name of the purchaser or holder of any certificate[3], the number of certificates purchased by any person, or the amount repaid in respect of any certificate[4]. However, this does not prevent the disclosure by a person authorised for the purpose by the Director of Savings from disclosing information to any person in connection with an offence committed with reference to any certificate or for the purpose of ascertaining whether or not an offence has been so committed nor does it prevent the Director of Savings from complying with a notice served on him under the requirement[5] to deliver or make available documents relating to liability of a taxpayer[6].

Information such as the name of the purchaser or holder of any certificate, the number of certificates purchased, or the amount repaid in respect of any certificate[7] may be disclosed in accordance with, and subject to such conditions as may be specified in, arrangements made by the Director of Savings for the purpose of enabling the person to whom the information is disclosed to provide, or assist in connection with the provision of, relevant information[8] to the purchaser or holder of any certificate, and any such person is thereby subject to the obligation of secrecy as if he were a person employed in connection with business arising under the regulations[9].

1 Ie the Savings Certificates Regulations 1991, SI 1991/1031.
2 As to the Director of Savings see PARA 810 et seq.
3 As to the meaning of 'certificate' see PARA 1354 note 1.
4 Savings Certificates Regulations 1991, SI 1991/1031, reg 31(1). As to the purchase of savings certificates see PARA 1354.
5 Ie under the Taxes Management Act 1970 s 20(3): see INCOME TAXATION vol 23(2) (Reissue) PARA 1700.
6 Savings Certificates Regulations 1991, SI 1991/1031, reg 31(2).
7 Ie information of the description mentioned in the Savings Certificates Regulations 1991, SI 1991/1031, reg 31(1) (see the text to note 4).
8 For these purposes, 'relevant information' means information about any investment opportunities, services or facilities available from or through the Director of Savings, including any information about: (1) the National Savings Bank; (2) the National Savings Stock Register; or (3) any means by which the Treasury raises money under the auspices of the Director of Savings: Savings Certificates Regulations 1991, SI 1991/1031, reg 31(4) (added by SI 1997/1859). As to the National Savings Bank see PARA 810 et seq. As to the National Savings Stock Register see PARA 1347. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
9 Savings Certificates Regulations 1991, SI 1991/1031, reg 31(3) (added by SI 1997/1859).

1361. Determination of disputes. Any dispute[1] between the Director of Savings and the holder of any certificate[2], or a person who is or claims to be the personal representative, next of kin or creditor of a holder, or the trustee in bankruptcy or assignee of a bankrupt or insolvent holder[3], or a person who claims to be entitled to any certificate[4], must be referred in writing to a person known as an 'adjudicator'[5], whose award is final and binding on all parties[6].

1 As to what amounts to a dispute cf *R v Chief Registrar of Friendly Societies, ex p Mills* [1970] 3 All ER 1076, [1970] 1 WLR 1534, DC.

2 Savings Certificates Regulations 1991, SI 1991/1031, reg 24(1)(a). As to the meaning of 'certificate' see PARA 178 note 1. As to the Director of Savings see PARA 810 et seq.
3 Savings Certificates Regulations 1991, SI 1991/1031, reg 24(1)(b).
4 Savings Certificates Regulations 1991, SI 1991/1031, reg 24(1)(c).
5 Savings Certificates Regulations 1991, SI 1991/1031, reg 24(1) (amended by SI 1992/3115). 'Adjudicator' means a person appointed under the Friendly Societies Act 1992 s 84 (now repealed): Savings Certificates Regulations 1991, SI 1991/1031, reg 2(1) (definition added by SI 1992/3115). Where a dispute was referred before 1 January 1993 to the chief registrar of friendly societies or a deputy appointed by him, that dispute is to be treated as if it had been referred to the adjudicator; and any thing done in relation to such a dispute by the chief registrar, any deputy appointed by him or the assistant registrar is to be treated as a thing done by the adjudicator: Savings Certificates Regulations 1991, SI 1991/1031, reg 24(5) (added by SI 1992/3115). The adjudicator may administer oaths to witnesses appearing before him: Savings Certificates Regulations 1991, SI 1991/1031, reg 24(2) (amended by SI 1992/3115). As to fees see the Savings Certificates Regulations 1991, SI 1991/1031, reg 24(4) (amended by SI 1992/3115).
6 Savings Certificates Regulations 1991, SI 1991/1031, reg 24(4) (amended by SI 1992/3115).

(iii) Premium Savings Bonds

1362. Premium savings bonds generally. The Treasury's power to borrow[1] extends to raising money by the creation and issue of premium savings bonds[2]. The principal of and interest on money so borrowed, the issuing expenses and the prizes allotted are charged on the National Loans Fund with recourse to the Consolidated Fund[3].

Premium savings bonds are a government security and are eligible for inclusion in draws for cash prizes which are free from United Kingdom income tax and capital gains tax[4].

1 Ie under the National Loans Act 1968 s 12: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 728–729. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
2 National Loans Act 1968 s 12(6)(a). Premium savings bonds were first issued under a prospectus dated 1 November 1956. These bonds were known as bonds of series A. A second issue was known as series B: see the Finance Act 1960 s 77.
3 National Loans Act 1968 s 12(4); Finance Act 1968 s 54(1), Sch 18 para 2. As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq. As to the Consolidated Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 34 (Reissue) PARA 952 et seq.
4 National Loans Act 1968 Sch 18 para 1. As to the meaning of 'United Kingdom' see PARA 2 note 3. As to income tax see generally INCOME TAXATION; and as to capital gains tax see CAPITAL GAINS TAXATION.

1363. Purchase of premium bonds. Premium savings bonds are issued by the Treasury in units of £1[1] at such places as the Director of Savings determines and by such persons as he authorises[2]. A bond may be purchased and held by any person[3] who has attained the age of 16[4], being a person who is not under any legal disability otherwise than by reason of age[5]. Bonds purchased or held by a person not entitled to do so may be forfeited, if the Director of Savings so directs[6].

An application to purchase a bond must be made in a manner approved by the Director of Savings, and, for the purposes of any such application, the applicant must deliver to the Director of Savings such documents and other information in writing as he may require[7]. The Director of Savings then causes such entries to be made in the register as are necessary to show the names of the holders of the bonds[8].

Bonds are not transferable either during the lifetime or on the death of the registered holder[9].

1 Finance Act 1968 s 54(1), Sch 18 para 2. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

2 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 3(1). As to the Director of Savings see PARA 810 et seq.

3 A bond may not be purchased or held by more than one person or by a body of persons, whether corporate or unincorporate: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 4(2). Subject to reg 4(3) (see note 4), a bond may not be purchased or held by any person on behalf of another person: reg 4(2A) (added by SI 1991/1337).

4 Subject to the provisions of the Premium Savings Bonds Regulations 1972, SI 1972/765, a bond may be purchased:

(1) on behalf of and in the name of a person under 16, by his parent or guardian or grandparent or by any person who satisfies the Director of Savings that he is a proper person to act on behalf of the first mentioned person;

(2) on behalf of and in the name of a person who lacks capacity, by his deputy; and

(3) subject to the approval of the Director of Savings, on behalf of and in the name of an eligible person, by any other person acting in pursuance of a power of attorney created by that eligible person,

and any bond so purchased is deemed to be held by the person on whose behalf it is purchased: reg 4(3) (substituted by SI 1980/767; and amended by SI 1981/310; SI 1999/3305; SI 2007/1898). 'Person who lacks capacity' means a person who lacks capacity within the meaning of the Mental Capacity Act 2005 (see MENTAL HEALTH); and 'deputy', in relation to England and Wales, means, in relation to any decision made by a person who lacks capacity, a deputy appointed by the Court of Protection (see MENTAL HEALTH vol 30(2) (Reissue) PARAS 676, 681 et seq) for that purpose with power to make decisions in relation to the matters in question: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 2(1) (definitions added by SI 2007/1898).

Where a bond has been purchased on behalf of a person who was, at the date of purchase, under the age of 16, the Director of Savings may, at any time after that person has attained 16, require a specimen of his signature: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 4(4).

5 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 4(1). If a holder is a person who lacks capacity or is under disability for any other reason except his age alone, anything required or authorised to be done by or to the holder is to be done by or to his deputy or other person administering his estate: reg 16 (amended by SI 2007/1898). No notice of a trust is receivable by the Director of Savings in respect of a bond: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 23.

6 See the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 19(1)(a).

7 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 3(2).

8 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 3(3). 'Holder' means, in relation to a bond, the person in whose name the bond is registered in the register kept by the Director of Savings: reg 2(1).

9 Finance Act 1968 Sch 18 para 4; Premium Savings Bonds Regulations 1972, SI 1972/765, reg 3(4). As to payment on death see PARA 1367. No responsibility can be accepted in respect of the use of bonds as security for a loan: Finance Act 1968 Sch 18 para 4.

1364. Maximum holding. A person may not purchase any premium savings bond or hold one purchased on his behalf if the total number of bond units[1] which will be held by him immediately after the purchase will exceed 30,000[2]. Any bond purchased in contravention of this provision will not be eligible for inclusion in any draw until the holding has been reduced to 30,000[3]; and any bond purchased or held in contravention of this provision may be forfeited, if the Director of Savings so directs[4].

1 'Unit' means, in relation to bonds of any series, the unit in which bonds of that series are denominated: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 2(1) (definition substituted by SI 1976/1543).

2 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 5(1) (amended by SI 1976/1543; SI 1993/782). In calculating the total number of bond units a person holds, a multiple bond is

taken to be such number of bond units as it represents: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 5(2) (amended by SI 1976/1543). 'Multiple bond' means a bond representing any number of bond units and entitling the holder to receive the aggregate amount of the sums repayable in respect of that number of bond units: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 2(1) (definition amended by SI 1976/1543).

As to the minimum purchase of bonds see the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 6 (substituted by SI 1976/1543) which provides that not less than five bond units may be purchased in the name of any one person at a time, and bonds must not be purchased except in five bond units or multiples thereof.

3 See the Finance Act 1968 s 54(1), Sch 18 para 9.

4 See the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 19(1)(b) (amended by SI 1976/1543). As to the Director of Savings see PARA 810 et seq.

1365. Interest, draws and prizes. The rate of interest on premium savings bonds is 4 5/8 per cent or such other rate as may be prescribed by the Treasury[1]. The monthly prize fund is determined by calculating one month's interest on each bond unit eligible[2] for the draws in that month[3]. Each £1 unit bond has one chance in each draw for which it is eligible; it may not win more than one prize in each such draw and in draws producing more than one prize it will be allotted the highest prize for which it is drawn[4]. The serial numbers of prize-winning bonds are published and the holders are notified by post[5].

All matters relating to the method and conduct of the draw and allotment of prizes are at the sole discretion of the Director of Savings, whose decision as to which bonds have drawn prizes is final[6].

1 See the Finance Act 1968 s 54(1), Sch 18 paras 5, 15(a) (amended by SI 2004/2353). Notwithstanding any requirement in the terms and conditions applicable to premium savings bonds to give notice of a change in the prize fund rate, the Treasury may change that rate at any time without notice: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 3A(1) (regs 3A, 3B added by SI 2004/2353). As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq. Where notice of a change in the prize fund interest rate or of a change in the scale of prizes (see note 4) has been given before 1 July 1972 but the period of notice ends after that date, the effective date of change may be brought forward; any decision to make such a change in effective date must be published in the London, Edinburgh and Belfast Gazettes: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 3A(5) (as so added).

2 A bond is eligible for inclusion in the first draw held after the expiration of three clear calendar months following the month in which it is purchased (unless sooner repaid) and thereafter in each succeeding draw (unless repaid before the first day of the month in which the draw is held or the holder has died before the first day of a period of 12 consecutive calendar months preceding the month in which the draw is held): Finance Act 1968 Sch 18 para 7. Bonds held in excess of the maximum holding are not eligible: see Sch 18 para 9.

3 Finance Act 1968 Sch 18 para 5. See also the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 3A(3) (as added: see note 1).

4 Finance Act 1968 Sch 18 para 8. Notwithstanding any requirement in the terms and conditions applicable to premium savings bonds to give notice of a change in the scale of prizes for a draw, the Treasury may change the scale without notice: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 3A(2) (as added: see note 1). A change in the scale of prizes for a draw is a change in the way the number of prizes for that draw is calculated, or a change in the way the prize fund for that draw is shared amongst the different prize values, or both: reg 3A(4) (as so added). See further note 1.

5 See the Finance Act 1968 Sch 18 para 11 (amended by SI 2004/2353). Notwithstanding any requirement in the terms and conditions applicable to premium savings bonds to publish the serial numbers of winning bonds in the London Gazette, the Director of Savings may instead publish such numbers on the National Savings and Investments website: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 3B (as added: see note 1). As to the Director of Savings see PARA 810 et seq.

6 See the Finance Act 1968 Sch 18 para 12. Note that the reference in Sch 18 para 12 to the Postmaster General appears not to have been formally amended so as to refer to the Director of

Savings, but cf the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 35(3). As to the transfer of functions from the Postmaster General see POST OFFICE vol 36(2) (Reissue) PARAS 1–4.

1366. Repayments in respect of premium bonds. The purchase price of a premium savings bond is repayable in full on application made by the holder[1] in writing in a manner approved by the Director of Savings[2].

Every payment in respect of a bond must be made by crossed warrant except to the extent that:

(1) payment is made by any other means in accordance with the terms and conditions subject to which the bond is held;

(2) the Director of Savings otherwise directs; or

(3) the applicant for the payment requests that all or part of the amount payable be used to (a) purchase another bond or bonds or any other description of security issued by the Treasury for the purpose of raising money under the auspices of the Director of Savings; or (b) make a deposit with the National Savings Bank,

and the Director of Savings consents thereto[3].

In the absence of a direction or request within head (1) or head (2) above, every application for payment in respect of a bond is to be treated as conferring authority on the Director of Savings[4]:

(i) subject to the terms and conditions subject to which the bond is held, to issue a crossed warrant for that amount and pay it in accordance with the terms of the warrant[5]; or

(ii) to make payment by such other means (if any) as may be provided for in those terms and conditions[6].

Where the Director of Savings is unable for any reason to obtain a valid discharge for any payment falling to be made to any person in respect of a bond, he may open a National Savings Bank account in that person's name[7] and, until payment can be made to that person, retain the amount due in that account[8].

The Treasury, the Director of Savings and any person authorised by him are not liable in respect of payments duly made or acts duly done in accordance with regulations; and any such payment is deemed to have been a valid payment, and the recipient's receipt is a full discharge[9].

None of these provisions, however, operates to prevent the recovery by any person or his representatives of any money lawfully due to him from the person to whom it was paid by the Director of Savings or from that person's representatives, or affects the right which any person or his representatives may have in respect of a bond against a third party[10].

Unclaimed money[11] may be paid to the National Debt Commissioners[12].

1 As to the meaning of 'holder' see PARA 1363 note 8. As to evidence of identity see the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 29(1). A holder aged 16 or over may, subject to the approval of the Director of Savings, authorise any person to apply for or receive repayment on his behalf: reg 7(3). No payment may be made to a bondholder under 16 (see reg 9(1)), but an application may, however, be made on his behalf by the person who purchased the bond or some other proper person (see reg 9(2) (substituted by SI 1981/310)). Application for payment in respect of a bond held by a person who lacks capacity is to be made by his deputy: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 10(1) (amended by SI 2007/1898). Where it is shown to the satisfaction of the Director of Savings that the holder of a bond is a person who lacks capacity for whom no deputy has been appointed in relation to his property and affairs, the Director of Savings may, where it is shown to his satisfaction that it is expedient that the whole or any part of the sum repayable, or of any other sum payable, should be applied for the maintenance or otherwise for the benefit of the holder, if he thinks fit pay that sum or that part of it to any person who satisfies him that he will apply it for such purposes:

Premium Savings Bonds Regulations 1972, SI 1972/765, reg 10(2) (substituted by SI 1991/1337; and amended by SI 2007/1898). In the case of a bankrupt, payment is made to and on the application of the official receiver or trustee in bankruptcy: see the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 11 (amended by SI 1986/2001). As to the Director of Savings see PARA 810 et seq. As to the meanings of 'person who lacks capacity' and 'deputy' see PARA 1363 note 4. As to the official receiver see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 503 et seq. As to the trustee in bankruptcy see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 316 et seq.

2 Finance Act 1968 s 54(1), Sch 18 para 13; Premium Savings Bonds Regulations 1972, SI 1972/765, reg 7(1). In the case of a multiple bond, an application may be made for repayment of any number of the bond units it represents: reg 7(2) (amended by SI 1976/1543). As to the meaning of 'multiple bond' see PARA 1364 note 2. As to the meaning of 'unit' see PARA 1364 note 1. As to the manner approved by the Director of Savings see PARA 1368.

3 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 8(1) (substituted by SI 2004/2353). As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq. As to the National Savings Bank see PARA 810 et seq. The provisions of the Bills of Exchange Act 1882 ss 76, 77(1), (3)–(6), 78–81 (see PARAS 1411, 1499, 1560, 1575; and also PARAS 838, 839, 880), and of the Cheques Act 1957 ss 3, 4 (see PARAS 900–901) apply to a crossed warrant as if it were a cheque drawn on the Director of Savings (see PARAS 921–922), but nothing in the Premium Savings Bonds Regulations 1972, SI 1972/765, makes such a warrant negotiable: reg 8(2). Except where the Director of Savings directs, a warrant will not be paid until the bond (or document in lieu of it) has been produced or, where the bond or any bond unit represented by a multiple bond is being repaid, delivered to the Director of Savings: reg 8(4) (amended by SI 1976/1543). The posting of a warrant to any person at the last address furnished to the Director of Savings is, as regards the liability of the Treasury or the Director of Savings, equivalent to the delivery of the warrant to that person: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 8(6) (substituted by SI 2004/2353). Where repayment is made in respect of a bond, the payment of the amount repayable under it is, for the purpose of determining whether any other sum is payable in respect of that bond, deemed to be effected on the date on which the warrant is issued: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 8(7) (added by SI 1980/767).

Where a warrant is issued payable to some person other than the bondholder or person entitled, but was issued in good faith and without negligence and the issue is attributable to some act or omission on the part of the bondholder or person entitled, the warrant is deemed to have been duly issued to a person entitled: see the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 26(2). This is expressed to be subject to reg 27 (saving of rights of third parties): see the text to note 10.

4 See the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 8(1A) (added by SI 2004/2353). The death of any person who made an application for payment in respect of a bond does not of itself determine the authority mentioned in the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 8(1A), but if the Director of Savings receives notice that the applicant has countermanded such authority or has died, the Director of Savings: (1) may not issue a warrant or, if such a warrant has already been issued, must take all reasonable steps to stop payment of it; and (2) may not initiate the making of payment by other means or, if such payment has already been initiated, must take all reasonable steps (if any) as may, having regard to the nature of the means of payment concerned, be within his power to prevent completion of the payment: see reg 8(1B) (added by SI 2004/2353).

5 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 8(1A)(a) (as added: see note 4).

6 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 8(1A)(b) (as added: see note 4).

7 If the person already has such an account, the money may be paid into it: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 17(1) proviso (a). In determining the amount in an account for the purposes of the provisions limiting deposits, no account is taken of sums credited under reg 17: reg 17(2).

8 See the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 17(1). In the case of an account opened by the Director of Savings: (1) no sum is to be received by way of deposit for the credit of the account except in pursuance of the Premium Savings Bonds Regulations 1972, SI 1972/765; and (2) the requirement that a declaration is to be made by a depositor in the National Savings Bank does not apply with respect to any payment into the account by the Director of Savings: reg 17(1) proviso (b). As to the National Savings Bank see PARA 810 et seq.

9 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 26(1). This is expressed to be subject to reg 27 (saving of rights of third parties): see the text to note 10.

10 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 27.

11 For these purposes, any moneys due on bonds and not claimed by the person entitled are deemed to be unclaimed if a period of five years has elapsed since the due date, but the Director of Savings may treat any such moneys as unclaimed before the expiration of that period: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 15(2).

12 See the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 15(1). As to the National Debt Commissioners see PARA 1332. Where the Director of Savings makes a payment to the National Debt Commissioners in respect of any moneys due on bonds, and afterwards pays those moneys to the person entitled, the amount paid to the National Debt Commissioners in respect of those moneys must be repaid by them to the Director of Savings: reg 15(3). Any sums so paid to the National Debt Commissioners must be placed to their account of unclaimed dividends, and any repayment by them to the Director of Savings under reg 15(3) must be made out of that account: reg 15(4).

1367. Death of a bondholder. On the death of the holder of a premium savings bond, the production of, or of a certified copy of, probate or letters of administration granted in respect of personalty comprising the bond by a court in the United Kingdom[1], the Isle of Man[2] or the Channel Islands[3] is sufficient authority to the Director of Savings to pay the amount repayable or any sum payable in respect of the bond to or as directed by the person to whom the grant was made[4].

On the death of the holder of bonds in respect of which the amount payable does not exceed £5,000, the Director of Savings may pay the sum repayable or any other sum payable in respect of the bonds, without the production of probate or letters of administration[5], to a person appearing to him to be entitled to take out probate or letters of administration[6], or, where the holder made a will[7], to the person to whom, in the opinion of the Director of Savings, the amount would be payable on probate or administration with the will annexed[8], or to a person who satisfies the Director of Savings that he is entitled to receive the amount or any part of it in right of his being the person who paid the funeral expenses, or a creditor, or a person having a beneficial interest in the estate[9], or to some other specified person[10].

1 As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 As to the application of the Premium Savings Bonds Regulations 1972, SI 1972/765, to the Isle of Man see reg 33 (amended by SI 2007/1898).

3 As to the application of the Premium Savings Bonds Regulations 1972, SI 1972/765, to the Channel Islands see reg 34 (amended by SI 1986/2001; SI 2007/1898).

4 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 12(1). If it subsequently appears that the grant was invalid or deficient, the payment is nevertheless deemed to have been duly made: reg 12(2). The Director of Savings may require evidence of the identity or title of a payee: see reg 29(1). He may accept as conclusive proof of the death of the holder of the bond any evidence which establishes to his satisfaction the fact that the holder has not been heard of for at least seven years: reg 29(2). 'Holder of a bond' includes any person beneficially interested at any time, whether absolutely or contingently, in the personal estate of the deceased holder of a bond: reg 29(2). As to the Director of Savings see PARA 810 et seq.

5 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 13(1) (amended by SI 1984/601).

6 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 13(1)(a).

7 'Will' includes a codicil: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 13(3).

8 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 13(1)(b). Recipients under reg 13(1)(b) or reg 13(1)(c) (see the text and note 9) who are aged 16 or over may give valid receipts: see reg 13(2). Where a person to whom any sum may be paid under reg 13(1)(b) or reg 13(1)(c) has died before payment has been made to him, that sum or any part of it may be paid to any person to whom it might have been paid if the first mentioned person had, immediately before his death, been the holder of the bonds in question: reg 13(1) proviso. As to administration with the will annexed see EXECUTORS AND ADMINISTRATORS.

9 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 13(1)(c). See further note 8.

10 As to the recipient where the deceased was a British subject whose next of kin reside abroad see the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 13(1)(d). As to the recipient where the deceased was a foreign seaman or foreign subject see reg 13(1)(e), (f). As to the

recipient where the estate devolves on the Crown see reg 13(1)(g). As to British citizenship generally see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 7 et seq.

Payment made in accordance with the law of the holder's residence at the time of his death is deemed to have been duly made unless before making payment the Director of Savings received notice that the holder was at the time of his death domiciled elsewhere: reg 14.

1368. Documents. The loss or destruction of any document issued by the Director of Savings in pursuance of the Premium Savings Bonds Regulations[1] must be notified in writing to the Director of Savings as soon as practicable by the person entitled to possession of the document[2]. If it appears to the Director of Savings that any document so issued has been issued in error, lost, destroyed or tampered with, or is in such a condition as to render it desirable that it should be replaced by a new document, he may issue[3] a new document in lieu of the old document to any person who satisfies him that he is entitled to the possession of the document[4].

Where any application is required[5] to be made in a manner approved by the Director of Savings, the document in which the application is made must contain a full and specific statement of the particulars required to be given, and any such document which is required by the Director of Savings to be signed by any person must be signed by that person[6]. Where any document is required[7] to be signed by any person and that person is unable to write, it is sufficient if the document is marked by that person in the presence of a witness in such manner as the Director of Savings may require[8]. Any mistake in any document received from the Director of Savings[9] must, as soon as practicable, be notified in writing to the Director of Savings by the person receiving the document[10]. If the Director of Savings is satisfied that any transaction effected or thing done, or purporting to have been effected or done[11], has been effected or done in error, he may cancel the transaction and may take all such steps as are, in his opinion, necessary to rectify the error, and may for that purpose require the surrender to him of any bond or other document[12].

1 Ie the Premium Savings Bonds Regulations 1972, SI 1972/765. Regulation 18(1) also applies to any document issued by the Postmaster General or the Director of Savings in pursuance of any regulation revoked by the Premium Savings Bonds Regulations 1972, SI 1972/765: reg 18(1). As to the Director of Savings see PARA 810 et seq. As to the transfer of functions from the Postmaster General see POST OFFICE vol 36(2) (Reissue) PARAS 1–4.
2 See the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 18(1).
3 The Director of Savings may attach to the issue of any new document such conditions as to indemnity or otherwise as he thinks fit: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 18(3).
4 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 18(2).
5 Ie by the Premium Savings Bonds Regulations 1972, SI 1972/765.
6 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 28.
7 Ie by the Director of Savings or by the Premium Savings Bonds Regulations 1972, SI 1972/765.
8 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 20.
9 Ie in pursuance of the Premium Savings Bonds Regulations 1972, SI 1972/765. Regulation 21(1) also applies to any document received from the Postmaster General or the Director of Savings in pursuance of any regulations revoked by the Premium Savings Bonds Regulations 1972, SI 1972/765: see reg 21(1).
10 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 21(1).
11 Ie in accordance with the Premium Savings Bonds Regulations 1972, SI 1972/765, or any regulations revoked by them: see reg 21(2).
12 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 21(2).

1369. Obligation of secrecy. A person employed in connection with business arising under the Premium Savings Bonds Regulations 1972[1] must not disclose to

any person, other than the Director of Savings or a person employed in carrying the regulations into execution, the name of the purchaser or holder of any bond, the number of bonds purchased or held by any person, or the amount paid to any person in respect of a bond[2]. However, this does not prevent a person authorised for the purpose by the Director of Savings from disclosing information to any person in connection with an offence committed with reference to any bond or for the purpose of ascertaining whether or not an offence has been so committed nor does it prevent the Director of Savings from complying with a notice served on him under the requirement[3] to deliver or make available documents relating to liability of a taxpayer[4].

Information such as the name of the purchaser or holder of any bond, the number of bonds purchased or held by any person and the amount paid in respect of a bond[5] may be disclosed in accordance with, and subject to such conditions as may be specified in, arrangements made by the Director of Savings for the purpose of enabling the person to whom the information is disclosed to provide, or assist in connection with the provision of, relevant information[6] to the purchaser or holder of any bond, and any such person is thereby subject to the obligation of secrecy as if he were a person employed in connection with business arising under the regulations[7].

1 Ie the Premium Savings Bonds Regulations 1972, SI 1972/765.
2 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 30(1). As to the purchase of premium bonds see PARA 1363. As to the Director of Savings see PARA 810 et seq.
3 Ie under the Taxes Management Act 1970 s 20(3): see INCOME TAXATION vol 23(2) (Reissue) PARA 1700.
4 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 30(2) (amended by SI 1988/1356; SI 1991/1337).
5 Ie information of the description mentioned in the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 30(1) (see the text to note 2).
6 For these purposes, 'relevant information' means information about any investment opportunities, services or facilities available from or through the Director of Savings, including any information about: (1) the National Savings Bank; (2) the National Savings Stock Register; or (3) any means by which the Treasury raises money under the auspices of the Director of Savings: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 30(4) (added by SI 1997/1862). As to the National Savings Bank see PARA 810 et seq. As to the National Savings Stock Register see PARA 1347. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
7 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 30(3) (added by SI 1997/1862).

1370. Determination of disputes. Any dispute[1] between the Director of Savings[2] and the holder of any premium savings bond[3], or a person who is or claims to be the personal representative, next of kin or creditor of a holder, or the trustee in bankruptcy or assignee of a bankrupt or insolvent holder[4], or a person who claims to be entitled to any bond[5], must be referred in writing to a person known as the 'adjudicator'[6], whose award is final and binding on all parties[7].

1 As to what amounts to a dispute cf *R v Chief Registrar of Friendly Societies, ex p Mills* [1970] 3 All ER 1076, [1970] 1 WLR 1534, DC.
2 As to the Director of Savings see PARA 810 et seq.
3 See the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 22(1)(a).
4 See the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 22(1)(b).
5 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 22(1)(c).
6 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 22(1) (amended by SI 1991/3116). 'Adjudicator' means a person appointed under the Friendly Societies Act 1992 s 84 (now repealed): Premium Savings Bonds Regulations 1972, SI 1972/765, reg 2(1) (definition added by SI 1992/3116). Where a dispute was referred before 1 January 1993 to the chief registrar of

friendly societies or a deputy appointed by him, that dispute is to be treated as if it had been referred to the adjudicator, and any thing done in relation to such a dispute by the chief registrar, any deputy appointed by him or the assistant registrar is to be treated as a thing done by the adjudicator: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 22(5) (added by SI 1992/3116). The adjudicator may administer oaths to witnesses appearing before him: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 22(2) (amended by SI 1992/3116). As to fees see the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 22(4) (amended by SI 1992/3116). As to the trustee in bankruptcy see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 316 et seq.

7 See the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 22(3) (amended by SI 1992/3116).

(iv) Government Annuities

1371. Power to grant annuities. Although the National Debt Commissioners[1] formerly had power to grant immediate annuities for life, either as government annuities[2] or as savings banks annuities[3], their power to do so is now limited to power to grant life annuities[4] by way of commutation of a savings bank insurance[5] or to grant an insurance or a savings bank annuity[6] on the surrender of a savings bank insurance or on default in the payment of premiums in respect of such an insurance[7].

Immediate life annuities and savings bank annuities are charged on the National Loans Fund[8], and issued out of the National Loans Fund with recourse to the Consolidated Fund[9] at such times as the Treasury directs[10], and deferred life annuities and savings bank annuities and all savings bank insurances are charged on and paid out of the Government Annuities Investment Fund[11].

1 As to the National Debt Commissioners see PARA 1332. Anything under the Government Annuities Act 1929 required or authorised to be done to, by or in respect of the commissioners may be done to, by or in respect of the Comptroller General or Assistant Comptroller acting under the commissioners: see s 68. As to the Comptroller General see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 724–726.

2 Ie under the Government Annuities Act 1929 s 1 (repealed).

3 Ie under the Government Annuities Act 1929 s 37 (repealed).

4 Ie under the Government Annuities Act 1929 s 45: see PARA 1372.

5 'Savings bank insurance' meant a contract for the payment of a sum of money: (1) on the death of the person or one of the persons with whom it was made; or (2) to be made on the attainment by the person with whom it was made of a specified age or sooner in the case of his death: Government Annuities Act 1929 s 37 (repealed).

6 Ie under the Government Annuities Act 1929 s 46: see PARA 1373.

7 Finance Act 1962 s 33(1), (2) (s 33(1) amended by the Statute Law (Repeals) Act 1974).

8 As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq.

9 As to the Consolidated Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 34 (Reissue) PARA 952 et seq.

10 Government Annuities Act 1929 s 8(1) (amended by the Finance Act 1962 Sch 11 Pt VI; the Statute Law Revision Act 1963; and the National Loans Act 1968 s 8(1), (2)); Government Annuities Act 1929 s 41(1) (amended by the Statute Law Revision Act 1963; and the National Loans Act 1968 s 8(1), (2)). As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

11 Government Annuities Act 1929 ss 8(2), 41(2). As to the Government Annuities Investment Fund see s 67 (amended by the Finance Act 1962 Sch 11 Pt VI; and the Statute Law Repeals Act 1963). The fund was established under the Government Annuities (Investments) Act 1864 (repealed).

1372. Commutation of savings bank insurance for annuity. Any person entitled to a savings bank insurance[1] is entitled to commute it for a life annuity equivalent to the sum payable on death under the insurance on depositing during

his lifetime with the National Debt Commissioners[2] a written direction to that effect and nominating in a form approved by them the person to whom the annuity is to be paid[3].

1 As to the meaning of 'savings bank insurance' see PARA 1371 note 5.
2 As to the National Debt Commissioners see PARA 1332. See also PARA 1371 note 1.
3 Government Annuities Act 1929 s 45(1). When approved by the commissioners the annuity commences on the 6 January, 6 April, 6 July or 6 October next following the death, and is paid in respect of the quarter commencing on that date: s 45(2). For the purposes of ss 45, 46, the tables constructed under s 53 (repealed) for calculating the amounts of annuities and insurances continue in force by virtue of the Finance Act 1962 s 33(3), and may be varied, added to or substituted by virtue of s 33(4). As to the tables see the Savings Bank Annuities (Tables) Order 1954, SI 1954/1578, and the Savings Bank Annuities (Tables) Order 1955, SI 1955/419 (both amended by SI 1963/1178; SI 1968/1731; SI 1973/1407; SI 1974/1935; SI 1975/692; SI 1977/1536). As to the use of these tables to assess the value of an ordinary annuity to an estate for what are now inheritance tax purposes cf *Westminster Bank Ltd v IRC* [1954] 1 All ER 240, [1954] 1 WLR 242.

As to transfers of life annuities see the Government Annuities Act 1929 s 13 (amended by the Finance Act 1962 Sch 11 Pt VI); and as to the transfer of savings bank annuities see the Government Annuities Act 1929 s 44.

1373. Surrender of savings bank insurance or default in paying premiums. If a person entitled to a savings bank insurance[1], having paid premiums for not less than two years, desires to surrender his policy, or defaults in paying premiums, the National Debt Commissioners[2], at his option, must pay him an ascertained sum of money or grant him such paid up policy or such immediate or deferred savings bank annuity as is equivalent in value to that sum[3].

1 As to the meaning of 'savings bank insurance' see PARA 1371 note 5.
2 As to the National Debt Commissioners see PARA 1332. See also PARA 1371 note 1.
3 Government Annuities Act 1929 s 46. This does not, however, apply to an insurance granted on condition that no part of the premiums paid are to be returnable: s 46 proviso. As to tables for ascertaining values see PARA 1372 note 3.

1374. Payment of annuities. Government annuities are payable quarterly on 5 January, 5 April, 5 July and 5 October[1]. At the expiration of 30 days after proof of any death on which a life annuity expires a further quarterly payment becomes payable, if claimed within two years of the death, to the person entitled to the annuity or his personal representatives[2].

Payment is made in the case of a life annuity by warrant[3], except that in the case of a savings bank annuity it may instead be credited to the savings bank account of the person entitled[4]. Under certain conditions, warrants may be sent by post[5] and a large proportion are so sent.

There are special provisions as to the validity of payments to personal representatives[6], and as to the payment of sums not exceeding £5,000 on death without probate or other proof of title of the personal representatives[7].

1 Government Annuities Act 1929 ss 9(1), 42(1). Money for payment is issued out of the National Loans Fund: National Loans Act 1968 s 8(1). As to the certification of amounts payable on the quarter days see the Government Annuities Act 1929 s 19 (amended by the National Loans Act 1968 s 8). As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq.
2 See the Government Annuities Act 1929 ss 9(3), 11, 42(3), (4) (ss 9(3), 42(3) amended by the Finance Act 1962 Sch 11 Pt VI).
3 See the Government Annuities Act 1929 ss 10, 27(2), 43, 52(1); Treasury Warrant dated 22 September 1930, SR & O 1930/754; the Government Annuities Payment Regulations 1958, SI 1958/1181, reg 1; and the Savings Bank Annuities Regulations 1969, SI 1969/1336, reg 3(1), (3), (6).

4 Trustee Savings Banks Life Annuity Regulations 1930, SR & O 1930/106, regs 13, 14 (reg 13 amended by SI 1965/567); Government Annuities Payment Regulations 1958, SI 1958/1181, reg 2; Savings Bank Annuity Regulations 1969, SI 1969/1336, reg 3(1), (2).

5 See the Government Annuities Act 1929 ss 24, 59 (both amended by the National Loans Act 1968 s 8(2)); the Government Annuities Payment Regulations 1958, SI 1958/1181, reg 3(1); and the Savings Bank Annuity Regulations 1969, SI 1969/1336, reg 3(6).

6 See the Government Annuities Act 1929 ss 20, 56.

7 See the Government Annuities Act 1929 ss 21, 57 (both amended by virtue of SI 1984/539).

1375. Unclaimed annuities. The National Debt Commissioners[1] must annually make up an account of all government life and savings banks annuities which have remained unclaimed for three years; and all such annuities, and all expired annuities, with the unclaimed quarterly arrears in each case, cease to be charged on and issued out of the National Loans Fund[2] as from the date from which they have remained unclaimed or on which they expired[3].

1 As to the National Debt Commissioners see PARA 1332. See also PARA 1371 note 1.

2 As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq.

3 See the Government Annuities Act 1929 ss 15(1), 50. This does not operate, however, to prejudice the rights of persons entitled to unclaimed government life annuities to claim the quarterly arrears and future payments, on supplying the proof of the existence of the nominee required by s 10 (see PARA 1110), and on such claim and proof the commissioners may reinstate the annuity and charge it, with the quarterly payments, on the National Loans Fund: s 15(1) proviso. Nor does this prejudice the rights of any person entitled to an unclaimed savings bank annuity who may at any subsequent period prove his title to the commissioners' satisfaction: s 50 proviso.

1376. Offences and penalties. Any person who receives a payment under a government life annuity after the death of the nominee, knowing him to be dead, is liable to forfeit treble the amount so received and also £500[1]. Any person who receives a payment under a savings bank annuity after the death of the nominee must pay the National Debt Commissioners double the amount so received, with interest at five per cent[2]. Any person giving a false certificate or making an untrue declaration is liable to a penalty[3]. It is also an offence to obtain property by fraud[4]. There are special provisions as to offences in Scotland, Northern Ireland, the Channel Islands and the Isle of Man[5].

1 See the Government Annuities Act 1929 s 31. Penalties and forfeitures imposed under Pt I (ss 8–36), other than those recoverable summarily, are recoverable by civil action in the High Court (see s 35(1); the Crown Proceedings Act 1947 s 13, Sch 1 para 1; and CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) PARA 107), and must be paid into the Exchequer (Government Annuities Act 1929 s 35(2)). As to the reward of informers see s 35(3).

2 Government Annuities Act 1929 s 61(1). The penalty is recoverable in a county court: s 61(1). As to the National Debt Commissioners see PARA 1332. See also PARA 1371 note 1.

3 See the Government Annuities Act 1929 ss 32, 62(2) (s 32 amended by the Finance Act 1962 Sch 11 Pt VI; the Criminal Justice Act 1982 ss 37, 38, 46; and by the Statute Law (Repeals) Act 1998). As to the certificates and declarations see the Government Annuities Act 1929 s 25.

4 See the Fraud Act 2006 s 1; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 310.

5 See the Government Annuities Act 1929 s 32(4) (amended by the Statute Law (Repeals) Act 1998); the Government Annuities Act 1929 s 33 (amended by the Finance Act 1962 Sch 11 Pt VI); the Government Annuities Act 1929 ss 35(1), 62(3), (4) (s 62(3), (4) amended by the Statute Law (Repeals) Act 1998); and the Government Annuities Act 1929 s 63 (amended by the Finance Act 1962 Sch 11 Pt VI).

(5) LOANS BY PUBLIC WORKS LOAN COMMISSIONERS

(i) Administration

1377. The Public Works Loan Commissioners. The Public Works Loan Commissioners[1] were constituted for the purpose of making loans to local authorities and certain other bodies[2] under the enactments relating to public works loans[3]. There are 12 commissioners[4]. They are appointed by Her Majesty, one being appointed to be chairman and one to be deputy chairman[5], and they hold office for four years, three of them retiring each year on 1 April in that year[6]. The commissioners may not receive any salary, fee or emolument for their services[7].

Meetings of the commissioners are convened by the secretary to the commissioners from time to time, as the business to be transacted may require[8]. A minute book must be kept, in which applications for loans and minutes of the proceedings of the commissioners are to be recorded[9]. Where minutes of a meeting of the commissioners are signed by a person purporting to be chairman of that or the next meeting, they are receivable in evidence without further proof and, unless the contrary is proved, the meeting is deemed to have been properly held[10].

1 The commissioners together constitute the Public Works Loan Board, which operates within the UK Debt Management Office, an executive agency of the Treasury. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
2 As to the objects for which money may be lent see PARA 1385.
3 See the Public Works Loans Act 1875 s 4. The enactments referred to in the text are the Public Works Loans Act 1875 and any enactment passed before or after that Act authorising or referring to public works loans: see s 4.
4 Public Works Loans Act 1946 s 1(2).
5 Public Works Loans Act 1946 s 1(1), (2) (s 1(1) amended by the Statute Law Revision Act 1963). A commissioner must sign a form of declaration: see the Public Works Loans Act 1875 s 4 (amended by the Public Works Loans Act 1946 Sch 2). As to the form itself see the Public Works Loans Act 1875 s 4, Sch 2.
6 Public Works Loans Act 1946 s 1(3) (amended by the Statute Law Revision Act 1963). A retired commissioner is eligible for reappointment, and a commissioner appointed to fill a casual vacancy holds office only until the person he replaces would have retired: s 1(4), (5). An act or proceeding of the commissioners is not to be questioned on account of any vacancy or vacancies in their body: Public Works Loans Act 1875 s 5(5).
7 Public Works Loans Act 1946 s 4.
8 Local Loans (Procedure) Regulations 1968, SI 1968/458, reg 1(1); and see PARA 1381 note 2. As to the secretary see PARA 1378. If at any meeting the chairman is not present, the deputy chairman is to be the chairman of the meeting; if neither is present, the commissioners present must choose one of their number to be the chairman: reg 1(2). Three commissioners form a quorum: reg 1(3). All questions arising at any meeting are to be decided by a majority of votes, and in the event of an equality of votes the chairman of the meeting has a second or casting vote: reg 1(4).
9 Local Loans (Procedure) Regulations 1968, SI 1968/458, reg 1(5).
10 See the Public Works Loans Act 1875 s 5(4).

1378. Secretary and other officers. The Public Works Loan Commissioners[1] may appoint or employ a secretary, solicitor, civil engineer, surveyor, and such number of officers, clerks, messengers and other persons as they may, with the consent of the Minister for the Civil Service, deem necessary[2]. The secretary may act for the commissioners under their direction[3] in conveyancing matters, in relation to mortgages[4] and in relation to local loans under the Public Works Loans Act 1965[5], and securities for loans may be taken by him on their behalf[6]. Property vested in and securities given to the secretary for the time being vest

automatically in his successor on his death, removal or resignation[7]. If the secretary is ill or absent or otherwise unable to act, the commissioners may authorise an assistant secretary to perform his functions[8].

1 As to the Public Works Loans Commissioners see PARA 1377.
2 Public Works Loans Act 1875 s 6; Minister for the Civil Service Order 1968, SI 1968/1656, art 2(1)(e). The commissioners may from time to time assign to any person so appointed or employed by them such salary or remuneration as they may, with the sanction of the Minister for the Civil Service, think proper: Public Works Loans Act 1875 s 6; Minister for the Civil Service Order 1968, SI 1968/1656, art 2(1)(e). As to the remuneration to be paid to such appointed persons see the Public Works Loans Act 1875 s 6. As to the Minister for the Civil Service see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 427, 549–550.
3 The secretary is presumed, unless the contrary is shown by an interested party, to have acted under the direction of the commissioners: Public Works Loans Act 1875 s 8.
4 See the Public Works Loans Act 1875 s 8. When the commissioners take possession of mortgaged property, the mortgagor's interest and powers vest in the secretary: s 22(1).
5 See the Public Works Loans Act 1875 s 8; and the Public Works Loans Act 1965 s 2(5), Schedule para 3 (amended by the Public Works Loans Act 1967 s 2(3)).
6 Public Works Loans Act 1875 s 20. The fact that the secretary is a party to a security is conclusive evidence that the security is in the prescribed form: see s 32; and see also PARA 1388.
7 See the Public Works Loans Act 1875 s 7 (amended by the Crown Proceedings Act 1947 Sch 2). Receipts required to be given on behalf of the commissioners are to be given by the secretary: Local Loans (Procedure) Regulations 1968, SI 1968/458, reg 5. All documents of the commissioners are, if purporting to be signed by the secretary, deemed, until the contrary is proved, to be made or issued by the commissioners; directions given or acts done by him are deemed, until the contrary is proved, to be given or done by them; all documents may be proved by the production of a copy or extract purporting to be certified by him to be true; and no proof is required of his handwriting or official position: reg 6.
8 Public Works Loans Act 1944 s 4(1). If an assistant secretary purports to exercise powers under s 4 he is presumed, unless the contrary is shown, to do so with the commissioners' authority: s 4(2). The assistant secretary and not more than two other officers authorised by the commissioners for the purpose are competent to perform any act authorised by the Local Loans (Procedure) Regulations 1968, SI 1968/458, to be performed by the secretary: reg 7.

1379. Accounts. The Public Works Loan Commissioners[1] must keep at the Bank of England such accounts as the Treasury may direct[2]. Two main accounts are kept: the Public Works Loans Account into which payments by borrowers from the commissioners in respect of repayments or interest are to be made[3], and the Public Works Loans (Advances) Account into which money required by the commissioners for advances is paid by the National Loans Fund[4].

The commissioners must, in respect of each financial year, prepare in such form and manner as the Treasury may direct an account of all loans made by them in that year, and of the sums paid or applicable in that year in or towards the discharge of the principal or interest of all loans made by them[5]. This account is required to be sent by the end of the November after the end of the financial year to which it relates to the Comptroller and Auditor General[6], who is required to examine, certify and report on the account and lay copies of it together with his report before each House of Parliament[7].

1 As to the Public Works Loans Commissioners see PARA 1377.
2 Public Works Loans Act 1875 s 43 (amended by the National Loans Act 1968 Sch 6 Pt II). Every such account is deemed to be a public account: Public Works Loans Act 1875 s 43 (as so amended). As to the Bank of England see PARA 793 et seq. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
3 See the Local Loans (Procedure) Regulations 1968, SI 1968/458, reg 4.
4 See the Local Loans (Procedure) Regulations 1968, SI 1968/458, reg 3(2). As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq.
5 See the National Loans Act 1968 s 3(6).

6 As to the Comptroller and Auditor General see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 724–726.

7 See the National Loans Act 1968 s 3(6).

1380. Returns. The Public Works Loan Commissioners[1] must annually cause to be made out up to the end of every financial year[2] a report of their transactions during the year, and the report must contain or have annexed to it the prescribed particulars[3] respecting money issued to and loans granted by them, and the execution of their duties, and such other particulars as they think fit[4].

1 As to the Public Works Loans Commissioners see PARA 1377.

2 'Financial year' means the year ending the 31 March: Public Works Loans Act 1875 s 51.

3 Money required by the commissioners is issued out of the National Loans Fund: see PARAS 1334, 1383. As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq.

4 See the Public Works Loans Act 1875 s 5(3). The particulars must include a statement of any difference that may have arisen between the commissioners and any public department regarding the grant of any loan or the construction of any Act relating to loans by them: s 5(3). The report must be transmitted to the Treasury and laid by the Treasury before both Houses of Parliament: s 5(3) (amended by the National Loans Act 1968 Sch 6 Pt II). As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq. As to the laying of documents before Parliament see the Laying of Documents before Parliament (Interpretation) Act 1948; and PARLIAMENT; STATUTES.

1381. Regulations. The Public Works Loan Commissioners[1] have power with Treasury approval to make regulations for carrying into effect the Public Works Loans Act 1875[2]. The fees to be paid by applicants for loans are no longer governed by these regulations, but by regulations made by the Treasury after consultation with the commissioners[3].

1 As to the Public Works Loans Commissioners see PARA 1377.

2 See the Public Works Loans Act 1875 s 41. The regulations may relate in particular to the commissioners' quorum and proceedings, the authentication of documents etc, application for loans, forms to be used and the relations between the commissioners and the Bank of England: see s 41 (amended by virtue of the Local Authorities Loans Act 1945 s 2(3); and by the National Loans Act 1968 Sch 6 Pt II). As to the Bank of England see PARA 793 et seq. Regulations must be submitted for the approval of the Treasury; notification of their making and the place where copies may be purchased must be published in the London Gazette; and copies must be laid before both Houses of Parliament, normally before the regulations come into operation: Public Works Loans Act 1875 s 41 (amended by the Statute Law (Repeals) Act 1986); Statutory Instruments Act 1946 ss 4(3), 12(2); and see STATUTES. Regulations may be rescinded, altered or added to: Public Works Loans Act 1875 s 41. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq. As to laying documents before Parliament see the Laying of Documents before Parliament (Interpretation) Act 1948; and PARLIAMENT; STATUTES.

The regulations in force under s 41 are the Local Loans (Procedure) Regulations 1968, SI 1968/458 (amended by SI 1991/1139; SI 1992/1565). As to meetings of the commissioners see the Local Loans (Procedure) Regulations 1968, SI 1968/458, reg 1; and PARA 1377. As to applications for loans see reg 2; and PARA 1384. As to payment of loans see reg 3; and PARA 1379. As to repayment of loans see reg 4; and PARA 1379. As to receipts and discharges see reg 5; and PARA 1378. As to powers of the secretary see reg 6; and PARA 1378. As to powers of other officers see reg 7; and PARA 1378.

In the Public Works Loans Act 1875, 'prescribed' means prescribed by regulations made under s 41 with the approval of the Treasury: s 51. Power to prescribe forms of security is conferred by s 32, but forms prescribed under s 32 are not printed in the statutory instruments series.

3 See the Local Authorities Loans Act 1945 s 2(3). Regulations made under the Local Authorities Loans Act 1945 must be laid before Parliament and are subject to annulment in pursuance of a resolution of either House of Parliament: see s 9(1), (2) (s 9(1) amended by the Statute Law

Revision Act 1953); the Statutory Instruments Act 1946 ss 4, 5; and STATUTES. The regulations in force are the Public Works Loans (Fees) Regulations 1991, SI 1991/1539 (amended by SI 1992/1566; SI 1997/985).

1382. Legal proceedings and service of notices. The Public Works Loan Commissioners[1] are an authorised government department for the purpose of taking and defending legal proceedings[2]. They also have power for the purpose of the execution of the Public Works Loans Act 1875, to conduct voluntary examinations, to administer oaths and to take affidavits and declarations[3]. Notices, directions, orders and other documents may be served and sent by post and, until the contrary is proved, are deemed to have been served and received respectively at the time when the letter containing them would be delivered in the ordinary course of post[4]. Notices and documents required[5] to be served on the commissioners may be served by serving them on their secretary, or by sending them addressed to or delivering them at the office of the commissioners[6].

1 As to the Public Works Loan Commissioners see PARA 1377.
2 As to legal proceedings by the Crown see CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) PARA 107 et seq; and as to legal proceedings against the Crown see CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) PARA 110 et seq.
3 Public Works Loans Act 1875 s 5(2).
4 See the Public Works Loans Act 1875 s 47. In proving such service or sending, it is sufficient to prove that the letter containing the notice etc was prepaid, and properly addressed, and put into the post: s 47.
5 Ie required by the Public Works Loans Act 1875 or by any regulation made under it: see s 48.
6 Public Works Loans Act 1875 s 48. As to the secretary see PARA 1378. Notices and documents required to be served by or on the commissioners, or to be made or issued by them, must be in writing or in print or partly in writing and partly in print: s 48.

1383. Funds from which loans are made. The Treasury[1] may issue out of the National Loans Fund[2] such sums as are required by the Public Works Loan Commissioners for making authorised loans[3]. Interest on loans made by the commissioners is to be paid at such rates as the Treasury may determine[4]. All sums paid or applicable in or towards the discharge of the principal or interest of any loans made are to be paid into the National Loans Fund[5].

1 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
2 As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq.
3 See the National Loans Act 1968 s 3(1); and see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 736. As to the Public Works Loan Commissioners see PARA 1377.
4 See the National Loans Act 1968 s 3(2); PARA 1386; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 736.
5 See the National Loans Act 1968 s 3(3). Where any security for a loan is enforced the net receipts only are to be paid into the National Loans Fund: s 3(3) proviso; and see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 736.

(ii) Loans

1384. The granting of loans. In considering whether to make a loan the Public Works Loan Commissioners[1] must have regard to the sufficiency of the security[2]. However, they are no longer required in considering the propriety of a loan to justify it on the basis of the public benefit which could be expected on its application[3]. The purposes for which the commissioners may make a loan are specified in the National Loans Act 1968[4]. A limit is imposed on the total amount of the loans which may be made by the commissioners[5].

The power of the Public Works Loan Commissioners to make loans[6] includes the power to enter into undertakings to make loans[7].

Applications for loans must be in the form required by the commissioners, and the commissioners may require applicants to provide such information as they think necessary for their consideration of the applications[8].

1 As to the Public Works Loans Commissioners see PARA 1377. As to the purposes for which the commissioners may lend see PARA 1385.
2 As to the security for repayment of loans see PARA 1388.
3 See the Public Works Loans Act 1964 s 3(a) (repealed).
4 See the National Loans Act 1968 s 3(11), Sch 4; and PARA 1385.
5 The aggregate of: (1) any commitments of the commissioners outstanding in respect of undertakings entered into by them to grant local loans; and (2) any amount outstanding in respect of the principal of any local loans, must not at any time exceed £55,000 million or such other lower or higher sum, not exceeding £70,000 million, as the Treasury may from time to time specify by order made by statutory instrument: National Loans Act 1968 s 4(1) (s 4 substituted by the Finance Act 1984 s 125(1); and the National Loans Act 1961 s 4(1) amended by the Finance Act 1990 s 130). See further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 736. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.
6 Ie under the National Loans Act 1968 s 3(1): see PARA 1383.
7 National Loans Act 1968 s 3(5) (amended by the Finance Act 1984 Sch 23).
8 Local Loans (Procedure) Regulations 1968, SI 1968/458, reg 2.

1385. Objects for which money may be lent. The Public Works Loan Commissioners[1] may lend money[2] to any local authority[3] for any purpose for which the authority has power to borrow whether by virtue of any enactment or otherwise[4]. The commissioners also have powers to lend money for certain other statutory purposes[5], but beyond this the commissioners' lending powers extend no further.

1 As to the Public Works Loans Commissioners see PARA 1377.
2 The loans are known as 'local loans': National Loans Act 1968 s 3(12). See also CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 736.
3 'Local authority' means:
   (1) in relation to England and Wales: (a) a billing authority, or a precepting authority as defined in the Local Government Finance Act 1992 s 69 (see RATING AND COUNCIL TAX vol 39(1) (Reissue) PARA 821; LOCAL GOVERNMENT); (b) a fire and rescue authority in Wales constituted by a scheme under the Fire and Rescue Services Act 2004 s 2 or a scheme to which s 4 applies (see FIRE SERVICES); (c) a levying body within the meaning of the Local Government Finance Act 1988 s 74 or a body as regards which s 75 applies (see LOCAL GOVERNMENT vol 29(1) (Reissue) PARA 530); (d) a functional body within the meaning of the Greater London Authority Act 1999 (see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 213); and (e) the Greater London Magistrates' Courts Authority (see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 616) (National Loans Act 1968 s 3(11) (amended by the Finance Act 1984 s 125(2); National Loans Act 1968 s 3, Sch 4 para 1(a) (substituted by SI 1990/776; and amended by the Local Government Finance Act 1992 Sch 13 para 26; the Access to Justice Act 1999 Sch 12 para 2, Sch 15 Pt V; the Greater London Authority Act 1999 Sch 34 Pt I; the Courts Act 2003 Sch 8 para 127, Sch 10; and by the Fire and Rescue Services Act 2004 Sch 1 para 22));
   (2) any port health authority or joint board constituted by an order under the Public Health Act 1936 or any enactment repealed by it (National Loans Act 1968 Sch 4 para 1(b)).
4 National Loans Act 1968 Sch 4 para 1. As to the borrowing powers of local authorities see LOCAL GOVERNMENT vol 29(1) (Reissue) PARA 594 et seq.
5 Ie loans to any authority in Great Britain under the Harbours and Passing Tolls etc Act 1861 s 3 (see PORTS AND HARBOURS vol 36(1) (2007 Reissue) PARA 680) (National Loans Act 1968 Sch 4 para 2 (amended by the Merchant Shipping Act 1988 Sch 7)); and loans to any person under the Housing Act 1985 s 451 (see HOUSING vol 22 (2006 Reissue) PARA 687) or the Housing Act 1996 s 23 (see HOUSING vol 22 (2006 Reissue) PARA 66) (National Loans Act 1968 Sch 4

para 3 (amended by the Housing (Consequential Provisions) Act 1985 Sch 2 para 15; and by SI 1996/2325)). As to the meaning of 'Great Britain' see PARA 2 note 3.

1386. Fees for and interest on loans. The fees to be paid to the Public Works Loan Commissioners[1] by persons to whom they make loans are fixed by Treasury regulations[2]. The rates of interest to be charged on loans made by the commissioners are determined by the Treasury[3].

1 As to the Public Works Loans Commissioners see PARA 1377.

2 See the Local Authorities Loans Act 1945 s 2(3). As to the regulations see the Public Works Loans (Fees) Regulations 1991, SI 1991/1539 (amended by SI 1992/1566; SI 1997/985). As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

3 See the National Loans Act 1968 s 3(2). As to the determination of the rate of interest see s 5; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 736. References in the Housing (Financial Provisions) Act 1958 Sch 3 para 7(1) proviso (repealed) and the Local Authorities (Land) Act 1963 s 3(4) (see LOCAL GOVERNMENT vol 29(1) (Reissue) PARA 501) to the rate of interest in respect of any particular class of loans to local authorities, and references in any other enactment passed, or in any document made, before 27 February 1964 (i e the date of passing of the Public Works Loans Act 1964) to the rate fixed by the Treasury under the Public Works Loans Act 1897 s 1 (repealed), in respect of loans of a particular class are subject to the National Loans Act 1968 s 6(2): s 6(1). Where the time in question falls after 31 March 1968 any such reference to the rate at that time is to be construed as a reference to the rate at that time determined by the Treasury in respect of local loans of the class in question made on the security of local rates or, where more than one rate is so applicable, to such one of those rates as the Treasury may direct generally or with respect to any particular enactment or document: s 6(2). The directions made are to be published in the London Gazette: s 6(2). For the purposes of s 6(2), 'local rate' means any rate levied or assessed, the proceeds of which are applicable to public local purposes and which is levied on the basis of a valuation of property, and includes any sum which, although obtained in the first instance by a precept, certificate or other instrument requiring payment from some authority or officer, is or can be ultimately raised out of the rate (s 6(3)(a)); and 'security of local rates' includes a security guaranteed by local rate (s 6(3)(b)).

1387. Time for repayment of loans. Loans granted by the Public Works Loan Commissioners[1] are to be made repayable within 50 years or such other period as may be authorised by a special Act[2] relating to the loan[3] or, in the case of a loan to a local authority for any purpose[4], by the Act authorising the authority to borrow for that purpose[5]. Where a loan is made repayable within less than the full permissible period the commissioners may extend the time for repayment within that period[6].

The Treasury has power on the recommendation of the commissioners to postpone for not more than five years the payment of instalments of principal and interest, or either, in respect of a loan granted by the commissioners[7]. The commissioners have power to accept payment of the whole or any part of the principal and interest of any loan or other money secured by a mortgage before it falls due[8]; and if an individual liable as principal or surety in respect of principal or interest of any loan becomes bankrupt or insolvent, or enters into any composition or arrangement with his creditors, or has his affairs liquidated by arrangement, or, in the case of a company so liable, is wound up, the whole loan becomes due immediately unless in the case of a surety the commissioners think fit to accept some other surety[9].

1 As to the Public Works Loans Commissioners see PARA 1377.

2 Ie any Act passed before the Public Works Loans Act 1875 which authorises the commissioners to lend money for the purposes of any work mentioned in s 9, Sch 1 (repealed), or any Act passed after that Act which authorises the commissioners to lend money for any purpose: s 51. As to the objects for which money may be lent see PARA 1385.

3 See the Public Works Loans Act 1875 s 11 (amended by the Public Works Loans Act 1911 s 4; and the Public Works Loans Act 1964 Sch 3). Where no period is authorised by a special Act relating to the loan, the period of 50 years may in special circumstances be extended by the Treasury on the recommendation of the commissioners: see the Public Works Loans Act 1875 s 11 (as so amended). As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

4 As to the commissioners' general power to lend to a local authority for any purpose for which it has power to borrow see PARA 1385.

5 See the Local Authorities Loans Act 1945 s 2(2) (amended by the National Loans Act 1968 Sch 6 Pt II). As to the borrowing powers of a local authority see LOCAL GOVERNMENT vol 29(1) (Reissue) PARA 594 et seq.

6 Public Works Loans Act 1875 s 11 (as amended: see note 3). Before granting an extension the commissioners must be satisfied as to the sufficiency of the security for the loan: s 11 (as so amended). As to security for repayment of loans see PARA 1388. The expiration of the time fixed for repayment of a loan does not affect the commissioners' power of enforcing payment of sums due in respect of it: s 34.

7 Public Works Loans Act 1875 s 37. The postponement may be made on such terms as to the completion and improvement of the work for which the loan was made and the ultimate payment of the principal and interest as the Treasury may authorise on the recommendation of the commissioners: see s 37. In the case of a loan to a local authority, the commissioners and the authority may agree that it is to be a condition of the postponement of any interest payment that the interest postponed be added to the principal of the loan: see the Local Authorities Loans Act 1945 s 4(3). Nothing in any enactment requiring the instalments of repayment of a loan to a local authority to be equal and periodical is to prevent these arrangements: see s 4(2).

8 Public Works Loans Act 1875 s 29; Public Works Loans Act 1965 s 2(5) (amended by the Local Government and Housing Act 1989 Sch 11 para 6); Public Works Loans Act 1967 s 2(2)(b), (3). The commissioners may release or convey the security for the loan to the person making the payment: see the Public Works Loans Act 1875 s 29.

9 See the Public Works Loans Act 1875 s 31. As to bankruptcy generally see BANKRUPTCY AND INDIVIDUAL INSOLVENCY; and as to the winding up of companies generally see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 432 et seq.

1388. Security for repayment of loans. Before advancing any money in respect of a loan, the Public Works Loan Commissioners[1] must take security[2] for its repayment with interest[3] unless the borrower is a relevant authority under the Public Works Loans Act 1965[4]. The security, where required, must consist of the security authorised by the special Act[5] relating to the loan, or, if none is so authorised, of a mortgage of property[6] or of a rate[7], or of both property and a rate[8]. Personal security must also be taken, unless the commissioners think fit to dispense with such security in a case in which in their opinion the mortgaged property or rate is sufficient security for the payment of the principal and interest of the loan within the stipulated period[9].

If default is made in any payment to the commissioners in respect of a loan they may enforce the security for the loan: (1) in the case of a mortgage or charge on property, by taking possession of[10], selling, mortgaging or letting[11] the property or any part of it[12]; (2) in the case of a charge on any rate, by assuming by notice in writing the powers of the mortgagor as to the making and levying of the rate[13]; or (3) in the case of any personal security, by taking the appropriate proceedings[14]. If the commissioners exercise the powers mentioned under head (1) or head (2) above, neither they nor their agents are liable to account for any money other than that which they actually receive out of the property or rate[15], and they are required to pay their net receipts only into the National Loans Fund[16].

Where the borrower is a relevant authority[17], the commissioners may enter into a loan agreement with it[18] and so long as any part of the principal of and interest on the loan remains outstanding, the loan becomes a charge on all the

revenues of the borrowing authority[19], and such a charge ranks equally with any other charges on these revenues, subject to any provision to the contrary made under any other enactment[20].

1 As to the Public Works Loans Commissioners see PARA 1377.

2 'Security' includes a mortgage; and 'mortgage' includes a charge and any instrument in the nature of a mortgage or charge: Public Works Loans Act 1875 s 51. As to mortgage generally see MORTGAGE.

3 Public Works Loans Act 1875 s 12. This provision does not apply to a loan secured by an automatic charge: Public Works Loans Act 1965 s 2(5), Schedule para 5. 'Automatic charge' means a charge imposed for securing a loan made in pursuance of an agreement to which s 2 (see the text and notes 17–20) applies: see s 2(5).

4 See the Public Works Loans Act 1965 s 2(1). 'Relevant authority' means: (1) a billing authority or a precepting authority as defined in the Local Government Finance Act 1992 s 69 (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARAS 5, 229; LOCAL GOVERNMENT); (2) a fire and rescue authority in Wales constituted by a scheme under the Fire and Rescue Services Act 2004 s 2 or a scheme to which s 4 applies (see FIRE SERVICES); (3) a levying body within the meaning of the Local Government Finance Act 1988 s 74 or a body as regards which s 75 applies (see LOCAL GOVERNMENT vol 29(1) (Reissue) PARA 530); (4) a functional body within the meaning of the Greater London Authority Act 1999 (see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 213); and (5) the Greater London Magistrates' Courts Authority (see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 616) (Public Works Loans Act 1965 s 2(1)(a) (amended by SI 1990/776; the Local Government Finance Act 1992 Sch 13 para 26; the Access to Justice Act 1999 Sch 12 para 2, Sch 15 Pt V; the Greater London Authority Act 1999 Sch 34 Pt I; the Courts Act 2003 Sch 8 para 127, Sch 10; and by the Fire and Rescue Services Act 2004 Sch 1 para 22)). Any relevant authority which does not otherwise have power to raise money by means of an agreement with the commissioners which gives rise to an automatic charge has the power to raise money by those means: Public Works Loans Act 1967 s 2(1).

5 As to the meaning of 'special Act' see PARA 1387 note 2.

6 Any toll, due, rent, imposition and other sum not being a rate (i e within the definition in note 7) is deemed to be property for this purpose: Public Works Loans Act 1875 s 51.

7 'Rate' means a rate, cess or assessment the proceeds of which are applicable to public local purposes and leviable on the basis of a valuation of property, and includes any sum which, although obtained in the first instance by a precept, certificate or other instrument requiring payment from some authority or officer, is or can be ultimately raised out of a rate: see the Public Works Loans Act 1875 s 51.

8 See the Public Works Loans Act 1875 s 12. See also s 18 (charge on property and priority of loans), s 19 (charge on rate of loan), s 30 (discharge of security and revesting of property on repayment of loan), s 32 (security to be in such form as may be prescribed by the commissioners under s 41 (see PARA 1381)), s 35 (security for works not commenced or completed at time of loan), s 38 (commissioners' power to accept substituted security), and s 39 (commissioners' power to concur in dispositions of mortgaged property). All money borrowed by a local authority together with any interest on the money borrowed, is charged indifferently on all revenues of the authority and all securities created by a local authority rank equally without any priority: Local Government Act 2003 s 13(3), (4); and see LOCAL GOVERNMENT. References to mortgagors or borrowers in the Public Works Loans Act 1875 include, if need be, their successors, heirs, executors, administrators and assigns and persons claiming through or under them: s 51.

9 Public Works Loans Act 1875 s 12.

10 See the Public Works Loans Act 1875 s 22 (commissioners' power when in possession, including power to make advances for the completion, repair etc of the property).

11 See the Public Works Loans Act 1875 s 25 (exercise of powers to sell or mortgage), s 26 (purchaser or mortgagee not liable to see to the validity of the sale or mortgage or to the application of money paid by him) and s 27 (terms of lease, sale, mortgage etc; protection of persons having interests in priority to loan and of lessees).

12 See the Public Works Loans Act 1875 s 21. See also s 28 (application of money arising from taking possession, lease, sale, mortgage etc). As to the general powers and liabilities of mortgagees see MORTGAGE.

13 See the Public Works Loans Act 1875 s 23 (which also provides for application of money levied).

14 See the Public Works Loans Act 1875 s 33 (amended by the Statute Law Revision Act 1898; the Courts Act 1971 Sch 11 Pt IV; and by the Statute Law (Repeals) Act 2004). The special

procedure set out in the Public Works Loans Act 1875 s 33 is now superseded: see the Crown Proceedings Act 1947 ss 13, 15, s 23(1), Sch 1; and CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) PARA 107 et seq. The commissioners are an authorised government department for the purpose of taking proceedings: see PARA 1382.

15 Public Works Loans Act 1875 s 24. Apart from s 24 the commissioners would be liable to account also for money which, but for their wilful neglect or default, they might have received: see *Gaskell v Gosling* [1896] 1 QB 669 at 691, CA; and MORTGAGE.

16 National Loans Act 1968 s 3(3). As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq.

17 Ie other than a relevant authority authorised to borrow money under the Local Government Act 2003 s 1 or s 19, Sch 1 para 2: see the Public Works Loans Act 1965 s 2(3) (amended by the Local Government and Housing Act 1989 Sch 11 para 6; the Local Government Act 2003 Sch 7 para 2(a); and by SI 2004/533). As to the meaning of 'relevant authority' see note 4.

18 See the Public Works Loans Act 1965 s 2(1) (as amended: see note 4).

19 Seethe Public Works Loans Act 1965 s 2(3) (as amended: see note 17). This provision does not apply to any authority in the case of which some other enactment is in force which of itself imposes a charge for securing loans of all descriptions on all the revenues of the authority: see the Public Works Loans Act 1967 s 2(2) (amended by the Local Government and Housing Act 1989 Sch 11 para 7; the Local Government Act 2003 Sch 7 para 3; and by SI 2004/533).

20 See the Public Works Loans Act 1965 s 2(4).

(6) INTERNATIONAL FINANCIAL ARRANGEMENTS

(i) The Exchange Equalisation Account

1389. Constitution of the Exchange Equalisation Account. The Exchange Equalisation Account is an account under Treasury control[1] to which is issued out of the National Loans Fund, at such times and in such manner as the Treasury directs, such sums as the Treasury may determine[2]. If at any time the Treasury is of opinion that the assets in sterling of the Exchange Equalisation Account are in excess of what is required for the purposes of the account[3], the Treasury may direct that the excess be paid into the National Loans Fund[4].

For each financial year in which the Exchange Equalisation Account operates the Treasury must prepare, in such form and on such basis as it prescribes, accounts in relation to the transactions, assets and liabilities of the Exchange Equalisation Account, and send the accounts to the Comptroller and Auditor General not later than 30 November of the financial year following that to which the accounts relate[5]. The Comptroller and Auditor General must examine and certify the accounts, issue a report on them and send the certified accounts and the report to the Treasury not later than 15 January of that financial year[6]. The Treasury must lay the certified accounts and the report before each House of Parliament not later than 31 January of that financial year[7].

In certifying the accounts[8] the Comptroller and Auditor General must state whether or not it is his opinion, having regard to his examination of the accounts, that:

(1) the resources of the Exchange Equalisation Account have been used[9] in accordance with the provisions of the Exchange Equalisation Account Act 1979[10];

(2) the transactions of the Exchange Equalisation Account are in accordance with any relevant authority[11]; and

(3) the accounts have been prepared in the form, and on the basis, prescribed[12] under these provisions[13].

1 Exchange Equalisation Account Act 1979 s 1(1), (2). The account was originally established under the Finance Act 1932 s 24 (repealed) after the United Kingdom abandoned the gold

standard. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Exchange Equalisation Account Act 1979 s 2(1). Sums so issued and for the time being outstanding constitute a liability of the account to the National Loans Fund: see s 2(2). As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq.

3 As to the purposes of the Exchange Equalisation Account see PARA 1390.

4 Exchange Equalisation Account Act 1979 s 2(3).

5 Exchange Equalisation Account Act 1979 s 4(1), (2) (s 4 substituted by the Finance Act 2000 s 24(7)). The Treasury may by order made by statutory instrument amend any of the dates for the time being specified in the Exchange Equalisation Account 1979 s 4(2)–(4) (see the text and notes 6, 7): s 4(6) (as so substituted). Before making such an order the Treasury must consult the Comptroller and Auditor General: s 4(7) (as so substituted). A statutory instrument containing an order under s 4(6) is subject to annulment in pursuance of a resolution of the House of Commons: s 4(8) (as so substituted). At the date at which this volume states the law no such order had been made. As to the Comptroller and Auditor General see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 724 et seq.

6 Exchange Equalisation Account Act 1979 s 4(3) (as substituted: see note 5). See note 5.

7 Exchange Equalisation Account Act 1979 s 4(4) (as substituted: see note 5). See note 5.

8 Ie under the Exchange Equalisation Account Act 1979 s 4(3): see the text to note 6.

9 A reference to the use of resources is a reference to their expenditure, consumption or reduction in value: Exchange Equalisation Account Act 1979 s 4(9) (as substituted: see note 5).

10 Exchange Equalisation Account Act 1979 s 4(5)(a) (as substituted: see note 5).

11 Exchange Equalisation Account Act 1979 s 4(5)(b) (as substituted: see note 5).

12 Ie the form and basis prescribed under the Exchange Equalisation Account Act 1979 s 4(1): see the text to note 5.

13 Exchange Equalisation Account Act 1979 s 4(5)(c) (as substituted: see note 5).

1390. Purposes for which the Exchange Equalisation Account is to be used. The Exchange Equalisation Account is to be used for:

(1) checking undue fluctuations in the exchange value of sterling[1];

(2) securing the conservation or disposition in the national interest of the means of making payments abroad[2];

(3) payment of charges to the International Monetary Fund[3]; and

(4) carrying out any of the functions of the United Kingdom government under the Articles of Agreement of the International Monetary Fund which relate to special drawing rights[4].

The Treasury[5] may cause any funds in the Exchange Equalisation Account to be invested in securities[6] or in the purchase of gold[7], or in the acquisition of special drawing rights under the Articles of Agreement of the International Monetary Fund[8].

1 Exchange Equalisation Account Act 1979 s 1(3)(a).

2 Exchange Equalisation Account Act 1979 s 1(3)(b).

3 Exchange Equalisation Account Act 1979 s 1(3)(c). This is the purpose specified in the International Monetary Fund Act 1979 s 1(3): see PARA 1391. As to the International Monetary Fund see PARA 1391.

4 Exchange Equalisation Account Act 1979 s 1(3)(d). Any special drawing rights received or disposed of by the United Kingdom government must, in the case of receipts, be treated as assets of the Exchange Equalisation Account and, in the case of disposals, be transferred from the Exchange Equalisation Account: s 3(2). As to the meaning of 'United Kingdom' see PARA 2 note 3.

5 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

6 'Securities' includes securities and assets in currency of any country and in whatever form held: Exchange Equalisation Account Act 1979 s 3(3). The reference to currency of any country includes a reference to units of account defined by reference to more than one currency: s 3(4) (added by the Finance Act 1986 s 113).

7 Exchange Equalisation Account Act 1979 s 3(1)(a).

8 Exchange Equalisation Account Act 1979 s 3(1)(b).

(ii) International Financial Institutions

1391. International financial organisations. The International Bank for Reconstruction and Development[1], the International Monetary Fund[2], the International Finance Corporation[3] and the International Development Association[4] are international financial and economic institutions which have been established by treaty and of which the United Kingdom is a member[5].

Charges payable to the International Monetary Fund by the United Kingdom government[6] are to be paid out of the Exchange Equalisation Account[7]. The Treasury is empowered to lend to the International Monetary Fund in accordance with the International Monetary Fund's borrowing arrangements[8]. Subscriptions, compensation and other payments by the government to the International Monetary Fund may be paid out of the National Loans Fund[9] or by the Secretary of State out of money provided by Parliament[10]. Receipts from the International Monetary Fund, other than sums received by reason of the operation of the Exchange Equalisation Account, are to be paid into the National Loans Fund[11]. Exchange contracts[12] which involve the currency of any member of the International Monetary Fund and which are contrary to the exchange control regulations of such member maintained or imposed consistently with the fund agreement are unenforceable in the territory of any other member of the fund[13]. Such contracts will therefore be unenforceable in the United Kingdom if they contravene the laws of other countries which are members of the fund[14].

The Secretary of State has power to make payment of initial subscriptions and other subscriptions and payments to a multilateral development bank[15].

The Treasury may, in such manner and on such conditions as it thinks fit, undertake to indemnify the Bank of England in respect of its financial assistance to the central bank of any overseas country[16]. The sums required or received in pursuance of any such undertaking are to be paid out of, or into, the Consolidated Fund[17].

1 The International Bank for Reconstruction and Development was established by an agreement drawn up at the United Nations Monetary and Financial Conference held at Bretton Woods, New Hampshire, USA in July 1944 (see the Bretton Woods Agreement Act 1945 preamble (repealed)) in order to assist in the reconstruction and development of members' territories by facilitating the investment of capital for productive purposes: see the Articles of Agreement of the International Bank for Reconstruction and Development (Washington, 27 December 1945; TS 21 (1946); Cmd 6885), art I. As to the immunities and privileges of the International Bank for Reconstruction and Development see PARA 1392.

2 The International Monetary Fund was established at the same time as the International Bank for Reconstruction and Development (see note 1). For the fund's functions in relation to currency exchange and balance of payments see the Articles of Agreement of the International Bank for Reconstruction and Development. For the Treasury's power to create and issue to the fund certain non-interest-bearing and non-negotiable notes or other obligations see the International Monetary Fund Act 1979 s 4(1). Sums payable under these notes and obligations are charged on the National Loans Fund with recourse to the Consolidated Fund: s 4(2). As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq. As to the Consolidated Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 34 (Reissue) PARA 952 et seq. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

3 The International Finance Corporation, which is an affiliate of the International Bank for Reconstruction and Development (see note 1), was established to encourage the development of productive private enterprise, particularly in the less developed countries: see the Articles of Agreement of the International Finance Corporation (Washington, 25 May 1955; TS 37 (1961); Cmnd 1377), art I. As to the immunities and privileges of the International Finance Corporation see PARA 1392.

4 The purpose of the International Development Association, which is an affiliate of the International Bank for Reconstruction and Development, and is for operational purposes one with it, is to promote economic development, increase productivity and raise standards of living in less developed areas: see the Articles of Agreement of the International Development Association (Washington, 29 January 1960; TS 1 (1961); Cmnd 1244), art I. See also the International Development Act 2002; and the International Development Association (Eleventh Replenishment) Order 1998, SI 1998/1149. As to the immunities and privileges of the International Development Association see PARA 1392.

5 See FOREIGN RELATIONS LAW vol 18(2) (Reissue) PARA 1029. As to the meaning of 'United Kingdom' see PARA 2 note 3.

6 Ie charges payable under the Articles of Agreement of the International Monetary Fund and of the International Bank for Reconstruction and Development (Final Act of the Bretton Woods Conference) (Washington, 27 December 1945; TS 21 (1946); Cmd 6885), art V s 8.

7 See the International Monetary Fund Act 1979 s 1(3). As to the Exchange Equalisation Account see PARAS 1389–1390.

As to the Secretary of State's requirement to report annually on total expenditure on international aid and the breakdown of such aid see PARA 1394.

8 See the International Monetary Fund Act 1979 s 2(1) (substituted by the International Monetary Arrangements Act 1983 s 1; and amended SI 1997/1611). The aggregate amount outstanding in respect of the principal of loans must not exceed 2577 million special drawing rights: International Monetary Fund Act 1979 s 2(1) (as so substituted). For these purposes, a loan under the International Monetary Fund Act 1979 s 2, or repayment of such a loan, in any currency is to be treated as a loan (or repayment) of the amount of special drawing rights which for the purposes of the fund's borrowing arrangements is the value of the loan or repayment: s 2(1A) (added by the International Monetary Arrangements Act 1983 s 1). As to the power of the Treasury to raise or further raise the limit on lending see the International Monetary Fund Act 1979 s 2(2), (3). Loans are to be made out of the National Loans Fund: s 2(4). The 'fund's borrowing arrangements' are the arrangements made by the International Monetary Fund for enabling it to borrow the currency of any member of the fund taking part in the arrangements: s 2(5).

9 See the International Monetary Fund Act 1979 s 1(1). This provision enables payment of:

(1) subscriptions in the event of increases in the United Kingdom's quota under the Articles of Agreement of the International Monetary Fund and of the International Bank for Reconstruction and Development, art III s 3(a) (International Monetary Fund Act 1979 s 1(1)(a));

(2) sums payable in respect of the maintenance of value of assets under the Articles of Agreement of the International Monetary Fund and of the International Bank for Reconstruction and Development, art V s 11 (International Monetary Fund Act 1979 s 1(1)(b));

(3) sums required to implement the guarantee against loss on the failure or default of a designated depository required by the Articles of Agreement of the International Monetary Fund and of the International Bank for Reconstruction and Development, art XIII s 3 (International Monetary Fund Act 1979 s 1(1)(c)); and

(4) compensation required to be paid to the International Monetary Fund or any member of it on withdrawal or liquidation under the Articles of Agreement of the International Monetary Fund and of the International Bank for Reconstruction and Development, Sch J or Sch K (International Monetary Fund Act 1979 s 1(1)(d)).

The United Kingdom's subscription to the International Monetary Fund was increased to 10,738.5 million special drawing rights by the International Monetary Fund (Increase in Subscription) Order 1998, SI 1998/1854.

10 As to the power to make payments relating to international development see the International Development Act 2002; PARAS 1392–1393; and COMMONWEALTH vol 6 (2003 Reissue) PARA 825; CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 462; FOREIGN RELATIONS LAW. As to the Secretary of State see PARA 3.

11 See the International Monetary Fund Act 1979 s 3.

12 'Exchange contract' is not defined for this purpose: *Kahler v Midland Bank Ltd* [1948] 1 All ER 811 at 819, CA; affd [1950] AC 24, [1949] 2 All ER 621, HL. It should be liberally construed having regard to the objects of the Bretton Woods Agreements to protect the currencies of member states: *Sharif v Azad* [1967] 1 QB 605 at 618, [1966] 3 All ER 785 at 789–790, CA, per Diplock LJ. The wider obiter definition of Lord Denning MR in that case has not been followed: see eg *Wilson, Smithett and Cope Ltd v Terruzzi* [1976] QB 683 at 700, [1975] 2 All ER 649 at 662 per Kerr J; affd [1976] QB 683 at 709, [1976] 1 All ER 817, CA. It has been held to mean a contract to exchange the currency of one country for the currency of

another: *Wilson, Smithett and Cope Ltd v Terruzzi* at 714 and 822 per Lord Denning MR, at 715 and 824 per Ormrod LJ, and at 722 and 829 per Shaw LJ (following *Re United Railways of Havana and Regla Warehouses Ltd, Tomkinson v First Pennsylvania Banking and Trust Co* [1961] AC 1007 at 1059, [1960] 2 All ER 332 at 350, HL, per Lord Radcliffe). For a case where the court found an exchange contract, though disguised, see *The American Accord* [1979] 1 Lloyd's Rep 267 sub nom *United City Merchants (Investments) Ltd and Glass Fibres and Equipment Ltd v Royal Bank of Canada* [1983] 1 AC 168, [1982] 2 All ER 720, HL ('exchange contract' included documentary credit used to finance illegal contract of sale which was partly a monetary transaction in disguise to exchange Peruvian currency for American dollars); *Mansouri v Singh* [1986] 2 All ER 619, [1986] 1 WLR 1393, CA (cheque part of unenforceable exchange contract).

As to the repeal of the exchange control legislation in the United Kingdom see PARA 1395.

13 See the Bretton Woods Agreements Order in Council 1946, SR & O 1946/36, art 3, Schedule art VIII s 2(b) (amended by SI 1977/825); and *Ispahani v Bank Melli Iran* (1997) Times, 29 December, CA. Apart from these provisions, the English court will regard a contractual obligation as invalidated or discharged by exchange control legislation if that legislation is part of the proper law of the contract or part of the law of the place of performance (see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 349 et seq).

14 See, however, *Wilson, Smithett and Cope Ltd v Terruzzi* [1976] QB 683 at 691, 696, [1975] 2 All ER 649 at 654, 658, where Kerr J expressed the view that to decide whether the exchange control regulations of a member state are maintained or imposed consistently with the Bretton Woods Agreements the agreements must be considered as a whole, and that the court will require evidence if it is to hold that foreign legislation is not so maintained or imposed.

15 See the International Development Act 2002 s 11; and PARA 1393. As to the meaning of 'multilateral development bank' see PARA 1393. For examples of agreements establishing development banks and subscription orders see PARA 1393 note 5.

16 See the International Monetary Arrangements Act 1983 s 2(1), (2). This applies to financial assistance of any kind provided by the Bank of England which appears to the Treasury to be provided in pursuance of arrangements made: (1) in co-operation with the Bank for International Settlements or any central bank or other monetary authority of any country outside the United Kingdom (s 2(2)(a)); and (2) for the purpose of assisting the central bank or other monetary authority of any country outside the United Kingdom (s 2(2)(b)). The Treasury must lay a statement of the undertaking before each House of Parliament: s 2(3). As to the Bank of England see PARA 793 et seq. The Bank for International Settlements is an organisation established to foster co-operation among central banks and other agencies and whose services are provided exclusively to central banks and international organisations.

17 International Monetary Arrangements Act 1983 s 2(4). The Treasury must lay a statement relating to the sum issued before each House of Parliament: s 2(5).

1392. Immunities and privileges of international financial organisations. Her Majesty may by Order in Council make such provision as is considered necessary[1] to give effect to provisions of the agreement establishing an international financial institution[2] relating to the status, privileges or immunities of:

(1) that institution[3];

(2) the governors, directors, executive-directors (or alternates) of that institution[4]; or

(3) the officers and employees of that institution[5].

For these purposes, the following are international financial institutions[6]: (a) the International Bank for Reconstruction and Development[7]; (b) the International Finance Corporation[8]; and (c) the International Development Association[9].

1 No recommendation may be made to Her Majesty in Council to make an order under these provisions unless a draft of the order has been laid before Parliament and approved by resolution of each House of Parliament: International Development Act 2002 s 12(4). At the date at which this volume states the law, no such order had been made. The provisions of s 12 are without prejudice to the powers conferred by the International Organisations Act 1968 or any other Act: see the International Development Act 2002 s 12(6). See also the International

Organisations Act 1968; the Multilateral Investment Guarantee Agency (Overseas Territories) Order 1988, SI 1988/791; and FOREIGN RELATIONS LAW vol 18(2) (Reissue) PARA 915.

2 See the text to notes 6–9. As to international financial institutions see further PARA 1391.

3 International Development Act 2002 s 12(1), (2)(a).

As to the Secretary of State's requirement to report annually on total expenditure on international aid and the breakdown of such aid see PARA 1394.

4 International Development Act 2002 s 12(1), (2)(b).

5 International Development Act 2002 s 12(1), (2)(c).

6 See the International Development Act 2002 s 12(3). The Secretary of State may by order amend s 12(3) by making additions to or deletions from the institutions that are for the time being listed there: s 12(5). At the date at which this volume states the law, no such order had been made. As to the Secretary of State see PARA 3.

7 International Development Act 2002 s 12(3)(a). See PARA 1391 note 1. As to the savings of provisions regarding guarantees of loans made by the International Bank for Reconstruction and Development under the Overseas Development and Co-operation Act 1980 s 8 (repealed) see the International Development Act 2002 s 20, Sch 5 para 2.

8 International Development Act 2002 s 12(3)(b). See PARA 1391 note 3.

9 International Development Act 2002 s 12(3)(c). See PARA 1391 note 4. Any order made under the Overseas Development and Co-operation Act 1980 s 6 (repealed) which had effect immediately before 17 June 2002, has effect on and after that time as if it were an order made under the International Development Act 2002 s 11 (see PARA 1393): see Sch 5 para 1(1).

1393. Multilateral development banks. A multilateral development bank is an international financial institution[1] having as one of its objects economic development either generally or in any region of the world[2]. Where the government of the United Kingdom is bound[3] to make a relevant payment[4] to a multilateral bank, the Secretary of State may make[5]:

(1) the relevant payment[6]; or

(2) where it has been paid, any payment required to maintain its value[7]; or

(3) a payment to redeem any non-interest-bearing and non-negotiable notes, or other obligations, issued or created by him, that are accepted by the bank in accordance with the agreement or arrangements under which the relevant payment is required to be made[8].

1 Eg the European Bank for Reconstruction and Development. Unlike the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development is not a United Nations agency; it does, however, enjoy certain immunities. As to international financial institutions see PARA 1391; and as to their immunities and privileges see PARA 1392.

2 See the International Development Act 2002 s 11(2).

3 Ie where the United Kingdom government has become bound before the coming into force of the International Development Act 2002 s 11 (ie before 7 June 2002), or thereafter becomes bound: see s 11(1). As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 'Relevant payment' means: (1) an initial subscription, or other initial contribution to the capital stock of the bank, that the international agreement for the establishment and operation of the bank requires the members of the bank to make; or (2) a further payment to the bank required to be made by the members under any arrangements: see the International Development Act 2002 s 11(2).

5 Ie by an order and with the approval of the Treasury: see the International Development Act 2002 s 11(4). Such orders may not be made unless a draft of the order has been laid before and approved by the House of Commons: s 11(5). See the African Development Fund (Additional Subscriptions) Order 2002, SI 2002/2404; the Caribbean Development Bank (Further Payments) Order 2002, SI 2002/2405; the International Development Association (Thirteenth Replenishment) Order 2002, SI 2003/700; the African Development Fund (Ninth Replenishment) Order 2003, SI 2003/1739; the International Fund for Agricultural Development (Fifth Replenishment) Order 2003, SI 2003/2157; the International Fund for Agricultural Development (Sixth Replenishment) Order 2004, SI 2004/3170; the International Development Association (Fourteenth Replenishment) Order 2006, SI 2006/1071; the African Development Fund (Multinational Debt Relief Initiative) Order 2006, SI 2006/2321; the International Development Association (Multinational Debt Relief Initiative) Order 2006, SI 2006/2323; the Asian Development Bank (Eighth Replenishment of the Asian Development

Fund) Order 2006, SI 2006/2324; the Caribbean Development Bank (Sixth Replenishment of the Unified Special Development Fund) Order 2006, SI 2006/2325; and the African Development Bank (Tenth Replenishment of the African Development Fund) Order 2006, SI 2006/2327. As to the Secretary of State see PARA 3. As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

As to the Secretary of State's requirement to report annually on total expenditure on international aid and the breakdown of such aid see PARA 1394.

6 International Development Act 2002 s 11(3)(a)(i).
7 International Development Act 2002 s 11(3)(a)(ii).
8 International Development Act 2002 s 11(3)(b).

1394. International development reporting and transparency. It is the duty of the Secretary of State[1] to lay before each House of Parliament each year[2] a report about international aid[3]. Each annual report must include specified information[4] and, in particular, the Secretary of State must include in each annual report his assessment of the year in which he expects that the target for expenditure on official development assistance to amount to 0·7 per cent of gross national income will be met by the United Kingdom[5]. Provision is made for the Secretary of State to include his assessment on issues relating to the Millennium Development Goals 1–7[6]. The Secretary of State must include in each annual report such general or specific observations as he thinks appropriate on the effects of policies and programmes pursued by government departments on the promotion of sustainable development in countries outside the United Kingdom and the reduction of poverty in such countries[7]. The Secretary of State must also include such observations as he thinks appropriate about the contribution by the government departments to the promotion of transparency in the provision of aid and the use made of aid provided[8], and observations about progress in relation to specified matters[9].

1 As to the Secretary of State see PARA 3.
2 An annual report must be laid before each House of Parliament as soon as practicable after 31 March each year: International Development (Reporting and Transparency) Act 2006 s 1(3).
3 International Development (Reporting and Transparency) Act 2006 s 1(1).
4 International Development (Reporting and Transparency) Act 2006 s 2. As to such specified information see Sch 1.
5 International Development (Reporting and Transparency) Act 2006 s 3. As to the meaning of 'United Kingdom' see PARA 2 note 3.
6 International Development (Reporting and Transparency) Act 2006 s 4. 'Millennium Development Goals 1–7' means the Goals 1 to 7 set out in the Annex to United Nations General Assembly document A/56/326 6 September 2001, entitled 'Road map towards the implementation of the United Nations Millennium Declaration: Report of the Secretary General', as those goals may be amended or modified from time to time: s 4(2)(a).
7 International Development (Reporting and Transparency) Act 2006 s 5(1). Such observations are to include observations on the pursuit of Millennium Development Goal 8, as set out in the Annex to the document referred to in note 6: s 5(2), (3).
8 International Development (Reporting and Transparency) Act 2006 s 6(1).
9 International Development (Reporting and Transparency) Act 2006 s 6(2).

(iii) Repeal of Exchange Control Legislation

1395. In general. Under the Exchange Control Act 1947, the Treasury[1] was given powers to control a wide variety of transactions in currency, gold and securities. The object of the legislation was to assist in conserving the United Kingdom's gold and foreign currency reserves, to protect the sterling system and to help maintain the balance of payments. From 24 October 1979, the Act was rendered largely a reserve power as persons in or resident in the United Kingdom (including the Channel Islands and the Isle of Man) were exempted from their

obligations under it[2], and in 1987 it was finally repealed[3]. However, the Treasury retained certain powers to validate retrospectively acts done before 13 December 1979[4].

1 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

2 See the Exchange Control (Gold and Foreign Currency) (Exemption) Order 1979, SI 1979/1331; the Exchange Control (Payments etc) (Exemption) Order 1979, SI 1979/1332; the Exchange Control (Securities etc) (Exemption) Order 1979, SI 1979/1333; the Exchange Control (Import and Export) (Exemption) Order 1979, SI 1979/1334; the Exchange Control (Settlements) (Exemption) Order 1979, SI 1979/1336; the Exchange Control (Bodies Corporate) (Exemption) Order 1979, SI 1979/1337; and the Exchange Control (Revocation) Directions 1979, SI 1979/1339 (all lapsed). As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 See the Finance Act 1987 s 68(1), Sch 16 Pt XI. The repeal extended to the Channel Islands and the Isle of Man: s 68(4).

4 Notwithstanding the repeal of the Exchange Control Act 1947, the Treasury retains the right to issue certificates under s 18(2) (repealed) including that provision as applied by s 28(3) or s 29(3) (both repealed): see the Finance Act 1987 s 68(2).

(7) ECONOMIC AND MONETARY UNION

1396. European financial and economic co-operation. In connection with the distribution after the 1939–45 war of American aid[1] and with the promotion of joint European economic recovery, the Organisation for European Economic Co-operation was set up by the governments of the United Kingdom and other European countries[2]. Temporary agreements were made between member countries for intra-European payments and compensations[3], which were superseded in 1950 by the European Payments Union Agreement[4], which itself was superseded in 1958[5] by the European Monetary Agreement[6].

A further agreement has been signed establishing a financial support fund in relation to the Organisation for Economic Co-operation and Development, which is the successor to the Organisation for European Economic Co-operation[7]. Payments for direct financing of the support fund are paid out of the National Loans Fund[8] and sums received on account of such payments and the proceeds of the liquidisation of the support fund are to be paid into the National Loans Fund[9]. Any payments required to be made to support borrowings by the support fund are to be paid out of the Consolidated Fund[10], which is to be credited with any sums received on account of such payments[11].

In regard to United Kingdom membership of the European Community, there is to be charged on and issued out of the Consolidated Fund or, if so determined by the Treasury[12], the National Loans Fund the amounts required to meet any Community obligation to make payments to any of the Communities or member states, or any Community obligation in respect of contributions to the capital or reserves of the European Investment Bank[13] or in respect of loans to that bank, or to redeem any notes or obligations issued or created in respect of any such Community obligation, as well as for various other expenses incidental to Community membership[14].

1 This was known as Marshall Aid and was granted by Act of Congress of the United States of America known as the Economic Co-operation Act 1948 and administered pursuant to the American Aid and European Payments (Financial Provisions) Act 1949 (repealed).

2 See the Convention for European Economic Co-operation (Paris, 16 April 1948; TS 59 (1949); Cmd 7796). As to the meaning of 'United Kingdom' see PARA 2 note 3.

As to the Secretary of State's requirement to report annually on total expenditure on international aid and the breakdown of such aid see PARA 1394.

3 See the Agreement for Intra-European Payments and Compensations (Paris, 16 October 1948; Misc 8 (1948); Cmd 7546); and the Agreement for Intra-European Payments and Compensations for 1949–50 (Paris, 7 September 1949; Misc 13 (1949); Cmd 7812) (amended by Supplementary Protocol No 2 (Paris, 22 April 1950; Misc 11 (1950); Cmd 8010)).

4 See the Agreement for the Establishment of a European Payments Union (Paris, 19 September 1950; Misc 14 (1950); Cmd 8064) (amended by Supplementary Protocols No 2 (Paris, 4 August 1951; Misc 12 (1951); Cmd 8372), No 3 (Paris, 11 July 1952; Misc 13 (1952); Cmd 8644), No 4 (Paris, 30 June 1953; Misc 12 (1953); Cmd 8930), No 5 (Paris, 30 June 1954; Misc 25 (1954); Cmd 9257), Nos 6, 7 (Paris, 29 June and 5 August 1955; Misc 19 (1955); Cmd 9601), No 8 (Paris, 29 June 1956; Misc 10 (1956); Cmd 9867), No 9 (Paris, 28 June 1957; Misc 21 (1957); Cmnd 259), No 10 (Paris, 27 June 1958; Misc 13 (1958); Cmnd 555)).

5 Ie as from 27 December 1958 on the introduction of a measure of convertibility of currency by a number of member countries.

6 See the European Monetary Agreement (Paris, 5 August 1955; Misc 20 (1955); Cmd 9602); and PARA 1397.

7 See the Agreement establishing a Financial Support Fund of the Organisation for Economic Co-operation and Development (Paris, 9 April–31 May 1975; Misc 20 (1975); Cmnd 6242); and the OECD Support Fund Act 1975. The organisation was established by the Convention on the Organisation for Economic Co-operation and Development (Paris, 14 December 1960; TS 21 (1962); Cmnd 1646). As to tax exemption see the OECD Support Fund Act 1975 s 4 (amended by the Finance Act 1990 Sch 19 Pt VI). As to immunities see the OECD Financial Support Fund (Immunities and Privileges) Order 1976, SI 1976/224 (amended by SI 1980/1096).

8 OECD Support Fund Act 1975 s 2(1). As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq.

9 OECD Support Fund Act 1975 s 2(2).

10 OECD Support Fund Act 1975 s 3(1). As to the Consolidated Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 34 (Reissue) PARA 952 et seq. Undertakings given by members of the support fund to support borrowings by the fund must be reported to Parliament: see s 3(3).

11 OECD Support Fund Act 1975 s 3(2).

12 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

13 As to the European Investment Bank see FOREIGN RELATIONS LAW vol 18(2) (Reissue) PARA 910 et seq.

14 See the European Communities Act 1972 s 2(3).

1397. The European Monetary Agreement. The European Monetary Agreement[1] made provision for the establishment of a European Fund and multilateral system of settlements[2], the purposes of the fund being:

(1) to enable discretionary credits for periods up to two years to be given on request to parties to the Agreement to help them through temporary balance of payment crises; and

(2) to facilitate the operation of the settlements system[3],

and the capital of the fund consisting partly of assets transferred from the European Payments Union[4] and partly of contributions by the parties to be called up when needed[5]. Sums advanced and payments made by the United Kingdom were to be paid out of, and sums received were to be paid into, the National Loans Fund[6].

The United Kingdom implementing legislation, the European Monetary Agreement Act 1959, was repealed as obsolete by the International Monetary Fund Act 1979, which consolidated enactments relating to the International Monetary Fund[7].

1 See the European Monetary Agreement (Paris, 5 August 1955; Misc 20 (1955); Cmd 9602) (amended by Supplementary Protocols No 2 (Paris, 27 June 1958; Misc 12 (1958); Cmnd 554), No 3 (Paris, 15 January 1960; Misc 2 (1960); Cmnd 959), and No 4 (Paris, 12 December 1961; Misc 7 (1962); Cmnd 1705)). The agreement came into force on 27 December 1958: see the European Monetary Agreement Act 1959 s 1 (repealed). See further FOREIGN RELATIONS LAW.

The European Monetary Agreement must be distinguished from the European Monetary System, of which as at the date this volume states the law the United Kingdom is not a member. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the European Monetary Agreement art 1.

As to the Secretary of State's requirement to report annually on total expenditure on international aid and the breakdown of such aid see PARA 1394.

3 See the European Monetary Agreement arts 2, 7.

4 As to the European Payments Union see PARA 1396.

5 See the European Monetary Agreement arts 3–5 (amended by Supplementary Protocol No 2). Provision was made for the fund to be liquidated on the termination of the Agreement: European Monetary Agreement, Annex.

6 See the European Monetary Agreement Act 1959 s 2(1), (4) (repealed); and the National Loans Act 1968 ss 2, 24(2), Sch 2, Sch 6 Pt I (s 2 amended and Sch 2 repealed by the Overseas Development and Co-operation Act 1980 Sch 2 Pt 1). As to the National Loans Fund see PARA 1334; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 727 et seq.

7 As to the International Monetary Fund and the International Monetary Fund Act 1979 see PARA 1391.

1398. Economic and Monetary Union. The Maastricht Treaty states that one of the European Union's objectives is to promote economic and social progress which is balanced and sustainable, through various means and in particular through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of the Treaty[1].

As a result of the findings of the Report on economic and monetary union in the European Community in 1989, the European Council proposed to introduce economic and monetary union (known as 'EMU') in three stages[2].

The first stage began on 1 July 1990 with the abolition of all remaining restrictions on the movement of capital between member states to encourage closer economic relations between them.

Stage two was initiated by the establishment of the European Monetary Institute in Frankfurt on 1 January 1994, the objective of which was to contribute to the realisation of the conditions necessary for the transition to the third stage of EMU, in particular by: (1) strengthening the co-ordination of monetary policies with a view to ensuring price stability; (2) making the preparations required for the establishment of the European System of Central Banks, and for the conduct of a single monetary policy and the creation of a single currency in the third stage; and (3) overseeing the development of the European currency[3]. During the second stage the eligibility of member states to join the EMU was assessed, with the Council of the European Union deciding whether a member state satisfied the necessary requirements to adopt the single currency. On 1 June 1998, the European Central Bank was established[4], replacing the European Monetary Institute. The European Central Bank, together with representatives of the national central banks of member states who join the single currency, form the European System of Central Banks the primary objective of which is to maintain price stability[5].

The third and final stage of economic and monetary union started on 1 January 1999 with the entry of 11 qualifying member states into the single currency[6]. The United Kingdom did not then join, but reserved its right to do so at some future date if it is in the national economic interest and if the case for joining is clear and unambiguous[7].

The Chancellor of the Exchequer announced that there is in principle no constitutional bar to joining the single currency; and that if the government decides it is right to enter, the issue will be put to a national referendum[8].

1 See the Treaty on European Union (Maastricht, 7 February 1992; TS 12 (1994); Cm 2485) Title I art 2.

2 See the Report on economic and monetary union in the European Community, 17 April 1989 (the 'Delors Report').

3 See the Treaty on European Union (Maastricht, 7 February 1992; TS 12 (1994); Cm 2485), Protocol on the Statute of the European Monetary Institute, art 2. Note that the Maastricht Treaty refers to the European currency unit ('ecu'). The European Council agreed in 1995 that this would be re-named the 'euro'. As to the euro see PARA 1399.

4 See the Treaty on European Union (Maastricht, 7 February 1992; TS 12 (1994); Cm 2485), Protocol on the Statute of the European System of Central Banks and of the European Central Bank, art 1.

5 See the Treaty on European Union (Maastricht, 7 February 1992; TS 12 (1994); Cm 2485), Protocol on the Statute of the European System of Central Banks and of the European Central Bank, art 2.

The European Central Bank (ECB), which is located in Frankfurt in Germany, is the central bank for Europe's single currency, the euro (see also PARA 1399). The ECB's main task is maintenance of the euro's purchasing power and thus price stability in the euro area. The euro area comprises the 13 EU countries that have adopted the euro since 1999. The euro area came into being when responsibility for monetary policy was transferred from the national central banks of 11 EU member states in January 1999; Greece and Slovenia joining subsequently (see note 6). To join the euro area, the 13 countries had to fulfil convergence criteria as will any countries joining in the future (see also note 7). The criteria set out the economic and legal preconditions for successful participation in EMU.

The European System of Central Banks (ESCB) consists of the ECB and the national central banks of all EU member states whether they have adopted the euro or not. The Eurosystem comprises the ECB and the national central banks that have adopted the euro. The Eurosystem and ESCB will co-exist as long as there are EU member states outside the euro area.

The Eurosystem and the single monetary policy for which it is responsible has the primary objective of maintaining price stability (see the Treaty Establishing the European Community art 105(1)). Related objectives are achieving a favourable economic environment and a high level of employment. The ECB is the sole issuer of bank notes and bank reserves and thus it can set out the conditions at which banks borrow from it and influence the conditions at which banks trade with each other in the money market. To achieve the primary objective of maintaining price stability, the Eurosystem uses a set of monetary policy instruments and procedures which forms the operational framework for implementing the single monetary policy. The monetary policy instruments are: open market operations; standing facilities; and minimum reserve requirements for credit institutions. The main guiding principles for the operational framework are said to be: operational efficiency; equal treatment and harmonisation in regard to credit institutions; decentralised implementation through the national central banks; and simplicity, transparency, continuity, safety and cost efficiency. For more information on the ECB and the ESCB see the ECB website. At the date at which this volume states the law, the website is www.ecb.int.

6 See EC Council Regulation 974/98 (OJ L139, 11.5.98, p 1) on the introduction of the euro, art 2. The original participating countries were: Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal and Spain: see art 1. From 1 January 2002 Greece also adopted the single currency: EC Council Decision 427/2000 (OJ L167, 07.07.2000 p 19) on the adoption by Greece of the single currency. As to Slovenia see EC Council Regulation 1647/2006 (OJ L309, 9.11.2006, p 2); as to Cyprus see EC Council Regulation 835/2007 (OJ L186, 18.7.2007, p 1); and as to Malta see EC Council Regulation 836/2007 (OJ L186, 18.7.2007, p 3).

7 See the statement to the House of Commons by the Chancellor of the Exchequer at 299 HC Official Report (6th series), 27 October 1997, col 586; and *UK membership of the single currency: an assessment of the five economic tests* (Cm 5776) (2003). The five economic tests that define whether a clear and unambiguous case can be made are: (1) whether there can be sustainable convergence between Britain and the economies of the single currency; (2) whether there is sufficient flexibility to cope with economic change; (3) the effect on investment; (4) the impact on the financial services industry; and (5) whether it is good for employment: see 299 HC Official Report (6th series), 27 October 1997, cols 584–585. See also note 5.

8 See 299 HC Official Report (6th series), 27 October 1997, cols 586–587.

1399. The euro. As from 1 January 2002, the European Central Bank[1] and the central banks of the participating member states have put into circulation euro banknotes and coins so that notes and coins in national currencies have been replaced in those states[2].

There are seven euro notes in denominations of 5, 10, 20, 50, 100, 200 and 500 euros, each depicting symbolic European architectural designs[3]. There are eight euro coins in denominations of 1 and 2 euros, and in 1, 2, 5, 10, 20 and 50 cents; each euro coin has a European design on one face and a national design on the other[4].

All euro notes and coins, wherever minted and of whatever national design, are legal tender in all participating member states[5].

While the introduction of the single currency has resulted in the market in wholesale financial services operating on a pan-European basis in participating member states, the market in retail financial services has remained fragmented along national lines. An EC Commission report published in early 2007 found a number of barriers to entry to national markets in retail financial services including cooperation between banks within national markets and banks' pricing policies but it also found a significant entry barrier created by payment systems and services and the way they operate. Varying transfer costs and terms of business have meant that the euro has not contributed to cross-border trade or stimulated competition to the extent originally envisaged. At the date at which this volume states the law, there are single market initiatives in this area involving the European Payments Council (EPC), the creation of the Single Euro Payments Area (SEPA) and the necessary legal framework for it in the form of the Payment Services Directive, a legislative proposal (ultimately to be implemented by individual member states by November 2009) which is intended to enhance competition within the market for payment services, to enhance market transparency and to harmonise the legal framework for payments and industry practices. In October 2007 it was announced that the Financial Services Authority[6] will be the UK regulator for the provision of payment services, established by the Payment Services Directive. In December 2007 the Treasury[7] announced a consultation on the implementation of the Directive, and in January 2008 there was the official launch of the SEPA.

1 As to the establishment of the European Central Bank see PARA 1398.

2 See EC Council Regulation 974/98 (OJ L139, 11.5.98, p 1) on the introduction of the euro, arts 10, 11, 15 (amended by EC Council Regulation 2169/2005 (OJ L346, 29.12.2005, p 1)). Provision is made for continuity of contracts and other legal instruments so that the introduction of the euro does not affect obligations under contracts unless the parties to those contracts have agreed otherwise: EC Council Regulation 1103/97 (OJ L162, 19.6.97, p 1) on certain provisions relating to the euro, art 3. See PARA 1398 note 5. See also CONTRACT.

3 Final designs for the euro notes were agreed by the European Council at Dublin, December 1996: see Decision of the European Bank 98/6 (OJ L8, 14.1.99, p 36) on the denominations, specifications, reproduction, exchange and withdrawal of euro bank notes, art 1.

4 Final designs for the euro coins were agreed by the European Council at Amsterdam, June 1997: see EC Council Resolution of 19 January 1998 (OJ C035, 2.2.98, p 5) on denominations and technical specifications of euro coins intended for circulation; and the EC Council Regulation 975/98 (OJ L139, 11.5.98, p 6) on denominations and technical specifications of euro coins intended for circulation, art 1 (amended by EC Council Regulation 975/98 (OJ L139, 11.5.98, p 6)).

5 See EC Council Regulation 974/98 (OJ L139, 11.5.98, p 1) on the introduction of the euro, arts 10, 11 (as amended: see note 2).

6 As to the Financial Services Authority see PARAS 4, 6 et seq.

7 As to the Treasury see PARA 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 512 et seq.

6. BILLS OF EXCHANGE AND OTHER NEGOTIABLE INSTRUMENTS

(1) BILLS OF EXCHANGE, CHEQUES AND PROMISSORY NOTES

(i) Introduction

1400. Origin of the law relating to bills, etc. The law relating to bills of exchange, cheques and promissory notes was consolidated and reduced to the terms of a code in 1882[1]. In origin, however, it was part of the common law known as the law merchant, consisting of those commercial practices, well established in trade and commerce, that had been ratified by the courts, upon such usages being proved before them, and adopted as settled law[2].

The codifying statute, for the most part, crystallises the effect of the judicial decisions which preceded it, and such cases are referred to in this title where they may be of assistance[3]. However, the Act of 1882 also deliberately altered the law in certain respects[4], and its provisions must be read predominantly in the light of those decisions made in cases subsequent to its coming into effect.

1 Bills of Exchange Act 1882. As to the meanings of 'bills of exchange', 'cheques' and 'promissory notes' see PARA 1405.

2 These rules of the law merchant were the product of the decisions in more than 2,000 cases and represented the gist of the practice in this country during the preceding 200 years. See CUSTOM AND USAGE vol 12(1) (Reissue) PARAS 662–664. The law relating to other negotiable instruments is still known as the law merchant: see PARA 1610.

3 Cf *Bank of England v Vagliano Bros* [1891] AC 107 at 144–145, HL, per Lord Herschell. The Bills of Exchange Act 1882 provides that rules of common law, including the law merchant, continue to apply except where they are inconsistent with the Act's express provisions: s 97(2). Where any Act or document refers to any enactment repealed by the Bills of Exchange Act 1882, the Act or document is construed, and operates, as if it referred to the corresponding provisions of the 1882 Act (s 99). However, nothing in the Act or in repeals effected by it affects (1) any law or enactment for the time being in force relating to the revenue (s 97(3)(a) (amended by the Statute Law Revision Act 1898)); or (2) the provisions of the Companies Act 1862 (repealed) or Acts amending it, or any Act relating to joint stock banks or companies (Bills of Exchange Act 1882 s 97(3)(b)); or (3) the provisions of any Act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively (s 97(3)(c)). As to savings made in respect of dividend warrants see PARA 1619.

4 See eg the Bills of Exchange Act 1882 s 7(2) (enabling bills to be made payable to one or more of several payees and to holders of offices) (see PARA 1430); s 8(4) (making all bills negotiable unless the contrary intention is expressed) (see PARA 1428); and s 34(4) (relating to bills indorsed in blank) (see PARA 1492).

(ii) Negotiability

1401. Principles of negotiability. The outstanding characteristics common to bills of exchange, cheques and promissory notes[1] which found expression in the cases decided before 1882, and are embodied in the codifying statute, are: (1) that a valuable consideration is presumed, so that there is no necessity to state it[2]; (2) that such instrument may be transferred[3] from one person[4] to another by indorsement[5] or by delivery[6], so as to enable the transferee to enforce it in his own name; and (3) that the transferee who takes such an instrument in good faith[7] and for value[8] obtains a good title in spite of any defect of title in the transferor[9].

1 As to the meanings of 'bills of exchange', 'cheques' and 'promissory notes' see PARA 1405.

2 As to consideration see PARA 1478 et seq.
3 As to transfer see PARA 1489 et seq. The term 'negotiable' is first used in the Bills of Exchange Act 1882 s 8(1) (see PARA 1440) and is impliedly distinguished from transfer which is, of course, an element in negotiation. That the terms have different meanings is clear from s 8(1). As to restrictions on negotiability see PARA 1440.
4 For the purposes of the Bills of Exchange Act 1882, 'person' includes a body of persons whether incorporated or not: s 2.
5 As to the meaning of 'indorsement' see PARA 1407.
6 As to the meaning of 'delivery' see PARA 1406.
7 For the purposes of the Bills of Exchange Act 1882, something is deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not: s 90.
8 For the purposes of the Bills of Exchange Act 1882, 'value' means valuable consideration: s 2. See also PARA 1416. As to the meaning of 'valuable consideration' see s 27(1); and PARA 1479.
9 As to freedom from defect in title see PARA 1488.

1402. Meaning of 'negotiable instrument'. A negotiable instrument is one which embodies the characteristics of negotiability[1]. In the case of bills and cheques, they must order the payment of money; in the case of notes, the instrument must contain a promise to pay[2]. To be a negotiable instrument a document should contain substantially an order or a promise to pay a definite sum of money and no more[3]; hence a document which is a receipt but contains no such promise is not a negotiable instrument[4].

1 As to negotiability see PARA 1401. In this title the words 'negotiable instrument' or 'instrument' have been used wherever possible to cover the terms 'bill of exchange', 'cheque' and 'promissory note', because the provisions of the Bills of Exchange Act 1882 applicable to a bill of exchange payable on demand apply, except as otherwise provided, to a cheque (see s 73; and PARA 1405), and the provisions of the Act relating to bills of exchange apply, with necessary modifications, to promissory notes except as provided by ss 83–88 and s 89(2), (3) (see s 89(1); and PARA 1405). Where these terms cannot be used the particular form of instrument referred to is named.
2 *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 at 381 per Blackburn J, approving notes to *Miller v Race* (1758) 1 Burr 452, in 1 Smith LC (2nd Edn) at 259, (13th Edn) at 533–534. As to the meanings of 'bills', 'cheques' and 'notes' see PARA 1405. As to other negotiable instruments (to which the provisions of the Bills of Exchange Act 1882 do not apply) see PARA 1610 et seq.
3 See *Akbar Khan v Attar Singh* [1936] 2 All ER 545 at 550, PC (following in effect the English decision in *Mortgage Insurance Corpn v IRC* (1888) 21 QBD 352, CA); *Claydon v Bradley* [1987] 1 All ER 522, [1987] 1 WLR 521, CA; and see also *Wirth v Weigel Leygonie & Co Ltd* [1939] 3 All ER 712 at 720 per du Parcq LJ. A bill of exchange payable on the condition that a bill of lading attached to it is genuine has been held not to be a negotiable instrument: see *Guaranty Trust Co of New York v Hannay & Co* [1918] 1 KB 43.
4 See *Jones & Co v Coventry* [1909] 2 KB 1029 at 1041 (receipt for army pension bearing indorsement at foot: 'this receipt must be presented for payment by a London banker, but may be negotiated in the country or abroad, and is to be left by the banker at the Paymaster General's Office one day for examination'); *Akbar Khan v Attar Singh* [1936] 2 All ER 545, PC (deposit receipt).

1403. Bills, notes and cheques as negotiable instruments. Both bills of exchange and promissory notes[1] were in use in this country in the seventeenth century[2], but while negotiability was an admitted attribute of a bill of exchange, it was denied to a promissory note[3]. The difficulty thus created was, however, overcome by statute[4], and since then both bills of exchange and promissory notes have been recognised by the courts as negotiable instruments[5].

Cheques are a special form of bills of exchange[6], being drawn on a banker[7] payable on demand[8], and are covered by the Bills of Exchange Act 1882[9], as well as by the Cheques Act 1957[10].

1 As to the meanings of 'bills of exchange' and 'promissory notes' see PARA 1405.
2 The first reported case on a bill of exchange is *Martin v Boure* (1603) Cro Jac 6.
3 *Buller v Crips* (1703) 6 Mod Rep 29 per Lord Holt CJ.

4 3 & 4 Anne (An Act for giving like remedy upon Promissory Notes as is now used upon Bills of Exchange) (1704) c 8, repealed by the Bills of Exchange Act 1882 s 96, Sch 2 (repealed). For the equivalent provisions now enacted in the Bills of Exchange Act 1882 see Pt IV (ss 83–89); and PARA 1405 text to notes 10–13.
5 As to the meaning of 'negotiable instrument' see PARA 1402.
6 As to the meaning of 'cheque' see PARA 1405.
7 In the Bills of Exchange Act 1882, 'banker' includes a body of persons whether incorporated or not who carry on the business of banking: s 2.
8 The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by countermand of payment, or notice of the customer's death: Bills of Exchange Act 1882 s 75. It has been held that, because modern commercial practice treats a direct debit in the same way as payment by cheque, the effect of cancelling a direct debit is equivalent to countermanding payment by cheque: *Esso Petroleum Ltd v Milton* [1997] 2 All ER 593, [1997] 1 WLR 938, CA. As to the determination of authority of a banker to pay a cheque generally see PARA 868.
9 See the Bills of Exchange Act 1882 s 73; and PARAS 1405, 1410.
10 As to the collection of cheques by bankers and the effect of the Cheques Act 1957 see PARA 900 et seq.

1404. Bills, notes and cheques as chattels and choses in action. Although bills and notes[1] in their negotiable quality[2] partake so largely of the nature of money, they retain their innate character of chattels and choses in action. They will, therefore, pass as chattels under a will[3]. As chattels they may be bought or sold[4], or deposited to secure the payment of book debts[5]. As choses in action they may be assigned[6] or charged[7]. In all these cases the person[8] taking them acquires the same title as that of the person from whom he took them[9].

Bills[10] and notes[11] may pass also by a donatio mortis causa[12]. So, too, cheques[13] of a third party held by the donor will pass[14], but not cheques drawn by the donor[15], which are revocable by notice to the banker of the drawer's death[16].

1 As to the meanings of 'bill' and 'note' see PARA 1405.
2 See PARA 1401.
3 As to the passing of personal estate under a will see generally WILLS.
4 Ie when they are transferable by delivery; cf *Fenn v Harrison* (1790) 3 Term Rep 757 at 759 per Lord Kenyon CJ; and see PARAS 1581–1582.
5 See the Companies Act 1985 s 396(2) (prospectively repealed); and COMPANIES vol 7(2) (2004 Reissue) PARA 1584 (as to the replacement provision see the Companies Act 2006 s 861(3)).
6 *Re Barrington and Burton* (1804) 2 Sch & Lef 112. As to the assignment of choses in action see CHOSES IN ACTION vol 6 (2003 Reissue) PARA 9 et seq.
7 See *Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] 2 Lloyd's Rep 142 at 158, where bills of exchange were held to constitute book debts within the meaning of a debenture. As to the charging of choses in action see CHOSES IN ACTION vol 6 (2003 Reissue) PARA 38.
8 As to the meaning of 'person' see PARA 1401 note 4.
9 Cf the Bills of Exchange Act 1882 s 31(4). As to transfer without indorsement see PARA 1490. The transferee will be well advised to obtain the indorsement to him of the transferor. Should the instrument remain in the latter's possession after the sale or assignment, an indorsement by him, though later in date, to a holder who took it under the conditions of s 29 (see PARA 1485) would give such holder a complete title to the instrument.
10 Whether payable to bearer (*Miller v Miller* (1735) 3 P Wms 356) or to order (*Rankin v Weguelin* (1832) 27 Beav 309; *Re Mead, Austin v Mead* (1880) 15 ChD 651; *Clement v Cheesman* (1884) 27 ChD 631; and see *Re Beaumont, Beaumont v Ewbank* [1902] 1 Ch 889). As to instruments payable to bearer or to order see PARA 1428.
11 *Veal v Veal* (1859) 27 Beav 303. It is doubtful whether a note made payable to the donee would entitle him to recover; but see *Re Whitaker* (1889) 42 ChD 119, CA.
12 Ie they may be delivered to the donee as a gift from the donor, who is in imminent expectation of death, and who thereafter actually dies. As to bills of exchange and gifts mortis causa see GIFTS vol 20(1) (Reissue) PARA 75. Delivery to an agent of the donee is sufficient: *Powell v Hellicar* (1858) 26 Beav 261.
13 As to the meaning of 'cheque' see PARA 1405.

14 *Clement v Cheesman* (1884) 27 ChD 631.
15 *Hewitt v Kaye* (1868) LR 6 Eq 198; *Re Beak's Estate, Beak v Beak* (1872) LR 13 Eq 489; *Re Beaumont, Beaumont v Ewbank* [1902] 1 Ch 889. But the gift of a deposit note on the back of which there is a form of cheque filled up by the donor entitles the donee to the proceeds: *Re Dillon, Duffin v Duffin* (1890) 44 ChD 76, CA.
16 See the Bills of Exchange Act 1882 s 75; and PARA 1403 note 8; *Re Swinburne, Sutton v Featherley* [1926] Ch 38, CA (incomplete gift inter vivos). As to the meaning of 'drawer' see PARA 1406.

(iii) Defined Terms

1405. Bill of exchange, cheque, promissory note. A bill of exchange is defined by statute as an unconditional order[1] in writing[2], addressed by one person[3] to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain[4] in money to or to the order of a specified person, or to bearer[5].

A cheque is a bill of exchange drawn on a banker[6] payable on demand[7]. An instrument[8] drawn by a banker on himself is probably not a cheque[9].

A promissory note is an unconditional promise in writing made by one person to another, signed by the maker[10], engaging to pay, on demand or at a fixed or determinable future time[11], a sum certain in money[12], to, or to the order of, a specified person[13] or to bearer[14].

An instrument which does not comply with one or other of these definitions (such as a deposit receipt[15] or an irrevocable undertaking to pay contained in a letter[16]) is not a bill of exchange or a cheque, or a promissory note[17].

When an instrument is so ambiguous in form as to be capable of being treated either as a bill of exchange or as a promissory note, it is in the option of the holder[18] to treat it as either[19].

An instrument signed by an acceptor[20], but without the name of the person giving it, and not addressed to anyone, is not a bill of exchange, though good as a promissory note[21]. The addition of conditional clauses to the promise to pay will prevent a document from being a promissory note[22].

1 As to an unconditional order to pay see PARA 1424.
2 For the purposes of the Bills of Exchange Act 1882, 'writing' includes print and 'written' includes printed: s 2.
3 As to the meaning of 'person' see PARA 1401 note 4.
4 As to a sum certain see PARA 1418 et seq.
5 Bills of Exchange Act 1882 s 3(1). References to 'bills' are references to bills of exchange: s 2. As to the meaning of 'bearer' see PARA 1407. As to instruments payable to bearer or to order see PARA 1428. An instrument in favour of 'cash' is not a bill of exchange: *North and South Insurance Corpn Ltd v National Provincial Bank Ltd* [1936] 1 KB 328; *Cole v Milsome* [1951] 1 All ER 311; applied in *Orbit Mining and Trading Co Ltd v Westminster Bank Ltd* [1963] 1 QB 794, [1962] 3 All ER 565, CA, in which Sellers LJ said that although 'cash can give no order the effect is, no doubt, that it is equivalent to a payment to bearer'. As to the undertaking by the drawer or indorser of a bill that it will be accepted and paid and (of a cheque) that it will be paid see PARAS 1574–1575, 1577.
6 As to the meaning of 'banker' see PARA 1403 note 7.
7 Bills of Exchange Act 1882 s 73. Except as otherwise provided in Pt III (ss 73–81A), the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque: s 73. See PARA 1410 et seq.
8 As to the meaning of 'instrument' see PARA 1402 note 1.
9 *London City and Midland Bank Ltd v Gordon* [1903] AC 240, HL; *Slingsby v Westminster Bank Ltd* [1931] 1 KB 173 at 187 per Finlay J, doubting *Ross v London County, Westminster and Parr's Bank Ltd* [1919] 1 KB 678; but see the Cheques Act 1957 ss 1, 4; and PARA 917.
10 As to the meaning of 'maker' see PARA 1406.
11 An instrument expressed to be payable '180 days from the date of the bill of lading' probably does not constitute a promissory note because it cannot be ascertained from the date of the

document: see *Credit Agricole Indosuez v Ecumet (UK) Ltd* [2001] All ER (D) 351 (Mar), distinguishing *Novaknit Hellas SA v Kumar Bros International Ltd* [1998] Lloyd's Rep Bank 287, CA (see PARAS 1436, 1476, 1579).

12 Ie a promissory note is a document which consists substantially of a promise to pay a sum of money, and of nothing else: see *Mortgage Insurance Corpn v IRC* (1888) 21 QBD 352 at 358, CA, per Bowen LJ; *Wirth v Weigel Leygonie & Co Ltd* [1939] 3 All ER 712 at 720 per du Parcq LJ. A document containing a promise to pay money in a currency which is not that of the country where the note is made and payable may, notwithstanding that, be a promissory note (*Syndic in Bankruptcy of Salim Nasrallah Khoury v Khayat* [1943] AC 507, [1943] 2 All ER 406, PC (decided on the Palestine Bills of Exchange Ordinance 1929 (No 47 of 1929)); and see *John Burrows Ltd v Subsurface Surveys Ltd* [1968] SCR 607, 68 DLR (2d) 354, Can SC; and PARA 1436 note 6.

13 A document which contains a promise to pay a named payee or into his banking account is probably not a promissory note ('I doubt whether a promise to pay to a man or to somebody else who may be his creditor or debtor is a promissory note': see *Wirth v Weigel Leygonie & Co Ltd* [1939] 3 All ER 712 at 721 per du Parcq LJ). A document in the form of a promissory note but which does not comply with the statutory definition (eg sterling and dollar certificates of deposit) probably operates as an equitable assignment.

14 Bills of Exchange Act 1882 s 83(1). References to 'notes' are references to promissory notes: s 2. The provisions of the Bills of Exchange Act 1882 apply, with necessary modifications and subject to the provisions and exceptions provided for under Pt II (ss 3–72), to promissory notes (s 89(1)). In applying these provisions the maker of a note is deemed to correspond with the acceptor of a bill, and the first indorser of a note is deemed to correspond with the drawer of an accepted bill payable to drawer's order: s 89(2). But the provisions relating to bills and their presentment for acceptance, their acceptance, their acceptance supra protest, and the provisions relating to bills in a set, naturally do not apply to notes: s 89(3); see further PARAS 1451, 1509, 1566, 1586.

15 See *Akbar Khan v Attar Singh* [1936] 2 All ER 545, PC (deposit receipt not a promissory note within the Indian Stamp Act 1899 (No 2 of 1899)); *Claydon v Bradley* [1987] 1 All ER 522, [1987] 1 WLR 521, CA (receipt for the sum of £10,000 'as a loan to be paid back' held not to be a promissory note within the Bills of Exchange Act 1882 s 83(1)).

16 See *Wirth v Weigel Leygonie & Co Ltd* [1939] 3 All ER 712.

17 Bills of Exchange Act 1882 ss 3(2), 73, 83, 89. But it may be valid as another form of instrument, eg as an equitable assignment: *Buck v Robson* (1878) 3 QBD 686; cf *Percival v Dunn* (1885) 29 ChD 128.

18 As to the meaning of 'holder' see PARA 1407.

19 *Edis v Bury* (1827) 6 B & C 433; and see *Peto v Reynolds* (1854) 9 Exch 410; *Fielder v Marshall* (1861) 9 CBNS 606.

20 As to the meaning of 'acceptor' see PARA 1406.

21 *Mason v Lack* (1929) 140 LT 696; see also *Haseldine v Winstanley* [1936] 2 KB 101, [1936] 1 All ER 137; *Britannia Electric Lamp Works Ltd v D Mandler & Co and Mandler* [1939] 2 KB 129, [1939] 2 All ER 469.

22 *Balck v Pilcher* (1909) 25 TLR 497.

1406. Drawer, acceptor, maker, etc. 'Drawer' means the party who draws a bill of exchange or cheque[1].

'Drawee' means the party on whom a bill of exchange or cheque is drawn[2].

'Acceptor' means the drawee of a bill of exchange, who has signified his assent to the order of the drawer[3].

'Acceptance' means the signification of such assent completed by delivery or notification thereof[4].

'Maker' means the party who makes a promissory note[5].

'Payee' means the party to whom a bill of exchange, cheque or note is made payable[6].

'Delivery' means transfer of possession, actual or constructive, from one person[7] to another[8].

'Issue' means the first delivery of a bill of exchange, cheque or note, complete in form, to a person who takes it as a holder[9].

1 See PARAS 1408, 1410, 1413. As to the meanings of 'bill of exchange' and 'cheque' see PARA 1405.
2 See PARAS 1408, 1410.
3 See PARAS 1408, 1451. There is no acceptor of a cheque, but see *Keene v Beard* (1860) 8 CBNS 372; and PARAS 1410, 1454.
4 Bills of Exchange Act 1882 s 2; and see PARA 1451. Provisions of the Act relating to acceptance are inapplicable to promissory notes: s 89(3)(b). As to the meaning of an 'approved acceptance' see *McDowall and Neilson's Trustee v Snowball Co Ltd* (1905) 7 F 35, Ct of Sess.
5 See PARA 1413. As to the meaning of 'promissory note' see PARA 1405.
6 See PARAS 1408, 1410, 1413, 1429–1431.
7 As to the meaning of 'person' see PARA 1401 note 4.
8 Bills of Exchange Act 1882 s 2; and see PARA 1440 et seq. As to transfer generally see PARA 1489 et seq. Constructive transfer is involved in three cases: (1) where a person holding a bill on his own account subsequently holds it as agent for another; (2) where, having held it as agent for one, subsequently he holds it as agent for another; (3) where, having held it as agent for another, he subsequently holds it on his own account. See also *Belcher v Campbell* (1845) 8 QB 1; *Ancona v Marks* (1862) 31 LJEx 163.
9 Bills of Exchange Act 1882 ss 2, 73. As to the meaning of 'holder' see PARA 1407. See *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356 at 378–379, CA; *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA.

1407. Negotiation, indorser, bearer, holder, etc. 'Negotiation' means the transfer for value[1] of a bill of exchange, cheque[2] or promissory note[3] to a person[4], who thereupon becomes entitled to hold it, and is capable of suing thereon in his own name[5].

'Indorsement' means the writing[6] on a bill, cheque or note the name of the transferor and its delivery[7] to the transferee[8].

'Indorsee' means the person to whom a bill of exchange, cheque or promissory note is transferred by indorsement[9].

'Bearer' means the person in possession of a bill or note which is payable to bearer[10].

'Holder' means the payee[11] or indorsee of a bill of exchange, cheque or promissory note who is in possession of it, or the bearer thereof[12].

'Holder for value' means, as regards the acceptor[13] and all parties prior to the time when value was given, a holder of a bill of exchange, cheque or promissory note for which value has at any time been given[14].

'Holder in due course' means a holder of a bill of exchange, cheque or promissory note, complete and regular on the face of it, who takes it in good faith[15] and for value before it is overdue, and without notice either of its previous dishonour or of any defect in the title of the person who negotiated it to him[16].

1 As to the meaning of 'value' see PARA 1401 note 8.
2 Questions of negotiation will not now arise in relation to cheques as a result of the Cheques Act 1992.
3 As to the meanings of 'bill of exchange', 'cheque' and 'promissory note' see PARA 1405.
4 As to the meaning of 'person' see PARA 1401 note 4.
5 See PARAS 1489–1491. Cf *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 at 381 per Blackburn J, citing with approval the notes to *Miller v Race* (1758) 1 Burr 452, in 1 Smith LC (2nd Edn) at 259, (13th Edn) at 534.
6 As to the meaning of 'writing' see PARA 1405 note 2.
7 As to the meaning of 'delivery' see PARA 1406.
8 Bills of Exchange Act 1882 s 2; see PARAS 1491–1495; *Marston v Allen* (1841) 8 M & W 494 at 504 per Alderson B; *Denton v Peters* (1870) LR 5 QB 475.
9 'Indorsee' is not defined in the Bills of Exchange Act 1882 but has been held to mean 'a person who has the rights which are given by statute in respect of a bill or cheque by virtue of an indorsement' and 'is not limited to one who has received a cheque with a signature actually written on the back': *Midland Bank Ltd v RV Harris Ltd* [1963] 2 All ER 685 at 687, [1963]

1 WLR 1021 at 1024 per Megaw J (a case decided under the Cheques Act 1957). 'Indorser' is not defined in the Bills of Exchange Act 1882 either, but in practice is taken to mean 'a person who effects an indorsement'.

10 Bills of Exchange Act 1882 ss 2, 73. See PARA 1428.

11 As to the meaning of 'payee' see PARA 1406.

12 Bills of Exchange Act 1882 ss 2, 73. See also PARA 1600; and cf *Lloyds Bank Ltd v Cooke* [1907] 1 KB 794 at 806, CA, per Fletcher Moulton LJ; *Re Hayward, ex p Hayward* (1871) 6 Ch App 546 at 548 per James LJ; and *Walters v Neary* (1904) 21 TLR 146 at 147, CA. The term 'holder' includes (1) the original payee of a bill; and (2) a banker who is a mere agent for collection: *Sutters v Briggs* [1922] 1 AC 1, HL, a decision on the term 'holder' in the Gaming Act 1835 s 2 (repealed); but the definition of the term was argued and adjudged with reference to the Bills of Exchange Act 1882, and *Nicholls v Evans* [1914] 1 KB 118 was overruled. See also *Dey v Meyo* [1920] 2 KB 346, CA; *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465 at 472.

13 As to the meaning of 'acceptor' see PARA 1406.

14 Bills of Exchange Act 1882 s 27(2), (3). It would seem that the holder of a cheque who has a lien on it is by virtue of s 27(3) deemed to have taken that cheque for value within the meaning of s 29(1)(b) (see note 15) to the extent of the sum for which he has a lien (*Re Keever (a bankrupt), ex p Trustee of Property of Bankrupt v Midland Bank Ltd* [1967] Ch 182, [1966] 3 All ER 631, [1966] 2 Lloyd's Rep 475; *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719); see also *Paine v Bevan and Bevan* (1914) 110 LT 933 (in which it was held the bookmaker payees of cheques for which they did not give value were liable in conversion to the true owner), and see further PARAS 1478–1481. See also PARA 881 et seq.

15 As to the meaning of 'good faith' see PARA 1401 note 7.

16 Bills of Exchange Act 1882 s 29(1)(a), (b); see PARA 1485. An original payee is not a holder in due course: *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL; and see PARAS 1450 note 3, 1486.

(iv) Necessary Parties

A. BILLS OF EXCHANGE

1408. Necessary parties to bill of exchange. The necessary parties to a bill of exchange[1] are: (1) the party giving the order, who must sign it, and who is called the drawer[2]; (2) the party to whom the order is given, who is called the drawee[3], and who on assenting to the terms of the order and signing it is called the acceptor[4]; and (3) the party to whom the money is to be paid, who is called the payee[5], or, if the bill be expressed to be payable to bearer[6], the bearer[7].

The same person[8] sometimes fills the position of two of these three necessary parties[9].

Thus the drawer may also be the payee when the bill is expressed 'pay to us', 'pay to our order', 'pay to us or order', or 'pay to ____ order'[10].

The drawee may also be the payee, for example, where the bill is expressed 'pay to your own order'[11]. Here, though the instrument[12] is in form a bill, there is nothing to enforce until the bill has been negotiated, that is, transferred for value[13] by being indorsed by the drawee or payee to some other party.

The drawer may also be the drawee. In this case, as also in the case of the drawee being a fictitious person or a person not having capacity to contract[14], the holder[15] may treat the instrument at his option either as a bill of exchange or as a promissory note[16]. A banker's draft[17] may also be treated either as a bill of exchange or as a promissory note[18].

1 As to the meaning of 'bill of exchange' see PARA 1405.

2 As to the meaning of 'drawer' see PARA 1406. A document in the form of a bill signed by the acceptor but not by the drawer is not a bill, but may be valid as an acknowledgment of debt: *Lawson's Executors v Watson* 1907 SC 1353, Ct of Sess. As to the right of the holder to complete an incomplete bill see PARA 1449. As to the nature of the contract made by the drawer see PARA 1574.

3 As to the meaning of 'drawee' see PARA 1406. Where the instrument, though in form a bill, is addressed to no drawee, it may be treated as a note, even where it cannot be treated as a bill: *Fielder v Marshall* (1861) 9 CBNS 606; *Mason v Lack* (1929) 140 LT 696. See also *Haseldine v Winstanley* [1936] 2 KB 101, [1936] 1 All ER 137.
4 As to the meaning of 'acceptor' see PARA 1406. As to the nature of the contract made by the acceptor see PARA 1451 et seq.
5 As to the meaning of 'payee' see PARA 1406.
6 As to instruments payable to bearer see PARA 1428.
7 As to the meaning of 'bearer' see PARA 1407.
8 As to the meaning of 'person' see PARA 1401 note 4.
9 A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee: Bills of Exchange Act 1882 s 5(1).
10 As to the last example see *Chamberlain v Young* [1893] 2 QB 206, CA; and text to PARA 1429 note 10. As to instruments payable to order see PARA 1428.
11 Formerly such an instrument was not a bill of exchange.
12 As to the meaning of 'instrument' see PARA 1402 note 1.
13 As to the meaning of 'value' see PARA 1401 note 8.
14 As to fictitious persons see PARA 1431. As to restrictions on capacity see PARA 1469. Notice of dishonour may be dispensed with also when the drawer and drawee are the same person; see PARA 1529.
15 As to the meaning of 'holder' see PARA 1407.
16 Bills of Exchange Act 1882 s 5(2); *Miller v Thomson* (1841) 3 Man & G 576; *Allen v Sea, Fire and Life Assurance Co* (1850) 9 CB 574. See also *Re British Trade Corpn* [1932] 2 Ch 1, CA, in which the instrument was drawn by a branch office on the head office.
17 As to the meaning of 'banker's draft' see PARA 1411 note 24.
18 As to the meaning of 'promissory note' see PARA 1405.

1409. Referee in case of need. Besides the parties necessary to a bill of exchange[1] another party may be introduced at the option of the drawer[2] and any indorser[3], called the 'referee in case of need'[4]. The drawer or indorser in that event inserts on the face of the bill the name of a person[5] to whom resort may be had 'in case of need', that is in the event of the bill being dishonoured by non-acceptance or non-payment[6]. The holder[7] of the bill is at liberty to choose whether he will resort to the referee or not[8], but in the case of a bill, where it is desired to charge a drawer or indorser resident in a foreign country, the holder should ascertain whether the law of that country does not require him first to resort to the referee in case of need[9]. A dishonoured bill must be protested[10], or at least noted for protest, for non-payment before it is presented for payment to the referee in case of need[11].

1 As to the meaning of 'bill of exchange' see PARA 1405.
2 As to the meaning of 'drawer' see PARA 1406.
3 As to the meaning of 'indorser' see PARA 1407 note 8.
4 See the Bills of Exchange Act 1882 s 15.
5 As to the meaning of 'person' see PARA 1401 note 4.
6 As to dishonour by non-acceptance see PARA 1515. As to dishonour by non-payment see PARA 1525.
7 As to the meaning of 'holder' see PARA 1407.
8 Bills of Exchange Act 1882 s 15.
9 See PARA 1597.
10 As to the meaning of 'protest' see PARA 1539.
11 Bills of Exchange Act 1882 ss 67(1), 93. This provision applies also to dishonoured bills accepted for honour supra protest: see PARA 1569. As to noting and protest see PARA 1537 et seq.

B. CHEQUES

1410. Necessary parties to cheque. The necessary parties to a cheque are the same as those to a bill of exchange, save that the drawee[1] must be a banker[2]. The

banker does not become acceptor[3] of the cheque, but there is an implied contract between the banker and his customer that he will honour cheques drawn upon him by his customer up to the amount of the funds of his customer which he has in his hands or, where there is an agreement to let the customer overdraw, up to the limits of the amount of the overdraft agreed on[4]. The banker's liability is to the drawer[5] (his customer) only; the mere dishonour of a cheque gives no right of claim to anyone other than the drawer[6]. With certain exceptions which will be noticed hereafter, the law applying to bills of exchange payable on demand applies equally to cheques[7].

1 As to the meaning of 'drawee' see PARA 1406.
2 As to the meanings of 'cheque' and 'bill of exchange' see PARA 1405. As to the meaning of 'banker' see PARA 1403 note 7.
3 As to the meaning of 'acceptor' see PARA 1406.
4 As to the position of the banker see further PARA 1454. See also PARA 853 et seq.
5 As to the meaning of 'drawer' see PARA 1406.
6 *Hopkinson v Forster* (1874) LR 19 Eq 74. As to claims in relation to bills of exchange see further PARA 1599 et seq.
7 Bills of Exchange Act 1882 s 73. See further PARAS 1411, 1415, 1454, 1499–1500, 1519, 1521, 1523, 1552, 1560.

1411. Crossing of cheques. The rules for the negotiation[1] of bills and notes apply generally to cheques[2] but the negotiation of a cheque may be affected by crossing it[3].

A cheque is crossed where it bears across its face an addition of: (1) the words 'and company' or any abbreviation thereof between two parallel transverse lines[4]; or (2) two parallel transverse lines simply[5]; or (3) the name of a banker[6]. In heads (1) and (2) above, the cheque is said to be crossed generally[7]; in head (3), it is said to be crossed specially, and to the banker so named[8]. The words 'not negotiable' may be added in any of these cases[9], but these words by themselves do not constitute a crossing[10].

The drawer[11] of a cheque may cross it either generally or specially[12]. The holder[13] may cross an uncrossed cheque generally or specially[14], or may cross a cheque specially that is crossed generally[15]. The holder may also add the words 'not negotiable' to a cheque that is crossed either generally or specially[16].

By operation of the Cheques Act 1957[17], the crossed cheque provisions of the Bills of Exchange Act 1882[18] apply not only to cheques[19] but extend to: (a) any document issued by a customer of a banker[20] which, though not a bill, is intended to enable a person[21] to obtain payment of the sum mentioned therein from that banker[22]; (b) any document issued by a public officer and intended to enable a person to obtain payment from the Paymaster General or the Queen's and Lord Treasurer's Remembrancer[23]; and (c) a banker's draft[24].

1 As to the meaning of 'negotiation' see PARA 1407.
2 Bills of Exchange Act 1882 s 73. As to the meanings of 'bill', 'note' and 'cheque' see PARA 1405. In relation to cheques, however, note the comment in PARA 1403 note 10; see also PARA 1407 note 2.
3 As to crossing of cheques generally see PARAS 859–860, 901.
4 Bills of Exchange Act 1882 s 76(1)(a).
5 Bills of Exchange Act 1882 s 76(1)(b).
6 Bills of Exchange Act 1882 s 76(2). As to the meaning of 'banker' see PARA 1403 note 7. It is customary, but not necessary, to add two parallel transverse lines in this case also: see PARA 901.
7 Bills of Exchange Act 1882 s 76(1).
8 Bills of Exchange Act 1882 s 76(2). Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection: s 77(5). A banker may also, where an uncrossed cheque or a cheque crossed generally is sent to him for collection, cross it specially to himself: s 77(6).

9 See the Bills of Exchange Act 1882 s 76(1)(a), (b), (2).
10 As to cheques marked 'not negotiable' see PARA 1499.
11 As to the meaning of 'drawer' see PARA 1406.
12 Bills of Exchange Act 1882 s 77(1).
13 As to the meaning of 'holder' see PARA 1407.
14 Bills of Exchange Act 1882 s 77(2).
15 Bills of Exchange Act 1882 s 77(3).
16 Bills of Exchange Act 1882 s 77(4).
17 See the Cheques Act 1957 s 5.
18 Bills of Exchange Act 1882 ss 76–81A: see PARAS 1499–1500, 1560, 1575.
19 Cheques Act 1957 ss 4(2)(a), 5. This includes cheques that are not transferable, whether or not so made under the provisions of the Bills of Exchange Act 1882 s 81A (see PARAS 900, 1500): Cheques Act 1957 s 4(2)(a) (amended by the Cheques Act 1992 s 3).
20 As to the meaning of 'banker' see PARA 1403 note 7; definition applied by the Cheques Act 1957 s 6(1).
21 As to the meaning of 'person' see PARA 1401 note 4; definition applied by the Cheques Act 1957 s 6(1).
22 Cheques Act 1957 ss 4(2)(b), 5.
23 Cheques Act 1957 ss 4(2)(c), 5. As to the Paymaster General and the Queen's and Lord Treasurer's Remembrancer see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 714; COURTS vol 10 (Reissue) PARA 654.
24 Cheques Act 1957 ss 4(2)(d), 5. A banker's draft is a draft payable on demand by a banker on himself, whether payable at the head office or some other office of his bank: s 4(2)(d).

1412. Marking of cheques by bankers. Occasionally cheques[1] are marked or certified by the bankers[2] on whom they are drawn. Doing so does not convert the banker into an acceptor[3] or make him liable on the cheque, but it may constitute a representation by him, on which he may be held liable, that the cheque will be paid as drawn if presented within a reasonable time[4].

1 As to the meaning of 'cheque' see PARA 1405.
2 As to the meaning of 'banker' see PARA 1403 note 7.
3 As to the meaning of 'acceptor' see PARA 1406.
4 See *Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] AC 176, [1944] 2 All ER 83, PC. As to such marking in general and its effect see PARAS 856, 868.

C. PROMISSORY NOTES

1413. Necessary parties to promissory note. The necessary parties to a promissory note[1] are: (1) the person[2] who makes the promise, and who is called the maker[3]; (2) the person to whom the promise is made, and who is called the payee[4]. Where the same person fills the position of both parties, for example, where the instrument[5] is expressed 'pay to my order', the instrument is not a note unless and until it is indorsed by the maker[6]. In the application of the statutory provisions relating to bills of exchange[7] to a promissory note, the maker of a note is deemed to correspond with the acceptor[8] of a bill and the first indorser[9] of a note is deemed to correspond with the drawer[10] of an accepted bill payable to drawer's order[11].

1 As to the meaning of 'promissory note' see PARA 1405.
2 As to the meaning of 'person' see PARA 1401 note 4.
3 As to the nature of the contract made by the maker see PARA 1576.
4 See the Bills of Exchange Act 1882 s 83(1); and PARA 1405. A note may also be payable to bearer: see the Bills of Exchange Act 1882 s 83(1); and PARA 1428.
5 As to the meaning of 'instrument' see PARA 1402 note 1.
6 Bills of Exchange Act 1882 s 83(2).
7 Ie the Bills of Exchange Act 1882 Pt II (ss 3–72). As to the meaning of 'bill of exchange' see PARA 1405.
8 As to the meaning of 'acceptor' see PARA 1406.

9 As to the meaning of 'indorser' see PARA 1407 note 8.
10 As to the meaning of 'drawer' see PARA 1406.
11 Bills of Exchange Act 1882 s 89(2). As to instruments payable to order see PARA 1428.

(v) Requirements of Form

1414. Wording. It is not necessary to adhere to any form of words so long as the conditions of the definition are observed[1], in which case the language in which the instrument[2] is written is immaterial[3].

1 As to the definitions see PARA 1405.
2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 *Re Marseilles Extension Railway and Land Co, Smallpage's and Brandon's Cases* (1885) 30 ChD 598, where the fact of a bill being drawn in French did not prevent its being treated as an inland bill.

1415. Date. Omission of the date does not invalidate a bill or note[1]. Where an instrument expressed to be payable at a fixed period after date[2] is issued[3] undated, or where the acceptance[4] of a bill payable at a fixed period after sight[5] is undated, any holder[6] may insert the true date of issue or acceptance, and the instrument becomes payable accordingly[7]. Where the holder inserts a wrong date in good faith[8] and by mistake, and in every case where a wrong date is inserted[9], if the instrument subsequently comes into the hands of a holder in due course[10], the instrument is not invalidated, but the date so inserted is deemed to be the true one[11].

Where an instrument remains undated it would seem that it should be taken to be dated on the date when it was issued[12], that is, when it was first delivered complete in form to a person[13] taking it as holder.

Where the drawing or indorsement[14] of any instrument or the acceptance of any bill is dated, the date, unless the contrary be proved, is deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be[15].

An instrument is not invalid by reason only that it is antedated or postdated or that it bears date on a Sunday[16].

1 Bills of Exchange Act 1882 ss 3(4)(a), 89. As to the meanings of 'bill' and 'note' see PARA 1405. Cheques are in a somewhat different position. Omission of the date may not, and probably does not, invalidate the cheque, but bankers usually refuse payment of an undated cheque, presumably on the ground that, unlike a bill or note, it is revocable in certain circumstances. See eg *Griffiths v Dalton* [1940] 2 KB 264. See also *Aspinall's Club Ltd v Al-Zayat* [2007] EWCA Civ 1007, [2007] All ER (D) 302 (Oct).
2 As to the meaning of 'instrument' see PARA 1402 note 1. As to the meanings of 'bill payable after date' and 'note payable after date' see PARA 1434.
3 As to the meaning of 'issue' see PARA 1406.
4 As to the meaning of 'acceptance' see PARA 1406.
5 As to the meaning of 'bill payable after sight' see PARA 1435.
6 As to the meaning of 'holder' see PARA 1407.
7 Bills of Exchange Act 1882 ss 12, 89. The date which the section allows to be inserted is the date of issue or acceptance so the section, as between immediate parties, does not apply to a case where an agreement provides the date from which the bill is to run irrespective of the date of the bill or the sight of the bill, and a date which is not the date in the agreement is inserted in the bill as the date from which the bill is to run: *Foster v Driscoll* [1929] 1 KB 470 at 495, CA, per Scrutton LJ.
8 As to the meaning of 'good faith' see PARA 1401 note 7.
9 Bills of Exchange Act 1882 s 12 proviso (1), s 89.
10 As to the meaning of 'holder in due course' see PARA 1407.
11 Bills of Exchange Act 1882 s 12 proviso (2), s 89.

12 This proposition derives from the provision that where a bill is expressed to be payable with interest, interest runs from the date of the bill (unless the instrument provides otherwise) and if the bill is undated, interest runs from the date of its issue: Bills of Exchange Act 1882 ss 9(3), 89.
13 As to the meaning of 'person' see PARA 1401 note 4.
14 As to the meaning of 'indorsement' see PARA 1407.
15 Bills of Exchange Act 1882 ss 13(1), 89.
16 Bills of Exchange Act 1882 ss 13(2), 89. Where one in possession of a blank acceptance fills it up as a bill with himself as drawer, and antedates it by a whole year, the bill is good: *Armfield v Allport* (1857) 27 LJEx 42. Again, where a bill is dated at a time subsequent to that at which the payee who indorsed it actually died, it has been held that the postdating may be proved and the bill recovered on: *Pasmore v North* (1811) 13 East 517. As to postdated cheques see *Royal Bank of Scotland v Tottenham* [1894] 2 QB 715, CA; and PARA 853. As to marking a postdated cheque see *Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] AC 176, [1944] 2 All ER 83, PC; and PARA 1412.

1416. Value. Omission to specify the value[1] given or that any value has been given does not invalidate an instrument[2], since the presumption always remains, unless actually negatived, that every party whose signature appears on a bill[3] has become a party thereto for value[4].

Evidence may be adduced to show absence, failure[5], or illegality of consideration[6] or fraud[7], whether the instrument is expressed to be for value or not, and generally contemporary evidence in writing may be given to negative the presumption or statement, if any, of value given; but, parol evidence, the effect of which would be to vary the terms of the instrument as they appear upon its face, is inadmissible[8].

1 As to the meaning of 'value' see PARA 1401 note 8.
2 Bills of Exchange Act 1882 ss 3(4)(b), 89. As to the meaning of 'instrument' see PARA 1402 note 1.
3 As to the meaning of 'bill' see PARA 1405.
4 See the Bills of Exchange Act 1882 s 30(1); and PARA 1478.
5 See PARA 1481.
6 As to consideration see PARA 1478 et seq. As to illegality of consideration see PARA 1484.
7 As to fraud see PARA 1483.
8 *Ridout v Bristow* (1830) 1 Cr & J 231; *Hill v Wilson* (1873) 8 Ch App 888. See also PARA 1447. As to parol evidence of consideration generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 192, 194.

1417. Place of drawing, etc. It is customary, but not necessary, to state in a bill the place where it is drawn, or in a note the place where it is made[1].

It is also unnecessary to state the place where it is to be paid[2]. The instrument[3] may, however, be so expressed, and may be made payable alternatively in one of two places[4].

1 Bills of Exchange Act 1882 ss 3(4)(c), 89(1). As to the meanings of 'bill' and 'note' see PARA 1405.
2 Bills of Exchange Act 1882 ss 3(4)(c), 87(1).
3 As to the meaning of 'instrument' see PARA 1402 note 1.
4 *Beeching v Gower* (1816) Holt NP 313; *Pollard v Herries* (1803) 3 Bos & P 335 (where a note was made payable in Paris or London at the choice of the holder, according to the rate of exchange); and *Forman v Bank of England* (1902) 18 TLR 339 (bank's choice of place of payment successfully disputed).

1418. For payment of money only. A bill of exchange, cheque or promissory note[1] must be for the payment of money only[2]; an instrument that orders any other act to be done in addition is not a bill of exchange, cheque or promissory note[3]. Further, it is essential that the money which is to be paid should be a sum certain[4], for otherwise the drawee[5] could not tell what he is to pay, or the payee[6]

or holder[7] what he is entitled to demand. However, there is no limit set to the amount for which a bill may be drawn[8]. A bill of exchange or promissory note drawn or made on or after 15 February 1971 is invalid if it is drawn wholly or partly in shillings and pence[9]. Reference to the old currency in shillings and pence, in cheques and other instruments to which the relevant provisions of the Cheques Act 1957[10] apply, in bills of exchange (other than cheques) and in promissory notes, is to be read as meaning the corresponding amount in the new currency calculated in accordance with the provisions of the Decimal Currency Act 1969[11] and any alteration done to make the instrument read in accordance with such provisions does not affect the validity of the instrument and, in the case of a bill of exchange or promissory note, does not render the alteration a material alteration[12].

1 As to the meanings of 'bill of exchange', 'cheque' and 'promissory note' see PARA 1405.
2 See the Bills of Exchange Act 1882 ss 3, 73, 83; and PARA 1405.
3 See the Bills of Exchange Act 1882 ss 3(2), 73, 89; and PARA 1405. See also *Akbar Khan v Attar Singh* [1936] 2 All ER 545 at 550, PC. Thus an instrument ordering the delivery up of houses and a wharf in addition to the payment of a sum of money is not a valid bill: *Martin v Chauntry* (1747) 2 Stra 1271. See also *Dickie v Singh* 1974 SLT 129 (instrument providing for employment and payment of staff in addition to the payment of a sum of money held not to be a promissory note).
4 See the Bills of Exchange Act 1882 ss 3(1), 9, 73, 83(1); and PARA 1405. Therefore a note to pay a given sum and whatever else may be due to the payee is not a good note (*Smith v Nightingale* (1818) 2 Stark 375; *Crowfoot v Gurney* (1832) 9 Bing 372), nor a note to pay '£13 and all fines according to rule' (*Ayrey v Fearnsides* (1838) 4 M & W 168), nor is a bill to pay the proceeds of the sale of a consignment of goods even when valued by the drawer at a definite sum a good bill (*Jones v Simpson* (1823) 2 B & C 318).
5 As to the meaning of 'drawee' see PARA 1406.
6 As to the meaning of 'payee' see PARA 1406.
7 As to the meaning of 'holder' see PARA 1407.
8 48 Geo 3 (Bills of Exchange) (1808) c 88, by which bills or notes for less than 20s were made void, was repealed by the Bills of Exchange Act 1882 s 96, Sch 2 (repealed).
9 Decimal Currency Act 1969 s 2(1), (2).
10 Ie the Cheques Act 1957 s 4: see the Decimal Currency Act 1969 s 3(3)(a). As to the application of the Cheques Act 1957 s 4 see PARA 1411.
11 Ie as given in the Decimal Currency Act 1969 Sch 1: s 3(1).
12 Decimal Currency Act 1969 s 3(2). The alteration of an amount of money in the pre-decimal currency to the equivalent decimal amount is not a material alteration for the purposes of the Bills of Exchange Act 1882 s 64: Decimal Currency Act 1969 s 3(2). As to material alterations see PARA 1560; and as to the rights of the transferee of an altered instrument see PARA 1505.

1419. Sum payable with interest. The sum payable is not to be regarded as uncertain although it is required to be paid with interest[1].

In English law there is no limit to the amount of interest that may be charged[2], but many foreign countries have usury laws, and bills or notes in such countries must not bear interest at a rate higher than that which the law permits. In England and Wales, where a bill or note is expressed to be with interest, but no rate is prescribed, a court would probably allow the appropriate commercial rate[3]. An instrument[4] payable with 'lawful interest' is thus not invalid for uncertainty[5].

1 Bills of Exchange Act 1882 s 9(1)(a).
2 As to excessive interest in consumer credit and moneylenders' transactions see PARA 1286; and CONSUMER CREDIT vol 9(1) (Reissue) PARAS 269–270. In *Re Tillman* (1918) 34 TLR 322, an acceptor of bills drawn by a drawer who became an enemy alien was not allowed to charge against the enemy alien commission or compound interest, but only the interest the acceptor had paid to the Bank of England in respect of an advance to enable the acceptances to be met, and, after the bank had been repaid, simple interest only at 5%.
3 See *Practice Direction (Claims for Interest)* [1983] 1 All ER 934, [1983] 1 WLR 377.

4 As to the meaning of 'instrument' see PARA 1402 note 1.
5 *Warrington v Early* (1853) 23 LJQB 47 (where it was held that a note in these terms valid in itself was rendered invalid by a subsequent alteration). But see contra, *Lamberton v Aiken* (1899) 37 SLR 138, Ct of Sess (where a note for a sum of money 'together with any interest that may accrue thereon' was held invalid in Scotland on the ground of uncertainty).

1420. Payment by instalments. The sum may also be expressed to be payable by stated instalments with or without a provision that upon default in payment of any instalment the whole shall become due[1], but the dates of the instalments must be stated[2].

1 Bills of Exchange Act 1882 s 9(1)(b), (c); *Carlon v Kenealy* (1843) 12 M & W 139. Unless the note so states the holder may not sue for the whole balance on default in payment of an instalment: *Van der Westhuizen v Lochner* (1908) 18 CTR 446 (SA). Where a promissory note containing such a provision and a bill of sale are both given to secure the same debt, the bill of sale is invalidated by the stipulation in the note, but the note itself is good: *Monetary Advance Co v Cater* (1888) 20 QBD 785, DC. As to statutory defeasances of a bill of sale see PARAS 1748–1749.
2 *Moffat v Edwards* (1841) Car & M 16, where the instrument was in this form: 'I owe £6 which is to be paid by instalments for rent', and was held not to be a note.

1421. Sum payable at stated rate of exchange. The sum may also be expressed to be payable according to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the instrument[1]. Bills[2] are sometimes drawn in this country payable in another country with 'exchange as per indorsement' or some variant of this; in such cases it would seem advisable to ensure that the particular form of words used binds the acceptor[3] to pay according to them[4]. A bill for an amount expressed in foreign currency is not invalidated because a rate of exchange is not indicated on the face of the bill, and evidence of the practice of bankers[5] in dealing with cheques drawn in England on an English bank in foreign currency may be given[6].

The addition to the instrument of a rate of exchange after acceptance[7] is a material alteration which invalidates the instrument[8].

An instrument may be expressed to be payable in the alternative at one of two places in the choice of the holder[9] according to the course of exchange between the two[10].

1 Bills of Exchange Act 1882 s 9(1)(d). See also *Re Hodgson & Co and Wigglesworth & Co Ltd* [1920] WN 198. As to the meaning of 'instrument' see PARA 1402 note 1. For the method to be used in arriving at the rate of exchange in certain cases where the rate is not fixed by the instrument see PARA 1594. For the general rules of conversion into English currency see PARAS 1278–1279.
2 As to the meaning of 'bill' see PARA 1405.
3 As to the meaning of 'acceptor' see PARA 1406.
4 *Tropic Plastic and Packaging Industry v Standard Bank of South Africa Ltd* 1969 (4) SA 108 (where it was held that in a bill bearing under the amount in words, the expression 'exchange as per indorsement', the mere setting out of the calculation of sterling into rand at a stated rate of exchange then obtaining was not an indorsement binding on the drawee).
5 As to the meaning of 'banker' see PARA 1403 note 7.
6 See *Cohn v Boulken* (1920) 36 TLR 767. As to what will be treated as the currency of a foreign country see *Lindsay, Gracie & Co v Russian Bank for Foreign Trade* (1918) 34 TLR 443 (payment 'in Russian currency').
7 As to the meaning of 'acceptance' see PARA 1406.
8 *Hirschfeld v Smith* (1866) LR 1 CP 340. As to material alterations see PARA 1560.
9 As to the meaning of 'holder' see PARA 1407.
10 *Pollard v Herries* (1803) 3 Bos & P 335. See also PARA 1417 text to note 4.

1422. Words prevail over figures. It is customary for bills and notes[1] to have the amount written in figures at the top of the instrument and also in words in

the body of the instrument. The figures at the top (the marginal figures, as they are sometimes called) are not in fact a necessary part of an instrument, though they are commonly placed there. It would seem that their original purpose was that the amount of the instrument might strike the eye immediately and be a note, index or summary of the contents[2].

Where there is a discrepancy between the words used to express a sum payable and the figures so used, the sum denoted by the words is the amount payable[3], and evidence cannot be adduced to show that in fact there was a mistake made in omitting words in the body of the instrument[4]. Probably if there is a marginal figure and there are no words in the body of the instrument, it is a valid instrument for the marginal figure[5].

Obvious and intelligible mistakes in the written words, however, do not invalidate an instrument[6].

1 As to the meanings of 'bill' and 'note' see PARA 1405.

2 *Garrard v Lewis* (1882) 10 QBD 30 at 32–35 per Bowen LJ, discussing at length the subject of marginal figures and citing, at 33, Nouguier, Lettres de Change (1875 Edn) 127: '*Les chiffres ne sont pas que pour simple note*'.

3 Bills of Exchange Act 1882 s 9(2). It is the practice of bankers in England to return the cheque with the answer 'amounts differ' unless the difference is insignificant or if the smaller amount only is claimed, when it is the custom to pay it. See *Macmillan v London Joint Stock Bank* [1917] 2 KB 439 at 448, CA, per Swinfen Eady LJ; revsd on other points sub nom *London Joint Stock Bank v Macmillan* [1918] AC 777, HL.

4 *Saunderson v Piper* (1839) 5 Bing NC 425.

5 *Heeney v Addy* [1910] 2 IR 688; but see *Garrard v Lewis* (1882) 10 QBD 30.

6 A bill for 'twenty-five, seventeen shillings and three-pence' has been held to be a good bill for £25 17s 3d: *Phipps v Tanner* (1833) 5 C & P 488. See also *Banco di Roma SpA v Orru* [1973] 2 Lloyd's Rep 505, CA.

1423. Peremptory order to pay. The wording of a bill of exchange[1] must import a demand, not a request[2].

1 As to the meaning of 'bill of exchange' see PARA 1405.

2 Bills of Exchange Act 1882 s 3(1). Thus an instrument in the form 'Please to let bearer have £ _____, and you will oblige me', has been held not to be a valid bill: *Little v Slackford* (1828) Mood & M 171; and cf *Russell v Powell* (1845) 14 M & W 418; *Hamilton v Spottiswoode* (1849) 4 Exch 200. But see *Ruff v Webb* (1794) 1 Esp 130 at 131 per Lord Kenyon CJ holding an instrument expressed in the form 'Mr Nelson will much oblige Mr Webb by paying to J Ruff or order 20 guineas on his account', to be a good bill.

1424. Unconditional order to pay. The order must be not only peremptory but unconditional[1], for any condition made would at once import uncertainty. Thus a cheque[2] drawn on a bank payable on the condition of signing a particular receipt form at the foot of the cheque may be conditional[3], unless it is clear that the words importing the condition are not addressed to the drawee-bank[4]. The addition of the words 'as per agreement' does not make a note conditional[5]; and the words 'to be retained', written by the drawer[6] of a cheque across its face, although they import a condition as between the drawer and the payee[7], leave the order to pay addressed to the banker unconditional[8].

An order to pay out of a particular fund is not an unconditional order, and an instrument[9] with such a provision is not therefore a good bill or note[10]. But an indication of a particular fund out of which the drawee is to reimburse himself, or of a particular account to be debited with the amount payable, does not by itself prevent an order being unconditional[11], nor does the recital on the

instrument of the transaction that gave rise to the instrument[12]. A note is not invalid by reason only that it contains also a pledge of collateral security, with authority to sell or dispose thereof[13].

1 Bills of Exchange Act 1882 ss 3(1), 73, 83(1); see also PARA 1405.
2 As to the meaning of 'cheque' see PARA 1405.
3 *Bavins, Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA. The instrument in this case was in the following form: 'Pay to _____ provided that the receipt form at foot hereof is duly signed, stamped, and dated'. Then followed signatures of the officers of the company drawing the instrument, and the receipt form was as follows: 'Received from the _____ Co the above-named sum as per particulars furnished. This receipt is not to be detached from the cheque.
Signature _____ Dated _____ 1890.'
4 *Nathan v Ogdens Ltd* (1905) 93 LT 553; affd on another point 94 LT 126, CA, where the instrument had at the foot 'The receipt at back hereof must be signed, which signature will be taken as an indorsement of this cheque', and on the back 'Received from Mr _____ (liquidator of Ogdens, Limited) this cheque for _____, being my share of the second and final bonus distribution of the company'. This was held by Lawrence J to be unconditional, 'for though the words are imperative in terms, they are not addressed to the bankers, and do not affect the nature of the order to them'. As to the meaning of 'drawee' see PARA 1406.
5 *Jury v Barker* (1858) EB & E 459. In *Wirth v Weigel Leygonie & Co Ltd* [1939] 3 All ER 712, du Parcq LJ (sitting as an additional judge), held that in the surrounding circumstances a document in the following terms was not a promissory note within the meaning of the Bills of Exchange Act 1882: 'Reference AC 3 TR/WLIS Kischner, London, WC1. We confirm herewith that we undertake to pay irrevocably the sum of £200 to you or into your banking account on May 25, 1935, in respect of the above reference'.
6 As to the meaning of 'drawer' see PARA 1406.
7 As to the meaning of 'payee' see PARA 1406.
8 *Roberts & Co v Marsh* [1915] 1 KB 42, CA.
9 As to the meaning of 'instrument' see PARA 1402 note 1.
10 Bills of Exchange Act 1882 ss 3(3), 89. As to the meanings of 'bill' and 'note' see PARA 1405. Thus an order to pay 'out of the moneys now due or hereafter to become due to me under the will of my late father and before making any payment to me thereout' is not a valid bill (*Fisher v Calvert* (1879) 27 WR 301), nor is the promise to pay out of the proceeds of a sale a valid note: *Hill v Halford* (1801) 2 Bos & P 413. See also *Dawkes v De Loraine* (1771) 2 Wm Bl 782; *Jenney v Herle* (1724) 2 Ld Raym 1361; *Haydock v Lynch* (1729) 2 Ld Raym 1563.
11 Bills of Exchange Act 1882 ss 3(3)(a), 89. A note expressed 'Pay _____ £9 10s as my quarterly half-pay' has been held a valid note (*Macleed v Snee* (1727) 2 Stra 762), and so, too, has a bill drawn on the official liquidator of a company to pay to _____ £ _____ 'on account of moneys advanced by me to the company': *Griffin v Weatherby* (1868) LR 3 QB 753. See also *Re Boyse, Crofton v Crofton, Canonge's Claim* (1886) 33 ChD 612, where a bill for £ _____, 'which sum is on account on the dividends and interest due on the capital and dividends registered in the books of the Governor and the Bank of England and Company in the name of _____ and _____, which you will please charge to my account and credit according to a registered letter which I have addressed to you', was held good.
12 Bills of Exchange Act 1882 ss 3(3)(b), 89. See *The Elmville* [1904] P 319.
13 Bills of Exchange Act 1882 s 83(3). See *Wise v Charlton* (1836) 4 Ad & El 786.

1425. Signature of drawer. A bill must be signed by the drawer[1], for though a bill may be accepted before it has the drawer's signature[2], it remains incomplete, and so cannot be issued[3].

Where, however, a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a prima facie authority to fill it up as a complete bill for any amount using the signature for that of the drawer, the acceptor[4] or an indorser[5], provided that the instrument[6] is filled up within a reasonable time[7] and strictly in accordance with the authority given[8].

The drawer's or maker's[9] signature is usually to be found at the foot of the instrument, but in the case of a note it may be sufficient if the maker's name is inserted in the body thereof[10].

A valid signature may be made in pencil[11], or in the case of an illiterate person by his mark[12].

Where a signature on a bill or note[13] is forged or placed thereon without the authority of the person[14] whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the instrument or to give a discharge for it[15] or to enforce payment of it against any party thereto can be acquired through or under that signature unless the party against whom it is sought to retain or enforce payment of the instrument is precluded from setting up the forgery or want of authority[16], but this does not affect the ratification of an unauthorised signature not amounting to forgery[17].

1 Bills of Exchange Act 1882 s 3(1); *M'Call v Taylor* (1865) 34 LJCP 365. As to the meaning of 'bill' see PARA 1405. As to the meaning of 'drawer' see PARA 1406.
2 See PARA 1459.
3 As to the meaning of 'issued' see PARA 1406.
4 As to the meaning of 'acceptor' see PARA 1406.
5 See the Bills of Exchange Act 1882 s 20(1); and PARA 1448. As to the meaning of 'indorser' see PARA 1407 note 8.
6 As to the meaning of 'instrument' see PARA 1402 note 1.
7 Bills of Exchange Act 1882 s 20(2). 'Reasonable time' for this purpose is a question of fact: s 20(2). See also PARA 1433 note 11.
8 See the Bills of Exchange Act 1882 s 20(2); *London and South Western Bank v Wentworth* (1880) 5 ExD 96; *Schultz v Astley* (1836) 2 Bing NC 544; *Awde v Dixon* (1851) 6 Exch 869. As to the holder's authority to fill in the name of the addressee see PARA 1449.
9 As to the meaning of 'maker' see PARA 1406.
10 *Taylor v Dobbins* (1720) 1 Stra 399. But the intention to use the name as a signature must appear.
11 *Geary v Physic* (1826) 5 B & C 234.
12 *George v Surrey* (1830) Mood & M 516.
13 As to the meaning of 'note' see PARA 1405.
14 As to the meaning of 'person' see PARA 1401 note 4.
15 As to discharges see PARA 1550 et seq.
16 Bills of Exchange Act 1882 ss 24, 89. As to the effect of forgery on bills of exchange see PARA 1503.
17 Bills of Exchange Act 1882 s 24 proviso, s 89.

1426. Certainty as to drawee. The drawee[1] must be named or otherwise indicated in a bill with reasonable certainty[2], for it is clear that a holder[3] must know to whom he has to present the bill, whether for acceptance or for payment[4].

A bill may be addressed to two or more drawees, whether they are partners or not, but an order addressed to two drawees in the alternative[5] or to two or more drawees in succession is not a bill of exchange[6], because, in the interests of certainty, there cannot be a series of acceptors[7].

1 As to the meaning of 'drawee' see PARA 1406.
2 Bills of Exchange Act 1882 s 6(1). As to the meaning of 'bill' see PARA 1405. This requisite is naturally complied with by naming the drawee precisely; but a bill expressed to be payable 'at _____', if accepted by the person who lives there, is a good bill (*Gray v Milner* (1819) 8 Taunt 739), and a bill addressed 'at Messrs _____' is a bill drawn on the firm of that name: *Shuttleworth v Stephens* (1808) 1 Camp 407. See also *Mason v Lack* (1929) 140 LT 696. In *Haseldine v Winstanley* [1936] 2 KB 101, [1936] 1 All ER 137, it was held that where an instrument not bearing the name of a drawee had been accepted, the acceptor's name might be filled in as drawee by virtue of the Bills of Exchange Act 1882 s 21. As to s 21 see PARAS 1441–1445.
3 As to the meaning of 'holder' see PARA 1407.
4 As to presentment for acceptance see PARA 1509 et seq. As to presentment for payment see PARA 1516 et seq.

5 An apparent exception to this is the 'referee in case of need', but his functions are distinct from those of the drawee: see PARA 1409. In the case of a note, too, the parties who draw the note may be both jointly and severally liable on it; see PARA 1427.
6 Bills of Exchange Act 1882 s 6(2).
7 *Jackson v Hudson* (1810) 2 Camp 447 at 448 per Lord Ellenborough CJ. See also *Re Barnard, Edwards v Barnard* (1886) 32 ChD 447, CA. As to the meaning of 'acceptor' see PARA 1406.

1427. Joint and several makers of a note. A note[1] may be made by two or more makers[2], and they may be liable on it jointly or jointly and severally according to its tenor[3], but where there are two or more makers they cannot be liable in the alternative[4]. Where a note runs, 'I promise to pay', etc, and is signed by two or more persons[5], it is deemed to be their joint and several note[6]; but if it runs, 'We promise to pay', etc, then it is their joint note only.

After a note is once issued[7] the name of a new maker cannot be added without invalidating the note[8].

1 As to the meaning of 'note' see PARA 1405.
2 As to the meaning of 'maker' see PARA 1406.
3 Bills of Exchange Act 1882 s 85(1). See *Re Jeffery, ex p Honey* (1871) 7 Ch App 178.
4 *Ferris v Bond* (1821) 4 B & Ald 679.
5 As to the meaning of 'person' see PARA 1401 note 4.
6 Bills of Exchange Act 1882 s 85(2); but where the makers are partners, and it is signed by one of them for the firm, there is no separate right of action against that partner: see *Re Clarke, ex p Buckley* (1845) 14 M & W 469; and PARA 1467.
7 As to the meaning of 'issue' see PARA 1406.
8 *Gardner v Walsh* (1855) 5 E & B 83; *Flanagan v National Bank Ltd* [1939] IR 352.

(vi) Classification of Instruments

A. BEARER AND ORDER BILLS, ETC

1428. Meaning and effect. An instrument[1] may be made payable: (1) to bearer[2]; or (2) to a specified person[3] or to his order[4].

An instrument is payable to bearer which is simply so expressed, or on which the only or last indorsement[5] is an indorsement in blank[6].

An instrument is payable to order which is payable to, or to the order of, a specified person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable[7].

Where an instrument is made payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option[8].

Where an instrument is not payable to bearer, the payee must be named or otherwise indicated with reasonable certainty[9], for in no other way can the drawee[10] of a bill[11], if he accepts it, know to whom he may properly pay it, so as to discharge himself from all further liability[12].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 As to the meaning of 'bearer' see PARA 1407.
3 As to the meaning of 'person' see PARA 1401 note 4.
4 Bills of Exchange Act 1882 ss 3(1), 73, 83(1).
5 As to the meaning of 'indorsement' see PARA 1407.
6 Bills of Exchange Act 1882 s 8(3); and see PARA 1492.
7 Bills of Exchange Act 1882 s 8(4). As to restrictions on negotiability see PARA 1440. As to transfer generally see PARA 1489 et seq.
8 Bills of Exchange Act 1882 s 8(5). So, too, when a bill is made payable 'to order of X' and the word 'order' is struck out, the acceptor inserting over his acceptance the words 'in favour of drawer only', the character of the instrument is not altered, and the drawer may indorse the bill

to another party as if no alteration had been made. By a majority of three to two the House of Lords held that the acceptance was general and not qualified, and the bill negotiable: *Meyer & Co v Decroix, Verley et Cie* [1891] AC 520, HL. As to general and qualified acceptance see PARAS 1462–1463. As to material alterations see PARA 1560.

9 Bills of Exchange Act 1882 s 7(1).
10 As to the meaning of 'drawee' see PARA 1406.
11 As to the meaning of 'bill' see PARA 1405.
12 As to discharges generally see PARA 1550 et seq.

1429. No payee named. An instrument[1] drawn in favour of 'cash or order' is not a bill of exchange[2]. Where the payee's[3] name is not filled in, it is open to any holder for value[4] to write his own name in[5] and sue on the instrument; but if his right to do so is contested, he must be prepared to prove that he was not acting outside the scope of his authority[6]. In the hands of any subsequent holder in due course[7] the instrument is valid and effectual for all purposes[8].

Where a bill is in the form 'Pay to _____ order', and is indorsed in that form by the drawer[9], the bill is equivalent to one drawn 'Pay to my order', and is a good bill[10]. Where a bill is in the form 'Pay to _____ or order', and is accepted or indorsed while in that state, the effect is doubtful[11].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 *North and South Insurance Corpn v National Provincial Bank Ltd* [1936] 1 KB 328; *Cole v Milsome* [1951] 1 All ER 311. As to the meaning of 'bill of exchange' see PARA 1405. Similarly an instrument drawn in favour of 'wages' or 'office' or some impersonal account is not a bill of exchange: *North and South Insurance Corpn v National Provincial Bank Ltd* above at 336 per Branson J; *Orbit Mining and Trading Co Ltd v Westminster Bank Ltd* [1963] 1 QB 794, [1962] 3 All ER 565, CA, approving the cases cited above.
3 As to the meaning of 'payee' see PARA 1406.
4 As to the meaning of 'holder for value' see PARA 1407.
5 See the Bills of Exchange Act 1882 s 20(1); and PARA 1448. See also *Crutchley v Clarance* (1813) 2 M & S 90; and see *Atwood v Griffin* (1826) 2 C & P 368; *Chamberlain v Young* [1893] 2 QB 206 at 210, CA, per Bowen LJ.
6 See the Bills of Exchange Act 1882 s 20(2); and PARA 1425. See also *Crutchly v Mann* (1814) 5 Taunt 529; and PARAS 1449–1450.
7 As to the meaning of 'holder in due course' see PARA 1407.
8 See the Bills of Exchange Act 1882 s 20(2); and PARA 1425.
9 As to the meaning of 'drawer' see PARA 1406.
10 *Chamberlain v Young* [1893] 2 QB 206, CA; and see PARA 1408 text to note 10. Where the drawer drew a bill, 'Pay to order', and it was accepted by the drawee and indorsed by the drawer to the plaintiff without the payee's name being filled in, it was held to be the equivalent of a bill payable 'to my order'.
11 *Chamberlain v Young* [1893] 2 QB 206 at 210, CA, per Bowen LJ. See also *Wookey v Pole* (1820) 4 B & Ald 1; contra *R v Randall* (1811) Russ & Ry 195.

1430. Payee by name or description. Where the payee[1] is named incorrectly, or where his name is misspelt, the instrument[2] is not invalidated, the payee being permitted to indorse the instrument as he was described, adding, if he thinks fit, his proper signature[3].

It is sufficient that the payee should be indicated without being actually named if the indication is reasonably precise[4].

Where there are two persons of the same name who are possible payees, the presumption will be that the one indorsing the instrument was the person intended[5].

An instrument may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees[6].

An instrument may also be made payable to the holder of an office for the time being[7].

1 As to the meaning of 'payee' see PARA 1406.
2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 Bills of Exchange Act 1882 s 32(4); and see PARA 1491. See *Willis v Barrett* (1816) 2 Stark 29.
4 *Cowie v Stirling* (1856) 6 E & B 333. Cf *Soares v Glyn* (1845) 8 QB 24.
5 *Stebbing v Spicer* (1849) 8 CB 827. But, this apart, it has been held that where father and son have the same name the payee will be presumed to be the father: *Sweeting v Fowler* (1815) 1 Stark 106.
6 Bills of Exchange Act 1882 s 7(2).
7 Bills of Exchange Act 1882 s 7(2).

1431. Fictitious or non-existing payee. Where an instrument[1] is made payable to a fictitious or non-existing person[2], it may be treated as payable to bearer[3].

The words 'fictitious or non-existing person' have given occasion for much difference of opinion. Even now the meaning of 'non-existing' is not clear, but it would appear to mean a person who does not exist at the time the instrument is drawn, whether he ever existed previously or not[4].

The meaning of 'fictitious' has been elucidated by a series of cases, the effect of which is that[5] whenever the name inserted as that of the payee[6] is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person or of one who has no existence[7].

The meaning here placed upon 'fictitious' may be illustrated by the analogy of the phrases 'a fictitious indorsement' or 'a fictitious entry', by which it is clearly intended to imply not that the indorsement[8] or entry did not exist, but that they were brought into existence entirely for the purpose of deception[9].

But where an instrument is made payable to a person known by the drawer[10] to be an existing person and intended by the drawer to be the payee, such a person is not to be deemed fictitious, even although the signature of the drawer has been obtained by fraud[11].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 As to the meaning of 'person' see PARA 1401 note 4.
3 Bills of Exchange Act 1882 s 7(3). As to the meaning of 'bearer' see PARA 1407. As to instruments payable to bearer see PARA 1428.
4 Where a firm has been induced by one of its employees by means of fraudulent vouchers to sign cheques payable to one who was in fact a non-existing person, and the employee has cashed them for his own benefit, the firm cannot recover the value of the cheques from the banker who cashed them: *Clutton v Attenborough & Son* [1897] AC 90, HL. Quaere, however, whether the result would have been the same if the payee had been 'fictitious' instead of non-existing: at 93–94 per Lord Halsbury LC, commented on in *Vinden v Hughes* [1905] 1 KB 795 at 800 per Warrington J. See also *Ashpitel v Bryan* (1864) 5 B & S 723; *Town and County Advance Co Ltd v Provincial Bank of Ireland Ltd* [1917] 2 IR 421.
5 *Bank of England v Vagliano Bros* [1891] AC 107, HL (in this case one Glyka, the clerk of Messrs Vagliano Brothers, had perpetrated a series of frauds by inducing his employers to accept bills which he had drawn himself, and in which he had fraudulently inserted as the drawers and payees the names of different firms with which his employers were accustomed to transact business; he then forged the indorsements of the payees, and obtained cash for himself from the bankers). Cf *Clutton v Attenborough & Son* [1897] AC 90, HL.
6 As to the meaning of 'payee' see PARA 1406.
7 *Bank of England v Vagliano Bros* [1891] AC 107 at 153, HL, per Lord Herschell.
8 As to the meaning of 'indorsement' see PARA 1407.
9 *Bank of England v Vagliano Bros* [1891] AC 107 at 152–153, HL, per Lord Herschell; and see *Stone v Freeland* (1769) 1 Hy Bl 316n.
10 As to the meaning of 'drawer' see PARA 1406.

11 *Vinden v Hughes* [1905] 1 KB 795 (where a clerk in the employ of plaintiffs, who were market salesmen, being in the habit of writing out cheques for the plaintiffs to sign payable to persons with whom they did business, obtained the signatures of the plaintiffs to a series of cheques payable to such persons, and, forging the indorsements, obtained cash from the defendant, a friend, who took them honestly and paid them through his bank: nevertheless the plaintiffs were held entitled to recover the amount of their loss from the defendant). See also *North and South Wales Bank v Macbeth* [1908] AC 137, HL; *Town and County Advance Co Ltd v Provincial Bank of Ireland Ltd* [1917] 2 IR 421; *Goldman v Cox* (1924) 40 TLR 744, CA. The distinction between the cases cited in this note and *Bank of England v Vagliano Bros* [1891] AC 107, HL, is that the last mentioned was not a case in which the drawer intended the payee to receive the proceeds of the bill; see per Lord Loreburn LC in *North and South Wales Bank v Macbeth* above at 140.

B. INLAND AND FOREIGN BILLS AND NOTES

1432. Definition. A bill of exchange[1] may be either an inland or a foreign bill[2]. An inland bill is a bill which is, or upon the face of it purports to be, (1) both drawn and payable within the British Islands[3]; or (2) drawn within the British Islands upon some person[4] resident therein. Any other bill is a foreign bill[5]. However, unless the contrary appears on the face of the bill, the holder[6] may treat it as an inland bill[7].

A note[8] which is, or on the face of it purports to be, both made and payable within the British Islands, is an inland note. Any other note is a foreign note[9].

1 As to the meaning of 'bill of exchange' see PARA 1405.

2 Bills of Exchange Act 1882 s 4.

3 For the purposes of the Bills of Exchange Act 1882, 'British Islands' means any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty: s 4(1). In this context, 'British Islands' is construed to exclude the Republic of Ireland: see the Irish Free State (Consequential Adaptation of Enactments) Order 1923, SR & O 1923/405, made under the Irish Free State (Consequential Provisions) Act 1922 (Session 2) s 6. As to the meanings of 'United Kingdom' and 'Great Britain' see PARA 2 note 3.

4 As to the meaning of 'person' see PARA 1401 note 4.

5 Bills of Exchange Act 1882 s 4(1). In the case of foreign bills, where there is conflict between British and foreign laws, the statute provides rules for resolution: see s 72; and PARA 1589 et seq.

6 As to the meaning of 'holder' see PARA 1407.

7 Bills of Exchange Act 1882 s 4(2).

8 As to the meaning of 'note' see PARA 1405.

9 Bills of Exchange Act 1882 s 83(4).

C. SIGHT AND TIME BILLS, ETC

1433. Payable on demand, at sight or on presentation. Bills and notes[1] are payable either on demand or at a fixed or determinable future time[2]. Cheques are always payable on demand[3].

Bills and notes are payable on demand (1) when they are expressed to be payable on demand or at sight[4] or on presentation[5]; or (2) when no time for payment is expressed[6]. Such a bill or note may be presented for payment at any time in the option of the holder[7], but it must be within a reasonable time after its issue[8] or making in order to render the drawer[9] liable[10] and within a reasonable time[11] after its indorsement[12] to render the indorser[13] liable[14].

An instrument[15] payable on demand is deemed to be overdue when it appears on the face of it to have been in circulation for an unreasonable length of time[16].

An instrument payable otherwise than on demand which has been accepted or indorsed when overdue is deemed, as regards the acceptor[17] or indorser concerned, to be an instrument payable on demand[18].

1 As to the meanings of 'bill' and 'note' see PARA 1405.

2 Bills of Exchange Act 1882 ss 3(1), 83(1).
3 Bills of Exchange Act 1882 s 73. As to the meaning of 'cheque' see PARA 1405.
4 As to the meanings of 'bill payable after sight' and 'note payable after sight' see PARA 1435.
5 Bills of Exchange Act 1882 ss 10(1)(a), 89. As to presentment for payment see PARA 1516 et seq.

6 Bills of Exchange Act 1882 ss 10(1)(b), 89. In *Korea Exchange Bank v Debenhams (Central Buying) Ltd* [1979] 1 Lloyd's Rep 548 at 550, CA, the Court of Appeal left open the question whether a bill which failed to comply with the Bills of Exchange Act 1882 s 11(1) might still be a bill payable on demand by virtue of s 10(1)(b).
7 As to the meaning of 'holder' see PARA 1407.
8 As to the meaning of 'issue' see PARA 1406.
9 As to the meaning of 'drawer' see PARA 1406.
10 Bills of Exchange Act 1882 ss 45(2), 89. See PARA 1518.

11 What is a reasonable time is to be determined by having regard to the nature of the instrument, the usage of trade with regard to similar instruments, and the facts of the particular case: Bills of Exchange Act 1882 ss 45(2), 86(2). See PARA 1518.
12 As to the meaning of 'indorsement' see PARA 1407.
13 As to the meaning of 'indorser' see PARA 1407 note 8.
14 Bills of Exchange Act 1882 ss 45(2), 86(1); see PARA 1518. Cheques also should be presented within a reasonable time, but as to this see PARA 1519; and PARA 853.
15 As to the meaning of 'instrument' see PARA 1402 note 1.

16 Bills of Exchange Act 1882 s 36(3). What constitutes an unreasonable length of time for this purpose is a question of fact in each case: s 36(3). As to overdue promissory notes payable on demand see PARA 1518.
17 As to the meaning of 'acceptor' see PARA 1406.

18 Bills of Exchange Act 1882 ss 10(2), 89.

1434. Time bills. An instrument[1] is payable at a determinable future time when it is expressed to be payable: (1) at a fixed period after date[2] or sight[3]; (2) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain[4]. It cannot be made payable simply after date or after sight, for that would involve uncertainty.

When the term 'month' is used it means a calendar month[5]. The period for which the bill[6] has to run is called the 'usance'.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 As to the case of an instrument expressed to be payable at a fixed period after date but issued undated see PARA 1415.

3 Bills of Exchange Act 1882 ss 11(1), 89. As to the meanings of 'bill payable after sight' and 'note payable after sight' see PARA 1435.

4 Bills of Exchange Act 1882 ss 11(2), 89.
5 See the Bills of Exchange Act 1882 s 14(4); and PARA 1439.
6 As to the meaning of 'bill' see PARA 1405.

1435. Fixed period after sight. Where a bill[1] is payable at a fixed period after sight the time is to be calculated from the date of the acceptance[2] if the bill is accepted, and from the date of noting or protest[3] if the bill is noted or protested for non-acceptance or for non-delivery[4].

In the case of a note[5] the phrase 'after sight' means after exhibition thereof to the maker[6] for the purpose of founding a claim for payment[7]. A note payable at a certain period after sight is payable at that period after presentment for sight[8]. A bill payable so many days after sight imposes different legal consequences from

a bill payable so many days after acceptance; neither in its words nor in its potential effect is the latter form of bill expressed to be payable at a fixed period after sight[9].

In the case of a bill payable after sight which has been accepted for honour, the date of its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour[10].

1 As to the meaning of 'bill' see PARA 1405.
2 As to the meaning of 'acceptance' see PARA 1406.
3 As to noting and protest see PARA 1537 et seq.
4 Bills of Exchange Act 1882 s 14(3); *Campbell v French* (1795) 6 Term Rep 200.
5 As to the meaning of 'note' see PARA 1405.
6 As to the meaning of 'maker' see PARA 1406.
7 *Holmes v Kerrison* (1810) 2 Taunt 323; *Sturdy v Henderson* (1821) 4 B & Ald 592; *Dixon v Nuttall* (1834) 1 Cr M & R 307. A note is not accepted (see the Bills of Exchange Act 1882 s 89(3); and PARA 1509) and thus differs from a bill of exchange.
8 *Sturdy v Henderson* (1821) 4 B & Ald 592.
9 *Korea Exchange Bank v Debenhams (Central Buying) Ltd* [1979] 1 Lloyd's Rep 548 at 553, CA, per Megaw LJ (bill drawn 'At 90 days D/A ... pay' held not to be payable at a fixed or determinable future time).
10 Bills of Exchange Act 1882 s 65(5); *Williams v Germaine* (1827) 7 B & C 468. As to acceptance for honour see PARA 1566 et seq.

1436. Events from which time may be reckoned. The specified event on, or at a fixed period after, the occurrence of which the instrument[1] is to be payable may be at any distance of time so long as it is an event which is certain to happen[2].

The instrument may also be made payable at or at a fixed period after 'any feast, civil or religious', or at any 'fixed holiday', or at a fair, even if the precise date of the fair is not fixed at the time the instrument is drawn[3], or 'from shipment' or 'from first presentation of documents'[4].

The specified event may also be one of a public nature[5], which for that very reason is held certain to take place.

However, the instrument must not be expressed to be payable on a contingency[6], and the happening of the event does not cure the defect[7].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 Bills of Exchange Act 1882 ss 11(2), 89. Thus a note made payable six weeks after the death of the father of the maker is a good note: *Colehan v Cooke* (1742) Willes 393. So too is one made payable to one then a minor on his coming of age (*Goss v Nelson* (1757) 1 Burr 226), and one payable one year after notice (*Clayton v Gosling* (1826) 5 B & C 360), or two months after demand in writing (*Price v Taylor* (1860) 5 H & N 540).
3 See *Colehan v Cooke* (1742) Willes 393 at 399.
4 *Novaknit Hellas SA v Kumar Bros International Ltd* [1998] Lloyd's Rep Bank 287, CA.
5 As on the paying off of a ship of Her Majesty's Navy (*Andrews v Franklin* (1717) 1 Stra 24; *Evans v Underwood* (1749) 1 Wils 262), or on the receipt of prize money (*R v Mackintosh* (1800) 2 East PC 942 at 956). But the arrival of a ship at its destination is only a contingency: *Palmer v Pratt* (1824) 2 Bing 185.
6 Bills of Exchange Act 1882 ss 11, 89. Thus a note payable at _____ days after the marriage of the maker is not valid (*Beardesly v Baldwin* (1741) 2 Stra 1151; *Pearson v Garrett* (1693) 4 Mod Rep 242); nor is one to pay _____ on the death of a third party 'provided he leaves either of us sufficient to pay the said sum, or if we shall be otherwise able to pay it' (*Roberts v Peake* (1757) 1 Burr 323; see *Leeds v Lancashire* (1809) 2 Camp 205); nor is one to pay 90 days after sight or when realised (*Alexander v Thomas* (1851) 16 QB 333); nor, again, a note payable on or before a given date: *Williamson v Rider* [1963] 1 QB 89, [1962] 2 All ER 268, CA; *Claydon v Bradley* [1987] 1 All ER 522, [1987] 1 WLR 521, CA. The dissenting view of Ormerod LJ in *Williamson v Rider* above was preferred by the court in *John Burrows Ltd v Subsurface Surveys Ltd* [1968] SCR 607, 68 DLR (2d) 354, Can SC, where a note was held to be unconditional which provided that 'the maker may pay on account of principal from time to

time the whole or any portion thereof upon giving thirty (30) days' notice', and also in *Creative Press Ltd v Harman* [1973] IR 313; and see *Palmer v Pratt* (1824) 2 Bing 185, cited in note 5.

7 Bills of Exchange Act 1882 ss 11, 89; *Hill v Halford* (1801) 2 Bos & P 413.

1437. Calculation of time of payment. Where a bill[1] is not payable on demand, it is due and payable in all cases on the last day of the time of payment as fixed by the bill or, if that is a non-business day, on the succeeding business day[2].

Where an instrument is payable at a fixed period after date[3], after sight[4], or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment[5].

Where the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded[6]. Non-business days for the purposes of the Bills of Exchange Act 1882 are: (1) Saturday, Sunday, Good Friday and Christmas Day[7]; (2) a bank holiday[8] under the Banking and Financial Dealings Act 1971[9]; (3) a day appointed by royal proclamation as a public fast or thanksgiving day[10]; and (4) a day declared by an order under the Banking and Financial Dealings Act 1971[11] to be a non-business day[12]. Any other day is a business day[13].

1 As to the meaning of 'bill' see PARA 1405.
2 Bills of Exchange Act 1882 s 14(1) (substituted by the Banking and Financial Dealings Act 1971 s 3(2)).
3 As to the meanings of 'bill payable after date' and 'note payable after date' see PARA 1434.
4 As to the meanings of 'bill payable after sight' and 'note payable after sight' see PARA 1435.
5 Bills of Exchange Act 1882 s 14(2). See *Campbell v French* (1795) 6 Term Rep 200.
6 Bills of Exchange Act 1882 s 92.
7 Bills of Exchange Act 1882 s 92(a) (amended by the Banking and Financial Dealings Act 1971 s 3(1)).
8 In England and Wales bank holidays are on Easter Monday, the last Mondays in May and August, 26 December if not a Sunday and 27 December if 25 or 26 December is a Sunday: Banking and Financial Dealings Act 1971 s 1(1), Sch 1. By proclamations made under s 1(3), New Year's Day (or, as appropriate, 2 January) has been declared each year since 1974 to be a bank holiday in England, Wales and Northern Ireland; and since 1978 the first Monday in May has been declared a bank holiday. For appointed dates in Scotland and Northern Ireland see Sch 1.
9 Bills of Exchange Act 1882 s 92(b) (amended by the Banking and Financial Dealings Act 1971 s 4(4)).
10 Bills of Exchange Act 1882 s 92(c).
11 Ie under the Banking and Financial Dealings Act 1971 s 2(1): see PARA 853.
12 Bills of Exchange Act 1882 s 92(d) (added by the Banking and Financial Dealings Act 1971 s 4(4)).
13 Bills of Exchange Act 1882 s 92.

1438. Due date. An instrument[1] must not be presented for payment until it is due[2]. Any earlier presentment is invalid[3]. If it is presented on the due date, and payment is refused, the instrument is dishonoured, and the holder[4] is entitled to give notice of dishonour, but no right of action accrues to the holder until the following day, for the acceptor[5] may, in spite of refusal in the first instance, make a valid payment at any time in the course of the day and if he does so the notice of dishonour becomes void[6].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 See PARA 1516 et seq.
3 *Wiffen v Roberts* (1795) 1 Esp 261 at 262. As to unavoidable delay in presentation for payment see PARA 1518.
4 As to the meaning of 'holder' see PARA 1407.

5 As to the meaning of 'acceptor' see PARA 1406.
6 *Kennedy v Thomas* [1894] 2 QB 759, CA; and see *Cocks v Masterman* (1829) 9 B & C 902; but see *Eaglehill Ltd v J Needham Builders Ltd* [1973] AC 992, [1972] 3 All ER 895, HL (where the acceptor was known to be in liquidation and it was uncertain whether the dishonour or the notice came first, the presumption was that the dishonour was first in point of time and the notice accordingly valid). As to notice of dishonour see PARA 1524 et seq. As to dishonour by non-payment see PARA 1525.

1439. Calculation of period of one month. As the term 'month' means a calendar month[1], an instrument drawn or made on the thirty-first of any month succeeded by a month with fewer days and payable one month after date[2] is nominally payable on the last day of the succeeding month, so that, for example, bills[3] payable one month after date and drawn on 29, 30 and 31 January are all nominally payable on 28 February, or, in the case of a leap year, 29 February.

1 Bills of Exchange Act 1882 s 14(4).
2 As to the meaning of 'bill payable after date' and 'note payable after date' see PARA 1434.
3 As to the meaning of 'bill' see PARA 1405.

(vii) Delivery

A. IN GENERAL

1440. Restriction on negotiability. Bills of exchange or promissory notes[1] are always prima facie negotiable[2]. They may, however, contain words prohibiting transfer or indicating an intention that they should not be transferable[3], and in such case they are only valid as between the parties[4]. An instrument[5] may also contain an express stipulation on the part of the drawer[6] or maker[7] or any indorser[8] either: (1) negativing or limiting his own liability to the holder[9]; or (2) waiving as regards himself some or all of the holder's duties[10]. Thus any party may sign the instrument adding words such as 'sans recours' or 'without recourse to me'[11], or words such as 'notice of dishonour waived'.

The negotiability of a cheque[12] is restricted by crossing it 'not negotiable'[13], and a cheque crossed 'account payee' or 'a/c payee', with or without the word 'only', is not transferable (and, therefore, not negotiable)[14].

1 As to the meanings of 'bill of exchange' and 'promissory note' see PARA 1405.
2 See PARA 1428. As to cheques see PARAS 1410 et seq, 1499 et seq.
3 See *National Bank v Silke* [1891] 1 QB 435, CA (where the mention of a particular account to be credited or debited was held not to be such an indication). A bill crossed 'not negotiable' and drawn 'pay to the order of X only' has been held to prohibit transfer and to limit payment to an agent of X for the purposes of X: *Hibernian Bank Ltd v Gysin and Hanson* [1939] 1 KB 483, [1939] 1 All ER 166, CA. As to the principles of negotiability see PARA 1401. As to transfer generally see PARA 1489 et seq.
4 Bills of Exchange Act 1882 ss 8(1), 89. As to cheques see PARA 1410.
5 As to the meaning of 'instrument' see PARA 1402 note 1.
6 As to the meaning of 'drawer' see PARA 1406.
7 As to the meaning of 'maker' see PARA 1406.
8 As to the meaning of 'indorser' see PARA 1407 note 8.
9 Bills of Exchange Act 1882 ss 16(1), 89. As to the meaning of 'holder' see PARA 1407.
10 Bills of Exchange Act 1882 ss 16(2), 89. As to the holder's duties see PARA 1509 et seq.
11 *Goupy v Harden* (1816) 7 Taunt 159 at 163 per Dallas J; cf *Castrique v Buttigieg* (1856) 10 Moo PCC 94. A note containing the following stipulation: 'No time given to, or security taken from, or composition or arrangement entered into with, either party hereto shall prejudice the rights of the holder to proceed against any other party', is not invalid: *Kirkwood v Carroll* [1903] 1 KB 531, CA, overruling *Kirkwood v Smith* [1896] 1 QB 582, DC, and approving *Yates v Evans* (1892) 61 LJQB 446, DC.
12 As to the meaning of 'cheque' see PARA 1405.

13 See PARA 1499.
14 See PARA 1500.

1441. Delivery essential. Delivery[1] is essential to the issue of an instrument[2], for by issue is meant the first delivery of the instrument complete in form to a person[3] who takes it as holder[4]. It is equally essential to the negotiation[5] of an instrument, for an instrument payable to bearer[6] must be transferred by delivery[7], and, in the case of every other instrument, indorsement[8] is incomplete without it[9]. In fact, every contract on an instrument, whether it be the drawer's[10], the maker's[11], the acceptor's[12], or an indorser's[13], is incomplete and revocable until delivery is made in order to give effect to it[14]. An indorsement may pass title even though it is irregular[15].

1 As to the meaning of 'delivery' see PARA 1406.
2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 As to the meaning of 'person' see PARA 1401 note 4.
4 Bills of Exchange Act 1882 ss 2, 21(1). As to the meaning of 'issue' see PARA 1406. As to the meaning of 'holder' see PARA 1407. A holder includes a payee, indorsee in possession, and bearer: s 2; *Re Hayward, ex p Hayward* (1871) 6 Ch App 546 at 548 per James LJ.
5 As to the meaning of 'negotiation' see PARA 1407.
6 As to the meaning of 'bearer' see PARA 1407. As to instruments payable to bearer see PARA 1428.
7 See the Bills of Exchange Act 1882 s 31(1), (2); and PARA 1489.
8 As to the meaning of 'indorsement' see PARA 1407.
9 See the Bills of Exchange Act 1882 s 31(3); and PARA 1489. As to the meaning of 'indorsement' see PARA 1407; *Marston v Allen* (1841) 8 M & W 494; *Abrey v Crux* (1869) LR 5 CP 37 at 42; and see note 14.
10 As to the meaning of 'drawer' see PARA 1406.
11 As to the meaning of 'maker' see PARA 1406.
12 As to the meaning of 'acceptor' see PARA 1406.
13 As to the meaning of 'indorser' see PARA 1407 note 8.
14 Bills of Exchange Act 1882 ss 21(1), 84. Cf *Re Deveze, ex p Cote* (1873) 9 Ch App 27 at 31 per Mellish LJ: 'In order to make the property in the bills pass, it is not sufficient to indorse them; they must be delivered to the indorsee or to the agent of the indorsee. If the indorser delivers them to his own agent, he can recover them; if to the agent of the indorsee, he cannot recover them'. See also *Cox v Troy* (1822) 5 B & Ald 474; *Brind v Hampshire* (1836) 1 M & W 365; *Bank of Van Diemen's Land v Bank of Victoria* (1871) LR 3 PC 526.
15 *Arab Bank Ltd v Ross* [1952] 2 QB 216, [1952] 1 All ER 709, CA.

1442. What amounts to delivery. 'Delivery' means transfer of possession, actual or constructive, from one person to another[1]. However, where an acceptance[2] is written[3] on a bill[4], and the drawee[5] gives notice to or according to the direction of the person entitled to the bill that he has accepted it, the acceptor's[6] contract then becomes complete and irrevocable[7]. Where the drawee has accepted a bill, but given no intimation of acceptance to the drawer[8], he is entitled to revoke his act[9], and this is so even where a bill has been deposited with the drawee for acceptance, and the holder[10] on calling for the bill is told that the bill has been mislaid and is requested to call again on the following day[11].

So, too, a note[12] is incomplete and revocable until delivery to the payee[13], and such a note cannot be issued[14] to the payee by an executor after the maker's[15] decease[16].

1 Bills of Exchange Act 1882 s 2; and see PARA 1406. As to transfer generally see PARA 1489 et seq. As to the meaning of 'person' see PARA 1401 note 4.
2 As to the meaning of 'acceptance' see PARA 1406.
3 As to the meaning of 'writing' see PARA 1405 note 2.
4 As to the meaning of 'bill' see PARA 1405.

5 As to the meaning of 'drawee' see PARA 1406.
6 As to the meaning of 'acceptor' see PARA 1406.
7 Bills of Exchange Act 1882 s 21(1) proviso.
8 As to the meaning of 'drawer' see PARA 1406.
9 *Cox v Troy* (1822) 5 B & Ald 474.
10 As to the meaning of 'holder' see PARA 1407.
11 *Bank of Van Diemen's Land v Bank of Victoria* (1871) LR 3 PC 526.
12 As to the meaning of 'note' see PARA 1405.
13 *Chapman v Cottrell* (1865) 34 LJEx 186. As to the meaning of 'payee' see PARA 1406.
14 As to the meaning of 'issue' see PARA 1406.
15 As to the meaning of 'maker' see PARA 1406.
16 *Bromage v Lloyd* (1847) 1 Exch 32. Where, however, a note is made, and directions are left by the maker that it shall be delivered to the payee after his death, it may perhaps constitute a charge on the maker's estate: *Re Richards, Shenstowe v Brock* (1887) 36 ChD 541. But see *Re Whitaker* (1889) 42 ChD 119 at 125, CA, per Cotton LJ, dissenting from *Re Richards, Shenstowe v Brock* above in so far, if at all, as it lays down the proposition that the payee of a promissory note without any consideration might in equity have a claim by way of debt.

1443. Mode of delivery. Delivery[1] may be made by post, but where it is so made it is made at the risk of the sender[2], unless the intended recipient has in some way authorised such means of delivery. When a bill[3] has once been posted, delivery is in English law irrevocable[4], for a letter, once sent, cannot be reclaimed, but until actually entrusted to a postal operator[5] the property remains in the sender, so that where a letter containing a bill is closed and placed in the letter-box of an office, but stolen therefrom before being posted, the theft is from the sender[6].

Part delivery does not complete the contract, so that when a note is cut in half, and the sender, having forwarded one half, decides not to send the other, he cannot be compelled to do so[7].

When delivery has been made by mistake and it is desired to revoke it, this may be done by consent[8].

1 As to the meaning of 'delivery' see PARA 1406.
2 *Pennington v Crossley* (1897) 13 TLR 513, CA. See *Warwicke v Noakes* (1791) Peake 98.
3 As to the meaning of 'bill' see PARA 1405.
4 *Re Deveze, ex p Cote* (1873) 9 Ch App 27. It is otherwise, however, in a country where the letter can be reclaimed from the postal authorities: *Re Deveze, ex p Cote*.
5 As to the meaning of 'postal operator' see PARA 1510 note 10.
6 *Arnold v Cheque Bank* (1876) 1 CPD 578.
7 *Smith v Mundy* (1860) 29 LJQB 172.
8 *Re Deveze, ex p Cote* (1873) 9 Ch App 27.

1444. Delivery by or to agent. As between the immediate parties, and as regards a remote party other than a holder in due course[1], the delivery[2], in order to be effectual, must be made either by, or under the authority[3] of, the party drawing, accepting or indorsing, as the case may be[4].

Delivery made to an agent may afterwards be ratified by the principal even after a claim has been brought in the principal's name[5].

The effect of delivery of dishonoured cheques[6] by a collecting banker to his customer may depend upon whether the banker retains any rights he may have to the cheques[7].

1 As to the meaning of 'holder in due course' see PARA 1407.
2 As to the meaning of 'delivery' see PARA 1406.
3 'Authority' here relates to the authority to deliver rather than to any mode of physical transfer that may be prescribed: *Dextra Bank and Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193, PC (where, in a case decided under the Jamaican equivalent of the Bills of

Exchange Act 1882 s 21(2)(a), an intermediary made a valid delivery of a cheque on behalf of an agent who held the formal authority to deliver).

4 Bills of Exchange Act 1882 s 21(2)(a).

5 *Ancona v Marks* (1862) 31 LJEx 163 (instrument sued on was delivered by one Wright to a firm of solicitors with directions that they should hold it for the plaintiff and sue in his name, and the plaintiff was held entitled to ratify after action brought).

6 As to the meaning of 'cheque' see PARA 1405.

7 *Westminster Bank Ltd v Zang* [1966] AC 182 at 196, [1965] 1 All ER 1023, CA; affd without addressing this point [1966] AC 182 at 211, [1966] 1 All ER 114, HL.

B. CONDITIONAL DELIVERY

1445. Effect of conditional delivery. As between immediate parties and as regards a remote party other than a holder in due course[1] delivery[2] may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill[3]. But if a bill is in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed[4]. And in every case where a bill is no longer in the possession of a party who has signed it as drawer[5], acceptor[6] or indorser[7], a valid and unconditional delivery by him is presumed until the contrary is proved[8].

Although a conditional delivery is valid, the condition attaches exclusively to the delivery. It does not affect the rule that a bill must be drawn[9], and a note[10] made, unconditionally[11].

1 As to the meaning of 'holder in due course' see PARA 1407.

2 As to the meaning of 'delivery' see PARA 1406.

3 Bills of Exchange Act 1882 s 21(2)(b); *Bell v Lord Ingestre* (1848) 12 QB 317. If the person to whom the instrument is so conditionally delivered misappropriates it, the true owner can recover it from him or a party taking it from him with notice: *Goggerley v Cuthbert* (1806) 2 Bos & PNR 170; *Arnold v Cheque Bank* (1876) 1 CPD 578; *North and South Wales Bank v Macbeth* [1908] AC 137, HL. As to the meaning of 'bill' see PARA 1405.

4 Bills of Exchange Act 1882 s 21(2); see PARA 1488.

5 As to the meaning of 'drawer' see PARA 1406.

6 As to the meaning of 'acceptor' see PARA 1406.

7 As to the meaning of 'indorser' see PARA 1407 note 8.

8 Bills of Exchange Act 1882 s 21(3).

9 *Colehan v Cooke* (1742) Willes 393 at 398.

10 As to the meaning of 'note' see PARA 1405.

11 As to conditional indorsement see PARA 1493.

1446. Difference from escrow. The delivery[1] of a bill[2] conditionally or for a special purpose is akin to the delivery of a deed in escrow, but there is this difference, that the deed must be delivered to a party outside the contract[3], whereas the negotiable instrument[4] may be delivered to one of the parties to it[5].

1 As to the meaning of 'delivery' see PARA 1406.

2 As to the meaning of 'bill' see PARA 1405.

3 *Bell v Lord Ingestre* (1848) 12 QB 317. As to delivery as an escrow see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 34, 37–39.

4 As to the meaning of 'negotiable instrument' see PARA 1402.

5 Cf *Davis v Jones* (1856) 17 CB 625.

1447. Evidence of nature of delivery. Evidence in writing that is contemporaneous[1] with or even subsequent to the date of the instrument[2] may be adduced, and may control the effect of it if there is consideration for the subsequent agreement[3]. Oral evidence may not be adduced to vary the terms of

the instrument[4], but may be adduced to deny the existence of consideration[5] or to show that an apparently complete contract is not so in fact[6].

As between the parties there may be an agreement to renew the instrument[7], but evidence of a parol agreement to such effect is not admissible, though such evidence may be admitted to show that the instrument was only delivered as an escrow, or that it is not to take effect as a contract until some condition is fulfilled[8].

1 *Maillard v Page* (1870) LR 5 Exch 312.
2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 *McManus v Bark* (1870) LR 5 Exch 65; *Overend, Gurney & Co (Liquidators) v Oriental Financial Corpn (Liquidators)* (1874) LR 7 HL 348.
4 *Foster v Jolly* (1835) 1 Cr M & R 703; *Abbott v Hendricks* (1840) 1 Man & G 791; *Besant v Cross* (1851) 10 CB 895; *Woodbridge v Spooner* (1819) 3 B & Ald 233; *Stott v Fairlamb* (1883) 53 LJQB 47 at 50, CA, per Bowen LJ; *New London Credit Syndicate Ltd v Neale* [1898] 2 QB 487, CA; *Hitchings and Coulthurst Co v Northern Leather Co of America and Doushkess* [1914] 3 KB 907; *Cohn v Boulken* (1920) 36 TLR 767; *Kettle v Dunster and Wakefield* (1927) 138 LT 158. But see also *Elliott v Bax-Ironside* [1925] 2 KB 301, CA, and *Britannia Electric Lamp Works Ltd v D Mandler & Co and Mandler* [1939] 2 KB 129, [1939] 2 All ER 469.
5 *Abbott v Hendricks* (1840) 1 Man & G 791. As to parol evidence of consideration generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 194. As to the parol evidence rule in contract generally see CONTRACT vol 9(1) (Reissue) PARA 622.
6 *Lindley v Lacey* (1864) 34 LJCP 7; *New London Credit Syndicate Ltd v Neale* [1898] 2 QB 487, CA. See further, as to parol evidence where there was no intention to make a binding contract, DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 190.
7 *Maillard v Page* (1870) LR 5 Exch 312; *Salmon v Webb and Franklin* (1852) 3 HL Cas 510. This is prima facie for one renewal only: *Innes v Munro* (1847) 1 Exch 473. The application for renewal must be made within reasonable time, but not necessarily before maturity: see PARA 1563.
8 *New London Credit Syndicate v Neale* [1898] 2 QB 487 at 490, CA.

C. BLANK SIGNATURES AND INCOMPLETE INSTRUMENTS

1448. Blank signature. The delivery[1] by the signer of a simple signature upon a blank paper in order that the paper may be converted into a bill or note[2] operates as a prima facie authority to fill the paper up as a complete instrument[3] for any amount, using the signature for that of the drawer[4], acceptor[5], maker[6] or indorser[7]. A blank acceptance[8] may be converted into a complete instrument after the death of the acceptor, and this is the case even where the party to whom the blank acceptance was delivered also dies, if his administrator inserts his own name as drawer[9].

1 As to the meaning of 'delivery' see PARA 1406.
2 As to the meanings of 'bill' and 'note' see PARA 1405.
3 As to the meaning of 'instrument' see PARA 1402 note 1.
4 As to the meaning of 'drawer' see PARA 1406.
5 As to the meaning of 'acceptor' see PARA 1406.
6 As to the meaning of 'maker' see PARA 1406.
7 Bills of Exchange Act 1882 ss 20(1), 89 (s 20(1) amended by the Finance Act 1970 Sch 8 Pt V). As to the meaning of 'indorser' see PARA 1407 note 8. See also PARAS 1425, 1429; and *Montague v Perkins* (1853) 22 LJCP 187. For instances of the use of the signature see *Collis v Emett* (1790) 1 Hy Bl 313 (drawer); *Montague v Perkins* above; *Schultz v Astley* (1836) 2 Bing NC 544; *London and South Western Bank v Wentworth* (1880) 5 ExD 96 (acceptor); *Lloyds Bank Ltd v Cooke* [1907] 1 KB 794, CA (maker); *Foster v Mackinnon* (1869) LR 4 CP 704 at 712 (indorser).

As to blank acceptances see *Baxendale v Bennett* (1878) 3 QBD 525, CA; *Smith v Prosser* [1907] 2 KB 735, CA; cf *Herdman v Wheeler* [1902] 1 KB 361; and *Ingham v Primrose* (1859) 7 CBNS 82 (bill accepted by A who tore it into two, intending to destroy it, and threw it away. B, in A's presence, recovered it and later pasted it together and put it into circulation: held, A

was liable to a holder without notice). As to estoppel see *Lloyds Bank Ltd v Cooke* above; *Wilson and Meeson v Pickering* [1946] KB 422, [1946] 1 All ER 394, CA (where the cheque was crossed 'not negotiable' and the principle of estoppel was held to be limited to negotiable instruments); *Paine v Bevan and Bevan* (1914) 110 LT 933; and also PARA 1576 note 6. A blank acceptance, although not a bill or note or security for the payment of money, or a writing the value of which exceeds £10 within the Carriers Acts (*Stoessiger v South Eastern Rly Co* (1854) 3 E & B 549; as to limitation of carriers' liability see CARRIERS vol 5(1) (2004 Reissue) PARA 562), is evidence of a debt (*Lawson's Executors v Watson* 1907 SC 1353).

For the effect of the position of signatures on a bill see *Glenie v Bruce Smith* [1908] 1 KB 263, CA; *Re Gooch, ex p Judd* [1921] 2 KB 593, CA. Cf *Jenkins & Sons v Coomber* [1898] 2 QB 168 (where the bill had not been negotiated and the Bills of Exchange Act 1882 s 20 did not apply), and *MT Shaw & Co Ltd v Holland* [1913] 2 KB 15, CA (where the prima facie authority given by the Bills of Exchange Act 1882 s 20 was limited by the circumstances) as explained in *Gerald McDonald & Co v Nash & Co* [1924] AC 625 at 633, HL, per Lord Haldane LC, and at 648 per Lord Sumner (which was applied in *McCall Bros Ltd v Hargreaves* [1932] 2 KB 423); and see *Lombard Banking Ltd v Central Garage and Engineering Co Ltd* [1963] 1 QB 220, [1962] 2 All ER 949.

A bill drawn by the drawers to their order, accepted by the acceptors, indorsed by backers of the bill and delivered to the drawers is an incomplete bill, but the incompleteness can be cured and the indorsers rendered liable to the drawers by the drawers indorsing their names as payees above the backers' indorsement: *Gerald McDonald & Co v Nash & Co* above.

8 As to the meaning of 'acceptance' see PARA 1406.

9 *Carter v White* (1883) 25 ChD 666, CA; *Re Duffy's Estate, Dutch v O'Leary* (1880) 5 LR Ir 92.

1449. Incomplete instrument. Where a person[1] is in possession of an instrument[2] wanting in any material particular, he has prima facie authority to fill up the omission in any way he thinks fit[3]. But, in order that any such instrument when completed may be enforceable against any person who became a party to it prior to its completion, it must be filled up within a reasonable time[4], and strictly in accordance with the authority given[5].

1 As to the meaning of 'person' see PARA 1401 note 4.

2 As to the meaning of 'instrument' see PARA 1402 note 1.

3 See the Bills of Exchange Act 1882 ss 20(1), 89; and PARA 1448. See the cases cited in PARA 1448 note 7. As to filling in the amounts see *Montague v Perkins* (1853) 22 LJCP 187; *Garrard v Lewis* (1882) 10 QBD 30. As to filling in the date see PARA 1415. See also PARAS 1425, 1429. As to adding the name of the addressee see *Haseldine v Winstanley* [1936] 2 KB 101, [1936] 1 All ER 137; and PARA 1426 note 2.

4 Bills of Exchange Act 1882 ss 20(2), 89. See also PARAS 1425, 1429. The question as to what is a reasonable time is a question of fact in each case: s 20(2). See *Temple v Pullen* (1853) 22 LJEx 151. Where a party gives a blank acceptance and then becomes bankrupt, but the bill is not filled up or negotiated before his discharge, the holder can recover from him as acceptor: *Goldsmid v Hampton* (1858) 5 CBNS 94. The payee of an acceptance uncompleted for more than six years cannot fill up the bill and sue the acceptor on it: *Re Bethell, Bethell v Bethell* (1887) 34 ChD 561.

5 Bills of Exchange Act 1882 ss 20(2), 89; *Watkin v Lamb* (1901) 85 LT 483; *MT Shaw & Co Ltd v Holland* [1913] 2 KB 15, CA; *Re Gooch, ex p Judd* [1921] 2 KB 593, CA; *Gerald McDonald & Co v Nash & Co* [1924] AC 625, HL. See *Awde v Dixon* (1851) 6 Exch 869. See also *Frontier Finance Ltd v Hynes and Niagara Sewing Machine Co, Frontier Finance Ltd v Butka and Niagara Sewing Machine Co* [1957] OWN 353, 10 DLR (2d) 206, Ont CA (notes signed in blank and filled in without authority; defendant not estopped from relying on lack of authority).

1450. Effect of negotiation after completion. Where, however, any such instrument after completion[1] is negotiated[2] to a holder in due course[3], it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given[4].

1 See PARA 1449.

2 As to the meaning of 'negotiation' see PARA 1407.

3 As to the meaning of 'holder in due course' see PARA 1407. An original payee is not a holder in due course, and delivery to the payee is not negotiation: *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL, in which case the view of Lord Russell of Killowen CJ in *Lewis v Clay* (1897) 67 LJQB 224 at 227 was preferred to that of Fletcher Moulton LJ in *Lloyds Bank Ltd v Cooke* [1907] 1 KB 794 at 808, CA. Where, however, the instrument has been signed and delivered to a third person for the purpose of enabling him to obtain an advance from the payee, the payee is entitled to enforce it on the ground of estoppel: *Lloyds Bank Ltd v Cooke*; but cf *Herdman v Wheeler* [1902] 1 KB 361, DC. But where the holder of a cheque is not a holder for value, the drawer of the cheque is not estopped as against the holder from saying that the cheque has been wrongly filled up: *Paine v Bevan and Bevan* (1914) 110 LT 933. See also *Guildford Trust Ltd v Goss* (1927) 136 LT 725; and PARA 1576 note 6.

4 Bills of Exchange Act 1882 s 20(2) proviso; s 89; *Schultz v Astley* (1836) 2 Bing NC 544; *London and South Western Bank v Wentworth* (1880) 5 ExD 96. A holder in due course must ex hypothesi have taken the instrument when complete and regular on the face of it; if the holder without inquiry takes a blank acceptance and fills up the blanks himself, he cannot claim to be a holder in due course or to have a better title than his transferor; *Hatch v Searles, Stanway's Case, Conway's Case* (1854) 2 Sm & G 147; *France v Clark* (1884) 26 ChD 257, CA. Where a person, without authority to do so, gives a blank acceptance in his firm's name to another who transfers it to a third person for value, the third person cannot complete the instrument and recover from the firm to which the giver of the blank acceptance belongs, if he knew that such giver gave it without authority: *Hogarth v Latham & Co* (1878) 3 QBD 643, CA. When a person is induced by a false representation as to the nature of the instrument to give his signature on a bill or note, he is not liable on it if he acted without negligence: *Foster v Mackinnon* (1869) LR 4 CP 704, as to which case see also *Howatson v Webb* [1908] 1 Ch 1, CA; *Lewis v Clay* (1897) 67 LJQB 224; *Bagot v Chapman* [1907] 2 Ch 222. As to the question of non est factum generally see *Saunders (Executrix of the Estate of Rose Maud Gallie) v Anglia Building Society* [1971] AC 1004, [1970] 3 All ER 961, HL, approving *Foster v Mackinnon* above, and overruling *Carlisle and Cumberland Banking Co v Bragg* [1911] 1 KB 489, CA. See also *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281, CA; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 69 et seq.

As regards the cognate question where a negotiable instrument is so filled up as to enable it to be altered to a larger amount and as to the effect of alterations as a discharge see PARAS 1559–1561.

(viii) Acceptance

A. LIABILITY OF ACCEPTOR

1451. Drawee as acceptor. The acceptance[1] of a bill[2] is the signification by the drawee[3] of his assent to the order of the drawer[4]. Thereafter the drawee is called the acceptor[5]. But the drawee, in the absence of any special agreement, is under no obligation to accept a bill[6].

1 As to the meaning of 'acceptance' see PARA 1406.
2 As to the meaning of 'bill' see PARA 1405.
3 As to the meaning of 'drawee' see PARA 1406.
4 Bills of Exchange Act 1882 s 17(1). As to the meaning of 'drawer' see PARA 1406. But a bill may be complete and regular and may be sued upon by a person to whom it has been negotiated before it has been accepted: see *National Park Bank of New York v Berggren & Co* (1914) 110 LT 907.
5 *Rowe v Young* (1820) 2 Bligh 391 at 402, HL. As to the meaning of 'acceptor' see PARA 1406.
6 See PARA 1453. As to cheques see PARA 1410. The provisions of the Bills of Exchange Act 1882 in so far as they relate to acceptance do not apply to promissory notes: s 89(3)(b).

1452. Acceptance by drawee or agent. The signature of any person other than the drawee[1] or his agent, though purporting to be an acceptance[2], is not one in fact[3], nor is the marking or certification of a cheque[4] an acceptance[5]. Where a bill[6] is accepted for the drawee by his agent, instead of by the drawee himself, the acceptance is good[7]. The hand that holds the pen is immaterial if in fact there is

authority to sign[8]. Where a bill is addressed to an agent, and the agent accepts, the principal is not bound, even if the agent accepts the bill in the principal's name and by his authority[9].

1 As to the meaning of 'drawee' see PARA 1406.
2 As to the meaning of 'acceptance' see PARA 1406.
3 *Jackson v Hudson* (1810) 2 Camp 447; *Davis v Clarke* (1844) 6 QB 16; and cf *Steele v M'Kinlay* (1880) 5 App Cas 754 at 770, HL, per Lord Blackburn. See also *Stacey & Co Ltd v Wallis* (1912) 106 LT 544 ('... a bill addressed to 'A' cannot be accepted by 'B' so as to make him liable as acceptor': per Scrutton J at 211); *Maxform SpA v B Mariani & Goodville Ltd* [1979] 2 Lloyd's Rep 385 at 387. As to a referee in case of need see PARA 1409; as to an acceptor for honour see PARA 1566.
4 As to the meaning of 'cheque' see PARA 1405. As to marking of cheques by bankers see PARA 1412.
5 *Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] AC 176, [1944] 2 All ER 83, PC.
6 As to the meaning of 'bill' see PARA 1405.
7 See the Bills of Exchange Act 1882 s 91(1); and PARA 1473.
8 But the fact of agency must be proved if necessary (see *Lindus v Bradwell* (1848) 5 CB 583; where a husband's promise to pay a bill drawn on him and accepted by his wife in her own name was held sufficient evidence of his having either authorised or ratified the acceptance). See also *Jenkins v Morris* (1847) 16 M & W 877; *Okell v Charles* (1876) 34 LT 822, CA; *Attwood v Munnings* (1827) 7 B & C 278. As to liability on signatures see the Bills of Exchange Act s 25; and PARA 1473 et seq. However, the Bills of Exchange Act s 25 relates only to rights and liabilities whilst the bill is current, and where it has been in fact paid, though signed without authority, the section does not operate or give a remedy to the principal: *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356 at 367–368, CA; but see *Midland Bank Ltd v Reckitt* [1933] AC 1 at 16, HL, per Lord Atkin. As to the liability of the agent see the Bills of Exchange Act 1882 s 26; and PARA 1476 et seq. As to acceptance on behalf of a company see the Companies Act 1985 s 37 (prospectively repealed) (as to replacement provisions see the Companies Act 2006 s 52), the Companies Act 2006 ss 82, 84 (formerly the Companies Act 1985 s 349); and COMPANIES vol 7(1) (2004 Reissue) PARAS 462, 471. As to the principles of agency generally see AGENCY.
9 Cf *Polhill v Walter* (1832) 3 B & Ad 114; *Steele v M'Kinlay* (1880) 5 App Cas 754, HL; and see AGENCY vol 1 (2008) PARA 128.

1453. Drawee not liable without accepting. The party primarily liable on a bill of exchange[1] is the acceptor[2]; that is the person to whom the order to pay is addressed. He is on the face of the bill as drawn, the drawee[3]; but as such he is not, apart from special contract, by English law under any obligation to accept the bill[4]. A drawee who does not accept is not, therefore, liable on the bill[5]. A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof[6].

1 As to the meaning of 'bill of exchange' see PARA 1405.
2 As to the meaning of 'acceptor' see PARA 1406.
3 As to the meaning of 'drawee' see PARA 1406.
4 See *Rowe v Young* (1820) 2 Bligh 391; and PARA 1451.
5 Bills of Exchange Act 1882 s 53(1).
6 Bills of Exchange Act 1882 s 53(1). For the position under Scottish law see PARA 1596.

1454. No acceptance of cheques. In English law, a banker on whom a cheque[1] is drawn by a customer in legal form is bound to honour the customer's cheques up to the amount to which he is entitled to draw[2]. But the banker is only liable on his contract with his customer, and not to the payee[3] or holder[4] of the cheque[5].

1 As to the meaning of 'cheque' see PARA 1405.
2 See PARA 853.
3 As to the meaning of 'payee' see PARA 1406.

4 As to the meaning of 'holder' see PARA 1407.
5 *Marzetti v Williams* (1830) 1 B & Ad 415.

1455. Effect of acceptance and non-acceptance. In the case of a bill of exchange[1], when the drawee[2] does accept he undertakes that he will pay the bill according to the tenor of his acceptance[3], but, where the drawee declines to accept, the drawer[4] must bear all the losses and expenses incurred as well by reason of the non-acceptance as of the non-payment[5].

1 As to the meaning of 'bill of exchange' see PARA 1405.
2 As to the meaning of 'drawee' see PARA 1406.
3 Bills of Exchange Act 1882 s 54(1); *Smith v Vertue* (1860) 30 LJCP 56. As to the meaning of 'acceptance' see PARA 1406. As to the tenor of the acceptance see PARAS 1461–1463.
4 As to the meaning of 'drawer' see PARA 1406.
5 See the Bills of Exchange Act 1882 s 55(1)(a); and PARA 1574.

1456. Acceptor primarily liable. Whenever a bill[1] is accepted the acceptor[2] is and remains the party primarily liable on the bill whatever may happen to the other parties[3], and whether any of the other parties are discharged or not[4]. Should an indorser[5] have to pay the bill, the acceptor by the fact of his acceptance[6] is liable to indemnify him[7].

In the case of a bill drawn for the accommodation of another party, the actual position differs from that appearing on its face[8]. The acceptor is only surety for the party accommodated, so that he is entitled to be indemnified by him, and if a holder[9] has recovered part of the amount due from the party accommodated, he can only recover the balance from the acceptor[10].

1 As to the meaning of 'bill' see PARA 1405.
2 As to the meaning of 'acceptor' see PARA 1406.
3 *Anderson v Cleveland* (1769) 13 East 430n.
4 As to discharge of parties see PARA 1564 et seq. Cf *Smith v Knox* (1799) 3 Esp 46.
5 As to the meaning of 'indorser' see PARA 1407 note 8.
6 As to the meaning of 'acceptance' see PARA 1406.
7 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL.
8 As to such bills see PARA 1482.
9 As to the meaning of 'holder' see PARA 1407.
10 *Cook v Lister* (1863) 13 CBNS 543. As to the right of indemnity see PARAS 1583–1585.

1457. Estoppel of acceptor. There are certain estoppels which bind the acceptor[1] in regard to a holder in due course[2]. The acceptor cannot deny to him the existence of the drawer[3], the genuineness of his signature[4] and his capacity and authority to draw the bill[5].

If the instrument is payable to the order of the drawer, the acceptor cannot deny to a holder in due course the capacity of the drawer to indorse at the time of such indorsement[6], nor if the instrument is payable to the order of a third party can he deny the existence of such third party or his capacity to indorse at the time of such indorsement[7]; but in neither case is he bound to admit the genuineness[8] or validity[9] of the indorsement[10].

1 Bills of Exchange Act 1882 s 54(2); *Lloyds Bank Ltd v Cooke* [1907] 1 KB 794, CA; *Paine v Bevan and Bevan* (1914) 110 LT 933. As to the meaning of 'acceptor' see PARA 1406.
2 A holder in due course does not include the original payee of a cheque: *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL. As to the meaning of 'holder in due course' see PARA 1407.
3 As to the meaning of 'drawer' see PARA 1406.
4 *Sanderson v Collman* (1842) 4 Man & G 209; *Cooper v Meyer* (1830) 10 B & C 468. As to the effect of forgery see PARA 1503.
5 Bills of Exchange Act 1882 s 54(2)(a); *Hallifax v Lyle* (1849) 3 Exch 446. See PARA 1465. As to the meaning of 'bill' see PARA 1405.

6 Bills of Exchange Act 1882 s 54(2)(b); *Pitt v Chappelow* (1841) 8 M & W 616; *Braithwaite v Gardiner* (1846) 8 QB 473; *Ashpitel v Bryan* (1864) 5 B & S 723. As to the meaning of 'indorsement' see PARA 1407.
7 Bills of Exchange Act 1882 s 54(2)(c).
8 *Beeman v Duck* (1843) 11 M & W 251; *Garland v Jacomb* (1873) LR 8 Exch 216.
9 *Robinson v Yarrow* (1817) 7 Taunt 455.
10 Bills of Exchange Act 1882 s 54(2)(b), (c).

1458. Acceptance by partners, etc. When a bill[1] is addressed personally to one who is also a partner in a firm, and he accepts it in the name of the firm, it is nevertheless not the firm's acceptance[2], but his own[3]. So, too, when a bill is addressed to a firm, and a partner accepts the bill in the name of the firm, adding his own name, the acceptance is that of the firm, not of the partner[4]. A bill addressed to a firm, and accepted by one member of the firm in his own name is an acceptance by that member of the firm, and he is liable as such acceptor[5]. An acceptance in its true style by a firm wrongly addressed is a valid acceptance[6].

A man trading in a name other than his own may accept in either name[7].

A bill addressed to a married woman as 'Mrs John Smith' would be properly accepted by her in the style 'Emma Smith, wife of John Smith'.

An acceptor cannot escape liability to the payee[8] on the ground that his acceptance was given under a mistake unless, perhaps, the mistake was fundamental to the transaction[9].

1 As to the meaning of 'bill' see PARA 1405.
2 As to the meaning of 'acceptance' see PARA 1406.
3 *Nicholls v Diamond* (1853) 9 Exch 154; cf *Mare v Charles* (1856) 5 E & B 978 (acceptance purporting to be on behalf of company). As to a partner's implied authority to draw, indorse and accept bills see PARTNERSHIP vol 35 (Reissue) PARA 48.
4 *Re Barnard, Edwards v Barnard* (1886) 32 ChD 447, CA; see also the Bills of Exchange Act 1882 s 23(2) and PARA 1467.
5 *Owen v Van Uster* (1850) 10 CB 318. As to the meaning of 'acceptor' see PARA 1406. When all the members of a firm accept a bill, the presumption is that it is accepted for the purposes of the firm (*Rossland Cycle Co v M'Creadie* 1907 SC 1208, Ct of Sess). As to authority of partners in respect of bills of exchange see PARTNERSHIP vol 35 (Reissue) PARA 61. Where the partners in a firm agreed to dissolve the partnership and to have the affairs of the firm liquidated by an agent, and a bill addressed to the firm was accepted by the agent in his own name and the name of a member of the firm, the latter was held not to have accepted the bill: *Odell v Cormack Bros* (1887) 19 QBD 223.
6 *Lloyd v Ashby* (1831) 2 B & Ad 23.
7 See the Bills of Exchange Act 1882 s 23 proviso (1); and PARA 1468.
8 As to the meaning of 'payee' see PARA 1406.
9 *Ayres v Moore* [1940] 1 KB 278, [1939] 4 All ER 351 (where it was held that, as against the payee and holder, the acceptor of a bill could not rely on his own mistake of fact as, if it had been true, it would not have affected his liability to accept the bill). As to mistake generally see MISTAKE.

B. TIME OF ACCEPTANCE

1459. When bill may be accepted. A bill[1] may be accepted before it has been signed by the drawer[2] or while otherwise incomplete[3].

It may also be accepted when it is overdue or after it has been dishonoured by a previous refusal to accept or by non-payment[4]; but a bill accepted when it is overdue is deemed as regards the acceptor[5] to be payable on demand[6].

If a bill payable after sight[7] is dishonoured by non-acceptance[8], and the drawee[9] afterwards accepts it, the holder[10] is entitled, in the absence of any agreement to the contrary, to have the bill accepted as of the date of the first presentment to the drawee for acceptance[11].

1 As to the meaning of 'bill' see PARA 1405.
2 As to the meaning of 'drawer' see PARA 1406.
3 Bills of Exchange Act 1882 s 18(1); see also PARA 1449. As to the meaning of 'acceptance' see PARA 1406.
4 Bills of Exchange Act 1882 s 18(2); *Mutford v Walcot* (1700) 1 Ld Raym 574; *Wynne v Raikes* (1804) 5 East 514.
5 As to the meaning of 'acceptor' see PARA 1406.
6 Bills of Exchange Act 1882 s 10(2). As to bills payable on demand see PARA 1433. As to overdue bills see PARA 1497.
7 As to the meaning of 'bill payable after sight' see PARA 1435.
8 As to dishonour by non-acceptance see PARA 1515.
9 As to the meaning of 'drawee' see PARA 1406.
10 As to the meaning of 'holder' see PARA 1407.
11 Bills of Exchange Act 1882 s 18(3); *Roberts v Bethell* (1852) 12 CB 778.

1460. Dating of acceptance. In general, an acceptance[1] need not be dated; but if the bill is payable after sight[2], the date of acceptance should always be inserted. If in such a case a date is not inserted, the holder[3] is entitled to insert it himself[4].

Where the date of the acceptance is not inserted, the presumption will be made that it was before maturity of the bill and within a reasonable time of its issue[5].

1 As to the meaning of 'acceptance' see PARA 1406.
2 As to the meaning of 'bill payable after sight' see PARA 1435.
3 As to the meaning of 'holder' see PARA 1407.
4 See the Bills of Exchange Act 1882 ss 12, 13; and PARA 1415.
5 See *Roberts v Bethell* (1852) 12 CB 778 (where the drawee accepted without dating a bill payable three months after date, and came of age just before its maturity, in which case it was presumed that he accepted it while still a minor).

C. FORM AND NATURE OF ACCEPTANCE

1461. Written, signed and delivered. The acceptance[1] must be written[2] on the bill[3] and be signed by the drawee[4]. It is not complete until delivery[5] or notification[6].

Any appropriate words may be made use of by the drawee to convey his assent to the drawer's[7] order, but his mere signature, without additional words, is sufficient[8].

An acceptance is usually written across the face of the bill, but it may be anywhere on the face and perhaps even on the back[9].

An acceptance must in no case state that the drawee will fulfil his obligation otherwise than by payment of money[10].

1 As to the meaning of 'acceptance' see PARA 1406.
2 As to the meaning of 'writing' see PARA 1405 note 2.
3 As to the meaning of 'bill' see PARA 1405. The provisions of the Bills of Exchange Act 1882 in so far as they relate to acceptance do not apply to promissory notes: s 89(3)(b).
4 Bills of Exchange Act 1882 s 17(2)(a). As to the meaning of 'drawee' see PARA 1406.
5 As to the meaning of 'delivery' see PARA 1406.
6 See PARAS 1406, 1441; *Cox v Troy* (1822) 5 B & Ald 474; *Bank of Van Diemen's Land v Bank of Victoria* (1871) LR 3 PC 526.
7 As to the meaning of 'drawer' see PARA 1406.
8 Bills of Exchange Act 1882 s 17(2)(a).
9 See *Young v Glover and Glover* (1857) 3 Jur NS 637.
10 Bills of Exchange Act 1882 s 17(2)(b); *Russell v Phillips* (1850) 14 QB 891.

1462. General and qualified acceptances. An acceptance[1] may be either general or qualified[2]. A general acceptance assents without qualification to the order of the drawer[3]. A qualified acceptance in express terms varies the effect of the bill[4] as drawn[5].

If the acceptor[6] desires to qualify his acceptance, he must do so in definite terms on the face of the bill, so that anyone taking the bill may clearly understand that it was accepted subject to an express qualification[7]. In the absence of such an express qualification, the acceptance will be deemed absolute[8].

1 As to the meaning of 'acceptance' see PARA 1406.
2 Bills of Exchange Act 1882 s 19(1).
3 Bills of Exchange Act 1882 s 19(2). As to the meaning of 'drawer' see PARA 1406. In *London and Northern Trading Co Ltd v Arcos Ltd* (1933) 38 Com Cas 242, HL, the Court of Appeal's judgment that bills should have been accepted subject to the provisions of the contracts under which they were to be accepted was varied in the House of Lords, Lord Buckmaster stating, at 247, that 'such a form of acceptance, if it were possible under the Bills of Exchange Act, would destroy the whole negotiability of the document'.
4 As to the meaning of 'bill' see PARA 1405. The provisions of the Bills of Exchange Act 1882 in so far as they relate to acceptance do not apply to promissory notes: s 89(3)(b).
5 Bills of Exchange Act 1882 s 19(2). As to kinds of qualified acceptance see PARA 1463.
6 As to the meaning of 'acceptor' see PARA 1406.
7 *Meyer & Co v DeCroix, Verley et Cie* [1891] AC 520, HL (where the drawee wrote above his acceptance 'in favour of Mr L Delobbel Flipo only', the bill being drawn payable 'to order Mr L Delobbel Flipo', and this was held not to be a qualified acceptance); and see *Canadian Bank of Commerce v British Columbia Interior Sales Ltd* (1957) 23 WWR 682, 11 DLR (2d) 609, BC CA (where the words 'subject to our adjustments' were not considered to be a valid qualification).
8 *Fanshawe v Peet* (1857) 26 LJEx 314 (where it was held that an addition to his acceptance by the drawee of words giving a wrong date for the maturity of the bill did not prevent the acceptance being general). But see *Sproat v Matthews* (1786) 1 Term Rep 182.

1463. Kinds of qualified acceptance. An acceptance may be qualified[1] in a variety of ways: (1) it may be conditional, that is, it may make payment of the bill[2] by the acceptor[3] dependent on the fulfilment of a condition stated by him in his acceptance[4]; or (2) it may be partial, that is, an acceptance to pay part only of the amount for which the bill is drawn[5]; or (3) it may be local, that is, to pay only at a particular specified place; unless, however, the acceptance expressly states that the bill is to be paid there and there only, it will be regarded as a general acceptance[6]; or (4) it may be qualified as to time[7]; or (5) it may be qualified by being accepted by one or more of the drawees[8], but not by all[9].

1 As to the meaning of 'qualified acceptance' see PARA 1462.
2 As to the meaning of 'bill' see PARA 1405. The provisions of the Bills of Exchange Act 1882 in so far as they relate to acceptance do not apply to promissory notes: s 89(3)(b).
3 As to the meaning of 'acceptor' see PARA 1406.
4 Bills of Exchange Act 1882 s 19(2)(a). For example, the acceptance may be to pay when goods conveyed to the drawee are sold (*Smith v Abbot* (1741) 2 Stra 1152), or when in cash for the cargo of a ship (*Julian v Shobrooke* (1754) 2 Wils 9). See also *Pierson v Dunlop* (1777) 2 Cowp 571; *Banbury v Lisset* (1744) 2 Stra 1211; *Smith v Vertue* (1860) 30 LJCP 56.
5 Bills of Exchange Act 1882 s 19(2)(b). An acceptance 'as far as £100 part thereof' of a bill for £127 is a valid, though qualified, acceptance: *Wegersloffe v Keene* (1719) 1 Stra 214. So, too, when the drawee accepted a bill partly in cash, partly in bills, the acceptance was held to be a valid, though qualified, acceptance in regard to the part accepted in cash: *Petit v Benson* (1697) Comb 452.
6 Bills of Exchange Act 1882 s 19(2)(c). As to the meaning of 'general acceptance' see PARA 1462. When bills are accepted 'payable at Messrs _____' (the drawee's bankers), this is a general acceptance, but when stated to be 'payable at Messrs _____ and not elsewhere', the acceptance is qualified: *Sebag v Abitbol* (1816) 4 M & S 462 at 466. The word 'only' need not be actually

used: *Higgins v Nichols* (1839) 7 Dowl 551. See also *Halstead v Skelton* (1843) 5 QB 86; *Sproat v Matthews* (1786) 1 Term Rep 182; *Rhodes v Gent* (1821) 5 B & Ald 244. See also *Ex p Hayward* (1887) 3 TLR 687, DC (acceptance in London of bill payable in Ceylon was a general acceptance); *Bank Polski v KJ Mulder & Co* [1942] 1 KB 497, [1942] 1 All ER 396, CA (acceptances of bills drawn in Poland and expressed to be payable in Amsterdam were general acceptances and not local as the bills contained no express stipulation that they were payable only in Amsterdam and not elsewhere).

7 Bills of Exchange Act 1882 s 19(2)(d). When a bill was dated 28 November 1836, payable 42 months after date, and was accepted 'on the condition of its being renewed until 28 November 1844, without interest payable by me at Messrs _____', the acceptance was held to be good though qualified by time: *Russell v Phillips* (1850) 14 QB 891.

8 As to the meaning of 'drawee' see PARA 1406.

9 Bills of Exchange Act 1882 s 19(2)(e). As to bills addressed to more than one drawee see also s 6(2); and PARA 1426.

1464. Holder and qualified acceptance. The holder[1] of a bill[2] may refuse to take a qualified acceptance[3], and if he does not obtain an unqualified acceptance he may treat the bill as dishonoured by non-acceptance[4].

If he consents to take a qualified acceptance, he should at once inform the drawer[5] and indorser[6], since in such case, if the drawer or an indorser has not expressly or impliedly authorised him to take it or does not subsequently assent to it, the drawer or indorser in question is discharged from liability on the bill[7].

When, however, the drawer or indorser has had notice of the qualified acceptance, and does not within a reasonable time dissent from it, he is deemed to have assented to it[8].

When, by the terms of a qualified acceptance, presentment for payment is required, the acceptor[9], in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures[10].

1 As to the meaning of 'holder' see PARA 1407.

2 As to the meaning of 'bill' see PARA 1405. The provisions of the Bills of Exchange Act 1882 in so far as they relate to presentment for acceptance do not apply to promissory notes: s 89(3)(a).

3 As to the meaning of 'qualified acceptance' see PARA 1462.

4 Bills of Exchange Act 1882 s 44(1). As to dishonour by non-acceptance see PARA 1515. When a bill is a foreign bill (as to which see PARA 1432), and the qualification attaching to the acceptance is 'partial', the holder cannot treat the bill as dishonoured. He can only protest the bill in respect of the balance which was not accepted: see s 44(2). As to protest see PARA 1538 et seq.

5 As to the meaning of 'drawer' see PARA 1406.

6 As to the meaning of 'indorser' see PARA 1407 note 8.

7 Bills of Exchange Act 1882 s 44(2). However, this is not so in the case of a partial acceptance where notice is duly given: s 44(2). As to the partial acceptance of a foreign bill see note 4. As to discharge of parties see PARA 1564 et seq.

8 Bills of Exchange Act 1882 s 44(3).

9 As to the meaning of 'acceptor' see PARA 1406.

10 See the Bills of Exchange Act 1882 s 52(2); *Smith v Vertue* (1860) 30 LJCP 56; and PARA 1516.

(ix) Capacity and Authority of Parties

A. CAPACITY AND AUTHORITY

1465. Capacity to incur liability and authority to sign. In general, capacity to incur liability as a party to a bill or note[1] is co-extensive with capacity to contract[2].

The signature of any party possessing such capacity may be written[3] either by himself or by some other person[4] acting by or under his authority[5].

The person to whom liability is to attach must have capacity to sign. The person who actually signs must, if he is not the person liable, have his authority to do so. Capacity means power to contract so as to bind oneself; authority means power to contract on behalf of another so as to bind him. Capacity is a matter of law; authority, as derived from the act of the parties, is usually a question of fact.

1 As to the meanings of 'bill' and 'note' see PARA 1405.
2 Bills of Exchange Act 1882 ss 22(1), 89. As to capacity of parties generally to contract see CONTRACT vol 9(1) (Reissue) PARA 630. As to the capacity of a company to become a party to a bill see the Bills of Exchange Act 1882 s 22(1) proviso; and PARA 1466.
3 As to the meaning of 'writing' see PARA 1405 note 2.
4 As to the meaning of 'person' see PARA 1401 note 4.
5 Bills of Exchange Act 1882 s 91(1); and see PARA 1452.

1466. Corporations. A company[1] has power to issue or accept negotiable instruments[2] where on a fair consideration of its memorandum and articles of association such a power is expressly or impliedly conferred[3].

Unless the power is expressly or impliedly given by the Act of Parliament[4], charter, or other instrument creating it, a non-trading company or corporation is not able to incur liability on a bill of exchange or promissory note[5].

Where, however, an instrument has been drawn or indorsed by such a non-trading company or corporation the holder[6] is entitled to have the instrument paid and to enforce it against any other party to it[7].

A bill of exchange or promissory note[8] is deemed to have been made, accepted or indorsed on behalf of a company if made, accepted or indorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority[9]. Where the Bills of Exchange Act 1882 requires any instrument or writing[10] to be signed, it is sufficient if the instrument or writing is sealed with the corporate seal, although nothing in the Act requires the bill or note of a corporation to be under seal[11].

1 Ie a company as defined by the Companies Act 1985 s 735(1) (prospectively repealed): see COMPANIES vol 7(1) (2004 Reissue) PARA 201 et seq (as to replacement provisions see the Companies Act 2006 ss 1(1), 1171).
2 As to the meaning of 'negotiable instrument' see PARA 1402. As to the meanings of 'acceptance' and 'issue' see PARA 1406.
3 See the Companies Act 1985 s 35 (prospectively repealed), s 35A (prospectively repealed), s 35B (prospectively repealed); and COMPANIES vol 7(1) (2004 Reissue) PARA 430 et seq (as to replacement provisions see the Companies Act 2006 ss 39, 40). See also *Peruvian Railways Co v Thames and Mersey Marine Insurance Co, Re Peruvian Railways Co* (1867) 2 Ch App 617; *Re General Estates Co, ex p City Bank* (1868) 3 Ch App 758. As to a company's power to deal with bills and notes see COMPANIES vol 7(1) (2004 Reissue) PARA 470 et seq.
4 See eg *Slark v Highgate Archway Co* (1814) 5 Taunt 792; *Murray v East India Co* (1821) 5 B & Ald 204.
5 *Harmer v Steele* (1849) 4 Exch 1; *Bateman v Mid Wales Rly Co* (1866) LR 1 CP 499 at 505; Bills of Exchange Act 1882 s 22(1) proviso, s 89. As to a company's implied power to draw cheques see PARA 843. As to a corporation's power to incur liability on bills of exchange or promissory notes see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1237.
6 As to the meaning of 'holder' see PARA 1407.
7 Bills of Exchange Act 1882 ss 22(2), 89.
8 As to the meanings of 'bill of exchange' and 'promissory note' see PARA 1405.
9 See the Companies Act 1985 s 37 (prospectively repealed); and COMPANIES vol 7(1) (2004 Reissue) PARA 471 (as to the replacement provision see the Companies Act 2006 s 52). In *Stacey & Co Ltd v Wallis* (1912) 106 LT 544, Scrutton J held it to be sufficient if the name of the company appeared on the bill as addressee.
10 As to the meaning of 'writing' see PARA 1405 note 2.
11 Bills of Exchange Act 1882 s 91(2).

1467. Partnerships. A partner in a trading firm, as distinct from a non-trading firm[1], has full power to incur liability on behalf of his firm as a party to a bill or note[2] for any purpose of the firm that falls within (but not outside[3]) the scope of its ordinary business[4], and the signature by him of the firm's name will bind all his partners equally with himself[5]. Accepting bills in blank is not a mercantile business transaction the power to do which can be implied from the existence of an ordinary trading partnership[6].

If a partner signs a joint and several note for himself and his partners, he cannot bind them severally[7], but he does bind himself and them jointly[8] and himself separately[9]. If a bill is accepted by a partner in the name of the firm, but in fraud, the onus is on the holder[10] as against the other partner of showing that value was given for the bill[11].

Where two partners without knowledge of one another sign the firm's name on two separate bills to satisfy the same debt, the firm may be liable on both bills should they pass into the hands of holders in due course[12].

1 A partner in a non-trading firm has no authority to draw bills binding the partnership unless expressly given authority; see *Wheatley v Smithers* [1906] 2 KB 321, DC (revsd on appeal, but not on this point [1907] 2 KB 684, CA); cf *Higgins v Beauchamp* [1914] 3 KB 1192 at 1194–1195, DC; and the Partnership Act 1890 s 6 proviso (see PARTNERSHIP vol 35 (Reissue) PARA 59). Whether or not the firm is a trading firm must in each case depend on the nature of the business: *Dickinson v Valpy* (1829) 10 B & C 128. As to bills of exchange and the powers of a partner to bind his firm see PARTNERSHIP vol 35 (Reissue) PARA 61.
2 As to the meanings of 'bill' and 'note' see PARA 1405.
3 *Re Cunningham & Co Ltd, Simpson's Claim* (1887) 36 ChD 532. As a partner has already full powers to bind his firm on partnership bills, it seems that if a fellow-partner who is going abroad grants him a power of attorney to deal with bills, such power applies to non-partnership bills only: *Attwood v Munnings* (1827) 7 B & C 278.
4 See the Partnership Act 1890 ss 5, 6; and PARTNERSHIP vol 35 (Reissue) PARA 44 et seq.
5 Bills of Exchange Act 1882 s 23 proviso (2), s 89. See *Pinkney v Hall* (1697) 1 Ld Raym 175; *Lewis v Reilly* (1841) 1 QB 349; *Re Barnard, Martins Bank v Trustee* [1932] 1 Ch 269; *Ringham v Hackett* (1980) 124 Sol Jo 201, CA.
6 *Hogarth v Latham & Co* (1878) 3 QBD 643, CA. As to acceptance of bills by partners see PARA 1458.
7 *Perring v Hone* (1826) 4 Bing 28 (the note was not signed in the firm's name).
8 *Maclae v Sutherland* (1854) 3 E & B 1.
9 *Elliot v Davis* (1800) 2 Bos & P 338; *Gillow v Lillie* (1835) 1 Bing NC 695.
10 As to the meaning of 'holder' see PARA 1407.
11 *Hogg v Skeen* (1865) 18 CBNS 426.
12 *Davison v Robertson* (1815) 3 Dow 218. As to the meaning of 'holder in due course' see PARA 1407.

1468. Sole traders. Where any person[1] signs an instrument[2] in a trade or assumed name he is liable on it as if he had signed it in his own name[3].

1 As to the meaning of 'person' see PARA 1401 note 4.
2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 Bills of Exchange Act 1882 s 23 proviso (1), s 89. See *Wilde v Keep* (1833) 6 C & P 235; *Edmunds v Bushell and Jones* (1865) LR 1 QB 97; cf *Alliance Bank Ltd v Kearsley* (1871) LR 6 CP 433. See also PARA 1458 text to note 7.

B. RESTRICTIONS ON CAPACITY AND AUTHORITY

1469. Restrictions. The principal instances in which there is want of capacity are: (1) persons of unsound mind[1]; (2) minors[2]; (3) non-trading corporations[3]. In addition to these there are certain classes to which special disabilities attach.

Previously the clergy were debarred from engaging in trade for lucre or profit[4], but this prohibition only rendered them liable to ecclesiastical

punishments and did not make void any instruments to which they have become parties[5]. They could not escape liability on instruments even if the other parties to the instrument knew that they were dealing with clergymen[6]. The capacity of a clergyman to incur liability on a bill is thus the same as that of any other individual, and is not affected by his special status.

Bankers and banking companies in England and Wales other than the Bank of England have, since 1844, been prohibited from the issue of bills or notes[7], which in legal effect are payable to bearer on demand, except, under certain conditions, where they did so at the time the statute was passed[8].

Restrictions have been imposed on taking and negotiating instruments in connection with consumer credit and consumer hire agreements[9].

1 See PARA 1470.
2 See PARA 1471.
3 See PARA 1466.
4 See the Pluralities Act 1838 s 29 (repealed); and ECCLESIASTICAL LAW vol 14 PARA 684.
5 See the Pluralities Act 1838 s 31 (repealed); and ECCLESIASTICAL LAW vol 14 PARA 685.
6 *Lewis v Bright* (1855) 4 E & B 917.
7 As to the meanings of 'bill' and 'note' see PARA 1405. 'Bank notes' means notes of the Bank of England payable to bearer on demand: see the Currency and Bank Notes Act 1954 s 3; PARA 1613; and PARA 796.
8 See the Bank Charter Act 1844 s 11; and PARA 796.
9 See PARA 1472.

1470. Persons of unsound mind, etc. Contracts made by mentally disordered persons[1] are voidable, not void[2]. By their signature to a bill or note[3] such persons, therefore, incur no liability to anyone who is aware of their condition, but that condition is not a defence against a holder for value[4] without notice[5].

1 As to the definition and classification of mental disorder see the Mental Health Act 1983 s 1; and MENTAL HEALTH vol 30(2) (Reissue) PARA 402.
2 As to civil capacity to contract see MENTAL HEALTH vol 30(2) (Reissue) PARA 600 et seq. As to void and voidable contracts see CONTRACT vol 9(1) (Reissue) PARA 607.
3 As to the meanings of 'bill' and 'note' see PARA 1405.
4 As to the meaning of 'holder for value' see PARA 1407.
5 *Imperial Loan Co v Stone* [1892] 1 QB 599, CA. See also *Brown v Jodrell* (1827) 3 C & P 30; *Levy v Baker* (1827) Mood & M 106n; and cf *Re Whitaker* (1889) 42 ChD 119, CA. In *Manches v Trimborn* [1946] WN 63, the defendant was to the plaintiff's knowledge incapable of understanding substantially the nature and effect of a transaction of which the cheque she issued formed part, but she was capable of understanding that the cheque would have the effect of transferring funds to the plaintiff for the benefit of a third person. Judgment was given in her favour.

1471. Minors. A minor[1] cannot make himself liable as either drawer[2], acceptor[3] or indorser[4] of a bill of exchange or promissory note[5], even if it be for necessaries supplied[6]; but if the instrument[7] has been drawn or indorsed by him, the holder[8] is entitled to receive payment and to enforce the instrument as against any other party to it[9].

A postdated cheque[10] drawn by a minor payable after his coming of age appears to stand on the same footing as a cheque drawn by a minor dated before his coming of age[11]. Where, however, a bill is drawn during the minority of the drawee[12], but accepted by him after he attains his majority, it is valid and may be enforced against him[13].

1 The age of majority is 18: see the Family Law Reform Act 1969 s 1(1); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 1.
2 As to the meaning of 'drawer' see PARA 1406.
3 As to the meaning of 'acceptor' see PARA 1406.

4 As to the meaning of 'indorser' see PARA 1407 note 8.
5 As to the meanings of 'bill of exchange' and 'promissory note' see PARA 1405.
6 *Re Soltykoff, ex p Margrett* [1891] 1 QB 413, CA. As to the position at common law see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 12 et seq. The statutory provisions of the Infants Relief Act 1874 (which invalidated certain contracts made by minors and prohibited actions to enforce contracts ratified after majority) and the Betting and Loans (Infants) Act 1892 s 5 (which invalidated contracts to repay loans advanced during minority) were repealed by the Minors' Contracts Act 1987 s 1 with regard to contracts made by a minor after 9 June 1987: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 14; CONTRACT vol 9(1) (Reissue) PARA 1051.
7 As to the meaning of 'instrument' see PARA 1402 note 1.
8 As to the meaning of 'holder' see PARA 1407.
9 Bills of Exchange Act 1882 ss 22(2), 89; *Grey v Cooper* (1782) 3 Doug KB 65; *Taylor v Croker* (1802) 4 Esp 187. In *Wauthier v Wilson* (1912) 28 TLR 239, CA, on a joint and several promissory note by a father and a minor son to secure a loan to the latter from a moneylender, the father was held liable as a principal.
10 As to the meaning of 'cheque' see PARA 1405.
11 *Hutley v Peacock* (1913) 30 TLR 42.
12 As to the meaning of 'drawee' see PARA 1406.
13 *Stevens v Jackson* (1815) 4 Camp 164.

1472. Restrictions on taking and negotiating instruments in connection with consumer credit and consumer hire agreements. A creditor or owner must not take a negotiable instrument[1], other than a bank note[2] or cheque[3], in discharge of any sum payable by the debtor or hirer under a regulated consumer credit or consumer hire agreement[4], or by any person as surety in relation to the agreement[5].

The creditor or owner must not negotiate a cheque taken by him in discharge of a sum payable as mentioned above except to a banker[6].

The creditor or owner must not take a negotiable instrument as security for the discharge of any sum payable as mentioned above[7].

1 As to the meaning of 'negotiable instrument' see PARA 1402.
2 As to the meaning of 'bank note' see PARA 1469 note 7.
3 As to the meaning of 'cheque' see PARA 1405.
4 Consumer Credit Act 1974 s 123(1)(a). As to regulated consumer credit or consumer hire agreements see ss 8(3), 15; and CONSUMER CREDIT vol 9(1) (Reissue) PARAS 79, 81–82. As to restrictions on taking and negotiating instruments see CONSUMER CREDIT vol 9(1) (Reissue) PARA 219.
5 Consumer Credit Act 1974 s 123(1)(b). A person takes a negotiable instrument as security for the discharge of a sum if the sum is intended to be paid in some other way, and the negotiable instrument is to be presented for payment only if the sum is not paid in that way: s 123(4). The provisions in s 123 do not apply where the regulated agreement is a non-commercial agreement (s 123(5)) or where the regulated agreement has a connection with a country outside the United Kingdom provided that the goods are hired in the course of the hirer's business: s 123(6); Consumer Credit (Negotiable Instruments) (Exemption) Order 1984, SI 1984/435.

After any contravention of the Consumer Credit Act 1974 s 123 has occurred in relation to a sum payable by the debtor or hirer under a regulated consumer credit or consumer hire agreement, the agreement under which the sum is payable is enforceable against the debtor or hirer on an order of the county court only: ss 124(1), 189(1). After any contravention has occurred in relation to a sum payable by a surety the security is enforceable on an order of the county court only: ss 124(2), 189(1). Where an application for an order under s 124(2) is dismissed, s 106 (ineffective securities) applies: s 124(3).

For consequences of contravention see s 125(1), (3); and note 4.
6 Consumer Credit Act 1974 s 123(2). 'Banker' has the same meaning as in the Bills of Exchange Act 1882: see the Consumer Credit Act 1974 s 123(2); and PARA 1403 note 7. Negotiating a cheque in contravention of the provision constitutes a defect in his title: s 125(2).
7 Consumer Credit Act 1974 s 123(3). A person who takes a negotiable instrument in contravention of s 123(1) or s 123(3) is not a holder in due course and is not entitled to enforce the instrument: s 125(1). If a person mentioned in s 123(1)(a) or s 123(1)(b) becomes liable to the holder in due course of an instrument taken in contravention of s 123(1) or s 123(3), or

taken from a person mentioned in s 123(1)(a) or s 123(1)(b) and negotiated in contravention of s 123(2), the creditor or owner must indemnify him: s 125(3). Nothing in the Consumer Credit Act 1974 affects the rights of the holder in due course of any negotiable instrument: s 125(4).

(x) Signature by and Liability of Agents

A. SIGNATURE BY AGENT

1473. Sufficiency of signature by agent. Where, by the Bills of Exchange Act 1882, any instrument[1] or writing[2] is required to be signed by any person[3], it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written on it by some other person by or under his authority[4]. In this case the person signing is an agent. The authority to sign may be created in any terms; it may be express or implied[5], and it may be for a special purpose or not.

However, a general authority to transact business and to receive and discharge debts may not in itself confer upon an agent the power of accepting and indorsing bills or notes[6] so as to charge his principal[7].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 As to the meaning of 'writing' see PARA 1405 note 2.
3 As to the meaning of 'person' see PARA 1401 note 4.
4 Bills of Exchange Act 1882 s 91(1). As to sufficiency of an agent's signature generally see AGENCY vol 1 (2008) PARA 42.
5 *Edmunds v Bushell and Jones* (1865) LR 1 QB 97; *Furze v Sharwood* (1841) 2 QB 388.
6 As to the meanings of 'bill' and 'note' see PARA 1405.
7 *Murray v East India Co* (1821) 5 B & Ald 204; *Hogg v Snaith* (1808) 1 Taunt 347; *Esdaile v La Nauze* (1835) 1 Y & C Ex 394. However see *Australia and New Zealand Bank Ltd v Ateliers de Constructions Electriques de Charleroi* [1967] 1 AC 86, PC (implied authority may be gathered from surrounding circumstances).

1474. Mode of signing by agent. An agent may simply sign in the name of his principal, or indicate, by signing by procuration or otherwise, that he does so in the capacity of agent. The important points are the signature and the authority to place it on the instrument, which are matters of evidence[1].

When the agent signs by procuration, the form of the signature operates as notice that he has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority[2]. But where the agent has authority, the fact that he may have abused his authority does not affect the rights of a bona fide holder for value[3] of a negotiable instrument[4] indorsed by him apparently within his authority[5]. Where, however, an agent draws a cheque[6] per pro outside the scope of his authority, the principal is not liable on the instrument, although he must account to the drawee[7] for any money which has thereby come into his possession[8].

An agent does not bind his principal if he signs in his own name[9] unless he is acting under a power of attorney granted by his principal[10].

1 *Lord v Hall* (1849) 8 CB 627 (where, in the case of a man whose affairs were managed by his wife, his signature was actually written, not by his wife, but by his daughter in his wife's presence and with her authority). See especially at 631 per Maule J commenting on *Re Marshall, ex p Sutton* (1788) 2 Cox Eq Cas 84.
2 Bills of Exchange Act 1882 s 25; *Attwood v Munnings* (1827) 7 B & C 278; *National Bank of Scotland v Dewhurst, The Gonchar and The Izgar* (1896) 1 Com Cas 318; cf *West London Commercial Bank v Kitson* (1884) 13 QBD 360, CA. See also PARA 1452 note 8. The expression 'by procuration' may be limited to agency on behalf of a natural person and not extend to signature on behalf of a company which cannot sign by itself: *Alexander Stewart & Son of Dundee Ltd v Westminster Bank Ltd* [1926] WN 126 per Rowlatt J; overruled on other grounds: [1926] WN 271, CA.

3 As to the meaning of 'holder for value' see PARA 1407.
4 As to the meaning of 'negotiable instrument' see PARA 1402.
5 *Bryant, Powis and Bryant v Banque du Peuple* [1893] AC 170 at 180, PC.
6 As to the meaning of 'cheque' see PARA 1405.
7 As to the meaning of 'drawee' see PARA 1406.
8 *Reid v Rigby & Co* [1894] 2 QB 40, DC.
9 *Ducarrey v Gill* (1830) Mood & M 450.
10 See the Powers of Attorney Act 1971 s 7(1)(a); and AGENCY vol 1 (2008) PARA 45.

1475. Determination of capacity. In determining whether a signature on an instrument[1] is that of the principal or that of the agent by whose hand it is written[2], the construction is adopted which is most favourable to the validity of the instrument[3].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 As to the meaning of 'writing' see PARA 1405 note 2.
3 Bills of Exchange Act 1882 s 26(2); see *Elliott v Bax-Ironside* [1925] 2 KB 301, CA (names of directors following the name of the company and, in view of particular circumstances, description did not indicate signature in representative capacity), explained in *Britannia Electric Lamp Works Ltd v D Mandler & Co and Mandler* [1939] 2 KB 129 at 135, [1939] 2 All ER 469 at 472 per Branson J. See also *Rolfe Lubell & Co v Keith* [1979] 1 All ER 860, sub nom *Rolfe Lubbell & Co v Keith* [1979] 2 Lloyd's Rep 75, DC.

B. LIABILITY OF AGENT

1476. Liability of agent. The signature of an agent in his own name with the mere addition of words describing him as an agent or as filling a representative character does not exempt him from personal liability, but he may escape liability if he adds words indicating that he signs for or on behalf of a principal or in a representative character[1]. This is the case where he is sued by a party who is in fact aware of his true position[2].

If the agent signs an instrument[3] in his principal's name, he is not liable on the instrument itself, even though he has signed without his principal's authority; but he may be made liable to the holder[4] in proceedings for deceit or breach of warranty of authority[5].

1 Bills of Exchange Act 1882 s 26(1); *Leadbitter v Farrow* (1816) 5 M & S 345; *The Elmville* [1904] P 319; *Landes v Marcus and Davids* (1909) 25 TLR 478. The relevant decisions bearing upon persons signing in a representative capacity are as follows: a note for the payment of money lent to a parish, and signed by the churchwardens as such, has been held to bind them personally (*Rew v Pettet* (1834) 1 Ad & El 196), and drafts on a banker by inclosure commissioners have had a similar effect: *Eaton v Bell* (1821) 5 B & Ald 34. Where four directors of a company signed a promissory note in the following form, 'We the directors of _____ promise to pay _____', they were held liable personally, even though the seal of the company was placed in one corner of the note and purported to be witnessed by another party: *Dutton v Marsh* (1871) LR 6 QB 361; and see *Courtauld v Sanders* (1867) 16 LT 562. But where the secretary of a company signed a promissory note thus, 'for the _____ company, John Sizer, secretary', he was held not to be personally liable (*Alexander v Sizer* (1869) LR 4 Exch 102); but see *Gray v Raper* (1866) LR 1 CP 694; and *M'Meekin v Easton* (1889) 16 R 363, Ct of Sess (where a note in the form, 'We, the undersigned, in the name and on the behalf of the Reformed Presbyterian Church, Stranraer, promise to pay', was held to bind the signatories personally).

In *Chapman v Smethurst* [1909] 1 KB 927, CA, a director was held not to be personally liable upon a promissory note beginning 'I promise to pay', and signed 'JHS's Laundry and Dye Works Ltd, JHS Managing Director'; but in *Elliott v Bax-Ironside* [1925] 2 KB 301, the Court of Appeal without comment on *Chapman v Smethurst* held the directors personally responsible as indorsees on a bill accepted in the form: 'Accepted payable at the W Bank—AB and CD directors. Fashions Ltd', and signed on the back 'Fashions Ltd, AB and CD directors'; and in *Kettle v Dunster and Wakefield* (1927) 138 LT 158, a receiver on behalf of debenture holders

who drew bills signing himself 'AB Receiver, Ford Paper Works (1923) Ltd', was held to be a party to the bills and entitled to sue upon them. See also *Britannia Electric Lamp Works Ltd v D Mandler & Co and Mandler* [1939] 2 KB 129, [1939] 2 All ER 469 (signature of D Mandler held not to be the signature of the company); *Rolfe Lubell & Co v Keith* [1979] 1 All ER 860, sub nom *Rolfe Lubbell & Co v Keith* [1979] 2 Lloyd's Rep 75, DC (words 'for and on behalf of the company' and 'director' held not to vary a clear agreement between payee and indorsee that indorsee would indorse bills in a personal capacity); *Bondina Ltd v Rollaway Shower Blinds Ltd* [1986] 1 All ER 564, [1986] 1 WLR 517, CA (director who signed a cheque printed with a company name and bank account number held to have a plainly arguable defence notwithstanding that he had given no indication that he was signing as a representative of the company and not on his own behalf); *Novaknit Hellas SA v Kumar Bros International Ltd* [1998] Lloyd's Rep Bank 287, CA (agents liable on bills which omitted the word 'Limited' from the company's name).

On the death of the holder of a bill or note the executors or administrators may indorse so as to negative personal liability: Bills of Exchange Act 1882 s 31(5). However where an executor at the direction of his testator carried on business and signed bills in his own name as 'executor of _____', he was held personally liable: *Liverpool Borough Bank v Walker* (1859) 4 De G & J 24. See also *Childs v Monins* (1821) 2 Brod & Bing 460.

2 *Leadbitter v Farrow* (1816) 5 M & S 345.
3 As to the meaning of 'instrument' see PARA 1402 note 1.
4 As to the meaning of 'holder' see PARA 1407.
5 *Polhill v Walter* (1832) 3 B & Ad 114; *West London Commercial Bank Ltd v Kitson Ltd* (1884) 13 QBD 360, CA; and see AGENCY vol 1 (2008) PARAS 128, 160.

1477. Liability to principal. When an agent is negligent, for example, in presenting an instrument[1] for payment or giving due notice of dishonour, he may be liable to his principal in damages for the loss incurred[2].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 *Bank of Van Diemen's Land v Bank of Victoria* (1871) LR 3 PC 526. As to negligence generally see NEGLIGENCE.

(xi) Consideration

A. SUFFICIENCY OF CONSIDERATION

1478. Presumption of consideration. Bills of exchange and promissory notes[1], unlike other forms of simple contract, are presumed to stand upon the basis of a valuable consideration[2]. Not only is this so in the case of the immediate parties to the bill or note, but it is so also in the case of those who become parties to it subsequently by indorsement[3], for every party whose signature appears on a bill is prima facie deemed to have become a party to it for value[4].

The effect of the presumption, therefore, is to shift the burden of proof from the claimant who relies upon the instrument to the defendant who impugns it.

But when, in an action[5] on a bill or note, it is admitted or proved that the acceptance[6], issue[7] or subsequent negotiation[8] of the instrument[9] is affected with fraud, duress, or force and fear, or illegality[10], the burden of proof is shifted unless and until the holder[11] proves that, subsequent to the alleged fraud or illegality, value has been given for the instrument in good faith[12].

1 As to the meanings of 'bill of exchange' and 'promissory note' see PARA 1405.
2 See PARA 1401 head (1).
3 As to the meaning of 'indorsement' see PARA 1407.
4 Bills of Exchange Act 1882 ss 30(1), 89. As to the meaning of 'value' see PARA 1401 note 8.
5 For the purposes of the Bills of Exchange Act 1882, this includes counterclaim and set-off: s 2.
6 As to the meaning of 'acceptance' see PARA 1406.
7 As to the meaning of 'issue' see PARA 1406.
8 As to the meaning of 'negotiation' see PARA 1407.
9 As to fraud, duress and illegality see PARAS 1483–1484.

10 As to the meaning of 'instrument' see PARA 1402 note 1.
11 As to the meaning of 'holder' see PARA 1407.
12 Bills of Exchange Act 1882 ss 30(2), 89; *Baker v Barclays Bank Ltd* [1955] 2 All ER 571, [1955] 1 WLR 822; *Hall v Featherstone* (1858) 3 H & N 284 (citing *Harvey v Towers* (1851) 6 Exch 656; and *Smith v Braine* (1851) 16 QB 244); *Fuller v Alexander Bros* (1882) 52 LJQB 103; *Tatam v Haslar* (1889) 23 QBD 345; *Jones v Gordon* (1877) 2 App Cas 616 at 627, HL, per Lord Blackburn; *Robinson v Benkel* (1913) 29 TLR 475. However, the provision in the Bills of Exchange Act 1882 s 30(2) for shifting the burden of proof does not apply to a case where the holder seeking to enforce the instrument is the person to whom it was originally delivered and in whose hands it remains: *Talbot v Von Boris* [1911] 1 KB 854, CA. When the burden of proof is shifted, it seems that the plaintiff must give evidence as to both value and good faith: *Tatam v Haslar* above; and see *Berrett v Smith, Smith v Brenkley* [1965] NZLR 460. As to the meaning of 'good faith' see PARA 1401 note 7. As to the meaning of a 'holder in due course' see PARA 1407; see also PARA 1485.

1479. Meaning of consideration. Valuable consideration for an instrument[1] may be constituted by either: (1) any consideration sufficient to support a simple contract[2]; or (2) an antecedent debt or liability[3]. In the absence of valuable consideration a claim on an instrument, as on any other simple contract, will fail[4].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 Bills of Exchange Act 1882 s 27(1)(a). As to consideration sufficient for simple contracts see CONTRACT vol 9(1) (Reissue) PARA 727 et seq. Forebearing, at the request of the promisor, to claim under a promissory note during the currency of a postdated cheque given as collateral security for the money due under the note is sufficient consideration to support an action on the cheque by the payee: *Elkington v Cooke-Hill* (1914) 30 TLR 670. If the liability is that of a third party there must be some relationship between the receipt of the instrument and the antecedent debt or liability such as a forbearance or promise to forbear, express or implied, on the part of the recipient in regard to the third party's debt or liability: *Oliver v Davis* [1949] 2 KB 727, [1949] 2 All ER 353, CA; applying *Crears v Hunter* (1887) 19 QBD 341, CA. See also *Ayres v Moore* [1940] 1 KB 278, [1939] 4 All ER 351; *Pollway Ltd v Abdullah* [1974] 2 All ER 381, [1974] 1 WLR 493, CA. As between immediate parties, consideration must move from the promisee: *Oliver v Davis* above; see also *Diamond v Graham* [1968] 2 All ER 909, [1968] 1 WLR 1061, CA; *Hasan v Willson* [1977] 1 Lloyd's Rep 431 at 442. See also *MK International Development Co Ltd v Housing Bank* (1991) Financial Times, 22 January, [1991] 1 Bank LR 74, CA. As to the absence of consideration in the context of gaming contracts see *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL.

As to debts owing by customers to their bankers see *M'Lean v Clydesdale Banking Co* (1883) 9 App Cas 95, HL; and PARA 1487.
3 Bills of Exchange Act 1882 s 27(1)(b). It is immaterial whether the instrument is payable on demand or at a future time: s 27(1)(b). The antecedent debt or liability must be that of the drawer or maker of the relevant instrument: *Oliver v Davis* [1949] 2 KB 727, [1949] 2 All ER 353, CA; *Hasan v Willson* [1977] 1 Lloyd's Rep 431 at 440–442; and see *Poirier v Morris* (1853) 2 E & B 89; *Currie v Misa* (1875) LR 10 Exch 153; affd sub nom *Misa v Currie* (1876) 1 App Cas 554, HL; cited with approval in *Fleming v Bank of New Zealand* [1900] AC 577 at 586, PC; *Stott v Fairlamb* (1883) 53 LJQB 47, CA. As to consideration of the nature of an antecedent debt or liability which may be sufficient consideration, see *Lomax Leisure Ltd (in liquidation) v Mill* [2007] EWHC 2508 (Ch), [2007] All ER (D) 164 (Oct).
4 Thus where an instrument is given as a present the donee cannot maintain an action against the donor thereon: *Milnes v Dawson* (1850) 5 Exch 948 at 950 per Parke B; *Holliday v Atkinson* (1826) 5 B & C 501. Where a note was originally given for no consideration, the renewal of the note from time to time, even with interest added, will not make it valid: *Edwards v Chancellor* (1888) 52 JP 454, DC. Neither in law nor in equity can the payee of a promissory note, which appears on the facts before the court to be voluntary, have any claim as a creditor: *Re Whitaker* (1889) 42 ChD 119 at 124, CA, per Cotton LJ.

Where by a misrepresentation, although innocent, the defendant is induced to give a note, there is no valid consideration: *Southall v Rigg, Forman v Wright* (1851) 11 CB 481. A merely moral obligation is insufficient to support a bill (*Eastwood v Kenyon* (1840) 11 Ad & El 438); but the promise to give up a will, thought by the holder to be invalid, is sufficient (*Smith v Smith* (1863) 13 CBNS 418). So, too, is the existence of a debt which could not in fact be recovered because it was statute barred (*La Touche v La Touche* (1865) 3 H & C 576); or the destruction

of a right of action in conversion against a thief who later returned the securities which he had stolen (*London and County Banking Co v London and River Plate Bank* (1888) 21 QBD 535, CA).

1480. Adequacy of consideration. The adequacy of the consideration[1] is not in general the subject of inquiry[2] in relation to a bill, but if upon the evidence given there is a patent and gross inadequacy of consideration, the transaction is open to the presumption of fraud[3].

1 As to the meaning of 'consideration' see PARA 1479.
2 *Solomon v Turner* (1815) 1 Stark 51; *Adib El Hinnawi v Yacoub Fahmi* [1936] 1 All ER 638, PC. As to the adequacy of consideration generally according to the principles of the law of contract see CONTRACT vol 9(1) (Reissue) PARA 736.
3 *Jones v Gordon* (1877) 2 App Cas 616, HL. In *Cole v Milsome* [1951] 1 All ER 311, it was decided that where the payee to whom the drawer was not indebted received a cheque in good faith from the agent of the drawer and dealt with the cheque in accordance with the agent's instructions by making payments against it, the payments constituted sufficient consideration to support an action against the drawer.

1481. Total or partial failure of consideration. In the absence, or subsequent failure, of consideration[1], the instrument[2] is invalid as between parties in immediate relationship, but not as between remote parties when the holder is a holder for value[3].

Where the consideration for which a party signed a bill or note[4] consists of a definite sum of money or of something the value of which is definitely ascertained in money, and it was either originally absent in part or has subsequently failed in part, the sum which a holder standing in immediate relation to such a party is entitled to receive from him is pro tanto reduced[5]. However, a remote party who has given value for the instrument may be entitled to receive payment in full[6].

1 As to the meaning of 'consideration' see PARA 1479.
2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 As to the meaning of 'holder for value' see PARA 1407. Where the defendant has given a note to a person in consideration of his promising to be his executor, and in fact actually survives him, the personal representatives of the latter are not entitled to enforce it: *Solly v Hinde* (1834) 2 Cr & M 516.
4 As to the meanings of 'bill' and 'note' see PARA 1405.
5 *Day v Nix* (1824) 9 Moore CP 159; *Southall v Rigg, Forman v Wright* (1851) 11 CB 481 at 488; see also *Oscar Harris, Son & Co v Vallarman & Co* [1940] 1 All ER 185, CA. Cf also *Clark v Lazarus* (1840) 2 Man & G 167; *Warwick v Nairn* (1855) 10 Exch 762; *Tye v Gwynne* (1809) 2 Camp 346; *Thoni GmbH & Co KG v RTP Equipment Ltd* [1979] 2 Lloyd's Rep 282, CA; and see further PARA 1599 text to note 13.
6 *Munroe v Bordier* (1850) 8 CB 862.

1482. Accommodation bills. An accommodation party to a bill[1] is a person[2] who has signed a bill as drawer[3], acceptor[4], or indorser[5], without receiving value[6] for it, and for the purpose of lending his name to some other person[7].

Any person who thus signs a bill is liable on it to a holder for value[8], whether the latter knew when he took the bill that such person was an accommodation party or not[9].

Though an accommodation party may sign in any capacity the bill will, properly speaking, only be an accommodation bill when the accommodation party signs as acceptor of it[10].

Where there is a fluctuating balance between the parties the bill is not to be deemed an accommodation bill, even if at the moment of drawing, acceptance[11] or payment the balance may be in favour of the acceptor[12].

When there are cross acceptances, even if for accommodation purposes only with no other basis to the contract, the consideration is deemed sufficient[13].

1 As to the meaning of 'bill' see PARA 1405.
2 As to the meaning of 'person' see PARA 1401 note 4.
3 As to the meaning of 'drawer' see PARA 1406.
4 As to the meaning of 'acceptor' see PARA 1406.
5 As to the meaning of 'indorser' see PARA 1407 note 8.
6 As to the meaning of 'value' see PARA 1401 note 8.
7 Bills of Exchange Act 1882 s 28(1).
8 As to the meaning of 'holder for value' see PARA 1407.
9 Bills of Exchange Act 1882 s 28(2). As to discharge of accommodation bills see PARA 1553.
10 *Scott v Lifford* (1808) 1 Camp 246.
11 As to the meaning of 'acceptance' see PARA 1406.
12 *Re Overend, Gurney & Co Ltd, ex p Swan* (1868) LR 6 Eq 344; cf *Re London, Bombay and Mediterranean Bank, ex p Cama* (1874) 9 Ch App 686.
13 *Rose v Sims* (1830) 1 B & Ad 521 at 526; cf *Hasan v Willson* [1977] 1 Lloyd's Rep 431 at 439–440.

B. FRAUD AND ILLEGALITY

1483. Fraud and duress. Fraud vitiates every contract into which it enters, and an instrument[1], the consideration for which is fraudulent even in part, is voidable at the option of the party defrauded except against a holder in due course[2]. However, the liability of the drawer[3] or maker[4] of an instrument to the original payee[5] is not affected by fraud if the fraud is that of a third party[6].

Fraud may consist in negotiating the instrument in breach of faith, as when a bill[7] is indorsed to a party for the special purpose of having it discounted by him, and the latter instead of doing so negotiates it to another person[8].

When the fraud is at the expense not of one of the immediate parties, but of persons who are strangers to the contract altogether, the effect is the same[9].

Duress, or taking an undue advantage of a party (as when he is drunk), is also a ground for denying the consideration for an instrument and rendering it voidable[10].

In all such cases, where the consideration is clearly fraudulent and the instrument is in the hands of a party with notice, the court may order it to be given up at once. When only a prima facie case of fraud is made out, the court may restrain the negotiation[11] of an instrument for a specified time in order that the question may be tried[12].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 *Jones v Gordon* (1877) 2 App Cas 616, HL; cf *Dawes v Harness* (1875) LR 10 CP 166; *Watson v Russell* (1864) 5 B & S 968, as explained in *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670 at 681, 689, 693, 700, HL. See also *Solomon v Turner* (1815) 1 Stark 51 (where the defendant had bought some pictures and given a note in payment for them; an action was brought on the note, and the defendant was about to offer evidence of the inadequacy of the consideration in order to reduce the damages, when Lord Ellenborough CJ said, at 52: 'I will not admit the evidence for the purpose of reducing the damages, by showing that the pictures were of an inferior value, but if you can, by the inadequacy of the value and other circumstances, prove fraud on the part of the plaintiff so as to show that there was no contract at all, the evidence will be admissible; if it fall short of that it will be unavailable'); *Lewis v Cosgrave* (1809) 2 Taunt 2. As to the meaning of 'holder in due course' see PARA 1407. As to voidable contracts see CONTRACT vol 9(1) (Reissue) PARA 607. As to fraud generally see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 755 et seq.
3 As to the meaning of 'drawer' see PARA 1406.
4 As to the meaning of 'maker' see PARA 1406.
5 As to the meaning of 'payee' see PARA 1406.

6 *Watson v Russell* (1864) 5 B & S 968; *Talbot v Von Boris* [1911] 1 KB 854, CA; *Hasan v Willson* [1977] 1 Lloyd's Rep 431 at 443–444, not following *Ayres v Moore* [1940] 1 KB 278, [1939] 4 All ER 351. See also *First Discount Ltd v Cranston* [2002] EWCA Civ 71. [2002] All ER (D) 340 (Jan).
7 As to the meaning of 'bill' see PARA 1405.
8 Cf *Lloyd v Howard* (1850) 15 QB 995; *Barber v Richards* (1851) 6 Exch 63. See the Bills of Exchange Act 1882 s 21(2); and PARAS 1445, 1497 note 4.
9 Eg where a debtor gives a bill or note to one of his creditors in fraudulent preference of the rest (*Cockshott v Bennett* (1788) 2 Term Rep 763; *Knight v Hunt* (1829) 5 Bing 432; *Howden v Haigh* (1840) 11 Ad & El 1033; *Atkinson v Denby* (1861) 30 LJ Ex 361; affd (1862) 7 H & N 934), or where a note or bill is given to one creditor for better security (*Leicester v Rose* (1803) 4 East 372).
10 *Kearns v Durell* (1848) 6 CB 596; *Gore v Gibson* (1845) 13 M & W 623; *Talbot v Von Boris* [1911] 1 KB 854, CA. See CONTRACT vol 9(1) (Reissue) PARA 710.
11 As to the meaning of 'negotiation' see PARA 1407.
12 See *Jones v Lane* (1839) 3 Y & C Ex 281. For cases on non est factum see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 69 et seq.

1484. Illegality. If the consideration is illegal either wholly or in part[1], the instrument[2] cannot be recovered on except by a holder in due course[3]. The illegality may consist either in its being against the general principle of the common law or in its special prohibition or interdiction by statute.

Common law illegality obtains wherever the consideration is founded upon a transaction which is against sound morals, public policy, public rights or public interests[4]. A contract containing a term which is void for illegality would not necessarily be wholly void if the terms are severable[5].

Previously under the old Gaming Acts[6], all bills and notes[7] (and like instruments), where the whole or any part of the consideration for them was money or any valuable thing won at certain games, or won by betting on such games, or given for reimbursing or repaying any money knowingly lent or advanced for such gaming or betting, were void in the hands of a holder[8] who had notice of the consideration, but could be recovered on by a holder in due course[9]. That legislation is repealed by the Gambling Act 2005[10] and the fact that a contract relates to gambling no longer prevents its enforcement[11]; but that is without prejudice to any rule of law preventing the enforcement of a contract on the grounds of unlawfulness (other than a rule relating specifically to gambling)[12].

1 The legality of the consideration for a cheque given abroad but drawn in English upon a London bank is to be determined by English law as the law of the place where the bill is payable: *Moulis v Owen* [1907] 1 KB 746, CA. Cf *Saxby v Fulton* [1909] 2 KB 208, CA; see also *United Dominions Trust Ltd v Bycroft* [1954] 3 All ER 455, [1954] 1 WLR 1345, CA (illegality under the Hire Purchase Act 1938 s 5(c) (repealed)); *Vinall v Howard* [1954] 1 QB 375, [1954] 1 All ER 458, CA (illegality under the Road Traffic Acts 1930 and 1934); *Bank für Gemeinwirtschaft AG v City of London Garages Ltd* [1971] 1 All ER 541, [1971] 1 WLR 149, CA, where failure to comply with exchange control regulations was held not to affect a holder in due course.
2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 If the evidence shows that there was an illegal consideration given for the instrument, the onus of proof is on the holder to show that he is a holder in due course: see the Bills of Exchange Act 1882 s 30(2); and PARA 1478; *Bailey v Bidwell* (1844) 13 M & W 73. As to the meaning of 'holder in due course' see PARA 1407; see also PARA 1485.
4 *Willison v Patteson* (1817) 7 Taunt 439 (alien enemy); *Lowe v Peers* (1770) 4 Burr 2225 (restraint of marriage); *Flower v Sadler* (1882) 10 QBD 572, CA; *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch 173, CA (stifling prosecution); *Société des Hôtels Réunis SA v Hawker* (1913) 29 TLR 578; affd (1914) 30 TLR 423, CA (threat of legal proceedings). In *Sharif v Azad* [1967] 1 QB 605, [1966] 3 All ER 785, CA, Diplock LJ said that 'A cheque issued in performance of an agreement which is merely unenforceable is not 'affected by illegality'.'

5 *Fielding and Platt Ltd v Najjar* [1969] 2 All ER 150, [1969] 1 WLR 357, CA.

6 See the Gaming Act 1710 s 1 (repealed by the Gambling Act 2005 s 334(1)(a)) and the Gaming Act 1835 s 1 (repealed by the Gambling Act 2005 s 334(1)(b)). Those repeals do not permit enforcement of a right which was created, or which emanates from an agreement made, before s 334 came into force (i e before 1 September 2007: see the Gambling Act 2005 (Commencement No 6 and Transitional Provisions) Order 2006, SI 2006/3272, art 2(4)): Gambling Act 2005 s 334(2).

7 As to the meanings of 'bill' and 'note' see PARA 1405.

8 As to the meaning of 'holder' see PARA 1407.

9 *Hay v Ayling* (1851) 16 QB 423 at 431 per Lord Campbell CJ. Where the defendant lost money to a person on bets made on a horse and drew a cheque for his losses in favour of that person, the plaintiff to whom the cheque was indorsed, and who took the cheque with notice of the consideration, could not recover thereon: *Woolf v Hamilton* [1898] 2 QB 337, CA; see also *Ladup Ltd v Shaikh* [1983] QB 225, [1982] 3 WLR 172. But although money knowingly lent or advanced for gaming or betting could not be recovered on the ground that the consideration was illegal, money lent to enable the borrower to pay betting debts already incurred was in a different category, and it was held in such a case where the borrower became bankrupt that the lender who had been given two promissory notes to secure the debt could prove in the bankruptcy: *Re Lister, ex p Pyke* (1878) 8 ChD 754, CA; *Re O'Shea, ex p Lancaster* [1911] 2 KB 981, CA. Money knowingly lent abroad for the purposes of gaming in a country where gaming was not illegal could possibly be recovered in the English courts (*Saxby v Fulton* [1909] 2 KB 208, CA); but action upon a cheque given upon such a consideration and payable in England could not be maintained, as the legality of the consideration fell to be decided by English law: *Moulis v Owen* [1907] 1 KB 746, CA; *Browne v Bailey* (1908) 24 TLR 644.

10 See the Gambling Act 2005 s 334; and note 6.

11 See the Gambling Act 2005 s 335(1).

12 Gambling Act 2005 s 335(2).

C. RIGHTS OF HOLDER

1485. Indorsement to holder for value. Where value[1] has at any time been given for an instrument[2], the holder is deemed to be a holder for value[3] as regards the acceptor[4] and all parties to the instrument who became parties prior to that time[5]. Value may be constituted by an antecedent debt or liability[6].

He is said to be a holder in due course[7] if he has taken an instrument, which is complete and regular on the face of it[8], under the following conditions: (1) that he became the holder[9] of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact[10]; (2) that he took the instrument in good faith[11] and for value, and that at the time the instrument was negotiated[12] to him he had no notice of any defect in the title of the person[13] who negotiated it[14]. In particular, the title of a person who negotiates an instrument is defective when he obtained the instrument, or the acceptance[15] of it, by fraud, duress, or force and fear, or other unlawful means or an illegal consideration, or when he negotiates it in breach of faith, or in such circumstances as amount to fraud[16].

1 As to the meaning of 'value' see PARA 1401 note 8.

2 As to the meaning of 'instrument' see PARA 1402 note 1. For the effect of a transfer for value of a bill payable to order where it is not indorsed see PARA 1490.

3 As to the meaning of 'holder for value' see PARA 1407.

4 As to the meaning of 'acceptor' see PARA 1406.

5 Bills of Exchange Act 1882 s 27(2).

6 See the Bills of Exchange Act 1882 s 27(1)(b); and PARA 1479 text to note 3.

7 As to the meaning of 'holder in due course' see PARA 1407.

8 In *Arab Bank Ltd v Ross* [1952] 2 QB 216 at 226, [1952] 1 All ER 709 at 715, CA, Denning LJ explained what is meant by regularity (promissory notes in favour of 'Fathi and Faysal Nabulsy Company or Order' were indorsed 'Fathi and Faysal Nabulsy'; the indorsement was held to be

irregular). As to unindorsed cheques see the Cheques Act 1957; and *Westminster Bank Ltd v Zang* [1966] AC 182 at 196, [1965] 1 All ER 1023, CA; affd [1966] AC 182 at 211, [1966] 1 All ER 114, HL.

9 As to the meaning of 'holder' see PARA 1407.

10 Bills of Exchange Act 1882 s 29(1)(a). As to the position after dishonour see PARA 1498.

11 As to the meaning of 'good faith' see PARA 1401 note 7.

12 As to the meaning of 'negotiation' see PARA 1407.

13 As to the meaning of 'person' see PARA 1401 note 4.

14 Bills of Exchange Act 1882 s 29(1)(b). An original payee, though he is a holder when in possession of a bill (see PARA 1407 note 11), cannot be a holder in due course (*RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL); and see *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719.

15 As to the meaning of 'acceptance' see PARA 1406.

16 Bills of Exchange Act 1882 s 29(2). 'Fraud' means common law fraud: *Österreichische Länderbank v S'Elite Ltd* [1981] QB 565, [1980] 2 All ER 651, CA. As to the effect of fraud, duress and illegality see also PARAS 1483–1484.

1486. Consideration enures for benefit of holder. Where value[1] has at any time been given for an instrument[2], the holder is deemed to be a holder for value[3] as regards the acceptor[4] and all parties to the instrument who became parties prior to such time[5].

Moreover, every holder of an instrument, except the payee[6], is prima facie deemed to be a holder in due course[7]. The payee is presumed to be a holder for value[8] though he cannot be a holder in due course[9].

A holder (whether for value or not) who derives his title to an instrument through a holder in due course, and who is not himself a party to any fraud or illegality affecting it (whether he has notice of the fraud or not[10]), has all the rights of that holder in due course as regards the acceptor and all parties to the instrument prior to that holder[11]. If he gave value for it, he has the same rights against that holder also.

1 As to the meaning of 'value' see PARA 1401 note 8.

2 As to the meaning of 'instrument' see PARA 1402 note 1.

3 As to the meaning of 'holder for value' see PARA 1407.

4 As to the meaning of 'acceptor' see PARA 1406.

5 See the Bills of Exchange Act 1882 s 27(2); and PARA 1485; *Hunter v Wilson* (1849) 4 Exch 489; *Munroe v Bordier* (1850) 8 CB 862. However, the Bills of Exchange Act 1882 s 27(2) does not override the requirement that, as between immediate parties, consideration must move from the promisee. In so far as *Diamond v Graham* [1968] 2 All ER 909, [1968] 1 WLR 1061, CA, decided otherwise, it has been questioned (see *Pollway Ltd v Abdullah* [1974] 2 All ER 381, [1974] 1 WLR 493, CA) and held to be inconsistent with *Oliver v Davis* [1949] 2 KB 727, [1949] 2 All ER 353, CA (see *Hasan v Willson* [1977] 1 Lloyd's Rep 431 at 442). It is unlikely that the Bills of Exchange Act 1882 s 27(2) applies where value is given by someone who never becomes a party to the instrument: see *MK International Development v Housing Bank* (1991) Financial Times, 22 January, [1991] 1 Bank LR 74, CA.

6 *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL. As to the meaning of 'payee' see PARA 1406.

7 See the Bills of Exchange Act 1882 s 30(2); and PARA 1478. As to the meaning of 'holder in due course' see PARA 1407. However when fraud or illegality in the making or negotiation of a bill is established the presumption is lost, the burden of proof is shifted and the onus of proving value and good faith is thrown upon the holder: see s 30(2); and PARAS 1478, 1483–1484.

8 See the Bills of Exchange Act 1882 s 30(1); and PARA 1478.

9 *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL; and see PARA 1450 note 3.

10 *May v Chapman* (1847) 16 M & W 355; *Masters v Ibberson* (1849) 8 CB 100.

11 Bills of Exchange Act 1882 s 29(3). 'Fraud' means common law fraud: *Österreichische Länderbank v S'Elite Ltd* [1981] QB 565, [1980] 2 All ER 651, CA. Where a payee discounts a bill to his bank, which in turn indorses the bill back to the payee upon dishonour, the payee is capable of being a holder within the Bills of Exchange Act 1882 s 29(3): see *Jade International Steel Stahl und Eisen GmbH & Co KG v Robert Nicholas (Steels) Ltd* [1978] QB 917, [1978] 3 All ER 104, CA.

1487. Lien of holder. Any person who discounts an instrument[1], or to whom an instrument is negotiated for the purpose of being discounted, is, although the property in it does not pass until it is discounted[2], a holder[3] of the instrument for its full value[4]. But where the holder of an instrument has a lien[5] upon it arising either from contract or by implication of law, he is deemed to be a holder for value[6] to the extent of the sum for which he has a lien[7]. He is, however, entitled to enforce payment of the full amount if his transferor could have sued on the instrument, but otherwise can only recover the amount of his lien[8]. In the former case he is trustee for his transferor of the surplus beyond the amount of his lien[9].

This is a case which occurs in the relation of banker and customer[10]. It is therefore important to distinguish carefully between bills[11] and such instruments when they are deposited with bankers as security and when they are handed to them for discount, as in the latter case the banker becomes a holder for the full value of the bill[12].

A bill broker may have a lien in the same way as a banker[13].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 *Re Firth, ex p Schofield* (1879) 12 ChD 337; *Dawson v Isle* [1906] 1 Ch 633.
3 As to the meaning of 'holder' see PARA 1407.
4 *Giles v Perkins* (1807) 9 East 12 at 14 per Lord Ellenborough CJ; *Re Gomersall* (1875) 1 ChD 137 at 144, CA, per Mellish LJ. But the holder who has discounted acceptances with notice that they are fraudulent can only prove in the bankruptcy of the acceptor for the amount given by him for them: *Re Gomersall*.
5 As to lien generally see LIEN.
6 As to the meaning of 'holder for value' see PARA 1407.
7 Bills of Exchange Act 1882 s 27(3); *Re Keever (a bankrupt), ex p Trustee of Property of Bankrupt v Midland Bank Ltd* [1967] Ch 182, [1966] 3 All ER 631; *Barclays Bank Ltd v Aschaffenburger Zellstoffwerke AG* [1967] 1 Lloyd's Rep 387, CA; *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719; *Midland Bank Ltd v Reckitt* [1933] AC 1 at 18, HL, per Lord Atkin. See also *Attenborough v Clarke* (1858) 27 LJEx 138; *Atwood v Crowdie* (1816) 1 Stark 483; *Re Bunyard, ex p Newton, ex p Griffin* (1880) 16 ChD 330, CA. But the presumption is that a holder holds absolutely and not by way of security: *Hills v Parker* (1866) 14 LT 107; *Re Boys, Eedes v Boys, ex p Hop Planters' Co* (1870) LR 10 Eq 467.
8 *Peacock v Pursell* (1863) 32 LJCP 266 at 268 per Byles J.
9 *Reid v Furnival* (1833) 1 Cr & M 538 at 539; *Cook v Lister* (1863) 32 LJCP 121 at 127 per Willes J.
10 The right acquired by a general lien is that of an implied pledge: *Brandao v Barnett* (1846) 3 CB 519 at 531, HL, per Lord Campbell; cf *Jeffryes v Agra and Masterman's Bank* (1866) LR 2 Eq 674; and see PARA 863.

Where a banker before collecting a bill or cheque for his customer credits the customer's account, that fact does not, without more, make the banker a holder for value: *AL Underwood Ltd v Bank of Liverpool and Martins, Same v Barclays Bank* [1924] 1 KB 775, CA.

Where, after an action by the drawer of a bill against a party to whom he had handed it to be discounted for the recovery of the bill, the bill was recovered and was in the possession of the drawer's solicitor, the latter had no power to sue the acceptor on the instrument with a view to satisfying out of the proceeds his bill of costs against the drawer: *Redfern & Son v Rosenthal Bros* (1902) 86 LT 855, CA.
11 As to the meaning of 'bill' see PARA 1405.
12 See *Re Firth, ex p Schofield* (1879) 12 ChD 337; *Dawson v Isle* [1906] 1 Ch 633; and see *Re Bowes, Earl of Strathmore v Vane* (1886) 33 ChD 586. In general the presumption is that, when a negotiable or transferable bill is transferred to a banker, he takes it as a holder, not as a bailee or depositary: *Re Boys, Eedes v Boys, ex p Hop Planters' Co* (1870) LR 10 Eq 467. As to banker's lien generally see PARA 860 et seq.
13 *Jones v Peppercorne* (1858) 28 LJCh 158.

1488. Freedom from defect of title. A holder who is a holder in due course[1] holds the instrument[2] free from any defect of title of prior parties as well as from mere personal defences available to prior parties among themselves, and he may enforce payment against all parties liable thereon[3]. Even if the holder's[4] title to

an instrument is defective, a holder in due course to whom he negotiates it obtains a good and complete title to it[5], and a payment made by any person[6] in due course to the holder, whether his title is defective or not, operates for that person as a valid discharge of the instrument[7].

1 As to the meaning of 'holder in due course' see PARA 1407.
2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 Bills of Exchange Act 1882 s 38(2). As to the presumption in his favour in regard to an incomplete instrument see PARAS 1415, 1450; and in regard to valid delivery see PARAS 1441–1442. As to transfer of an altered instrument see PARA 1505. As to freedom from defect of title in the case of a bill dishonoured before maturity see PARA 1498. Where a previous holder of an instrument has renounced the liabilities of any party thereto before, at, or after maturity, the rights of a holder in due course who has received no notice of such renunciation are unaffected; see PARA 1555. See also *Re Keever (a bankrupt), ex p Trustee of Property of Bankrupt v Midland Bank Ltd* [1967] Ch 182 at 191–193, [1966] 3 All ER 631 at 635–637.
4 As to the meaning of 'holder' see PARA 1407.
5 Bills of Exchange Act 1882 s 38(3)(a); *Marston v Allen* (1841) 8 M & W 494 at 504 per Alderson B.
6 As to the meaning of 'person' see PARA 1401 note 4.
7 Bills of Exchange Act 1882 s 38(3)(b). As to the meanings of 'discharge of the instrument' and 'payment in due course' see PARA 1550.

(xii) Transfer

A. TRANSFER BY NEGOTIATION

1489. Negotiation by delivery or indorsement and delivery. Bills and notes[1] are negotiated[2] when they are transferred from one person[3] to another in such a manner as to constitute the transferee the holder[4] of the bill or note[5].

Negotiable bills and notes[6] may be payable either to order or to bearer[7]. Where they are payable to bearer[8], they are negotiated simply by delivery[9]; where they are payable to order (whether payable simply to A B or to A B's order, or to A B or order), they are negotiated by indorsement[10] and delivery[11].

The specified payee[12] of an instrument[13] payable to order negotiates it either by indorsing it in blank, or by directing payment to another specified party and signing his name beneath the direction, which is written on the back of the instrument[14]. He thus becomes an indorser[15] of the instrument, and the party to whom he directs payment to be made becomes the indorsee[16]. The indorsee may in his turn direct payment to another by indorsing over to him[17].

Every instrument the transfer of which is not expressly prohibited by words appearing on its face[18] may be negotiated.

1 As to the meanings of 'bill' and 'note' see PARA 1405.
2 As to the meaning of 'negotiation' see PARA 1407. The delivery of a cheque to the original payee is not a negotiation: see *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670 at 680, 687, 695, HL.
3 As to the meaning of 'person' see PARA 1401 note 4.
4 As to the meaning of 'holder' see PARA 1407.
5 Bills of Exchange Act 1882 ss 31(1), 89.
6 As to the meaning of 'negotiable instrument' see PARA 1402.
7 Bills of Exchange Act 1882 ss 8(2), 89. As to instruments payable to bearer or to order see PARA 1428.
8 As to the meaning of 'bearer' see PARA 1407.
9 Bills of Exchange Act 1882 ss 31(2), 89. Delivery may be actual or constructive: see PARA 1406.
10 As to the meaning of 'indorsement' see PARA 1407.
11 Bills of Exchange Act 1882 ss 31(2), 89. Delivery may be actual or constructive: see PARA 1406.
12 As to the meaning of 'payee' see PARA 1406.
13 As to the meaning of 'instrument' see PARA 1402 note 1.

14 See PARA 1492.
15 As to the meaning of 'indorser' see PARA 1407 note 8.
16 As to the meaning of 'indorsee' see PARA 1407.
17 The possibility of successive indorsements is recognised in the Bills of Exchange Act 1882 ss 32(5), 59(2)(b): see PARAS 1491, 1558.
18 See PARA 1440. When in spite of such words a bill is indorsed, the indorser is liable to the indorsee on his indorsement, for he is virtually the drawer of a new bill (aliter, however, if the instrument is a note); see *Gwinnell v Herbert* (1836) 6 Nev & MKB 723; *Plimley v Westley* (1835) 2 Bing NC 249.

1490. Transfer of order bill without indorsement. Where the holder[1] of a bill[2] payable to his order[3] transfers it for value[4] without indorsing it, the transfer gives the transferee such title as the transferor had in the bill and the transferee in addition acquires the right to have the indorsement[5] of the transferor[6]. In such a case the date of indorsement is deemed to be the true date of negotiation[7]; and until the indorsement takes place the transferee's position is no better than that of an equitable assignee of an ordinary chose in action[8]. He is affected by any notice of fraud received by him prior to the indorsement[9]. He cannot sue on the bill except in the name of the transferor, and he cannot negotiate it to another party[10]. If he writes on the bill the name of the transferor, it is an unauthorised signature and, as such, wholly inoperative[11].

1 As to the meaning of 'holder' see PARA 1407.
2 As to the meaning of 'bill' see PARA 1405.
3 As to instruments payable to order see PARA 1428.
4 As to the meaning of 'value' see PARA 1401 note 8.
5 As to the meaning of 'indorsement' see PARA 1407.
6 Bills of Exchange Act 1882 s 31(4); *Walters v Neary* (1904) 21 TLR 146, CA. The right to have the instrument indorsed may be enforced by action (see *Rose v Sims* (1830) 1 B & Ad 521); and if the transferor is dead or bankrupt, his executor or trustee respectively will be compelled to indorse: *Watkins v Maule* (1820) 2 Jac & W 237; *Re Everest, ex p Mowbray* (1820) 1 Jac & W 428. If the transferee returns the bill to the transferor for indorsement and the latter loses or destroys the bill, the transferee has no remedy on the bill against the acceptor but only against the transferor: *Edge v Bumford* (1862) 31 Beav 247.
7 *Whistler v Forster* (1863) 14 CBNS 248 at 257–258. As to the meaning of 'negotiation' see PARA 1407.
8 As to the rights of such an assignee see CHOSES IN ACTION vol 6 (2003 Reissue) PARA 69.
9 *Whistler v Forster* (1863) 14 CBNS 248 at 257 per Willis J: 'The general rule of law is undoubted, that no one can transfer a better title than he himself possesses. *Nemo dat quod non habet*. To this there are some exceptions, one of which arises out of the rule of the law-merchant as to negotiable instruments ... If such an instrument be transferred in good faith, for value, before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder. This rule, however, is only intended to favour transfers in the ordinary and usual manner whereby a title is acquired according to [statute], and not to (sic) a transfer which is valid in equity according to the doctrine respecting the assignment of choses in action, and it is therefore clear, that, in order to acquire the benefit of this rule, the holder of the bill must, if it be payable to order, obtain an indorsement, and that he is affected by notice of a fraud received before he does so'.
10 *Harrop v Fisher* (1861) 10 CBNS 196.
11 *Harrop v Fisher* (1861) 10 CBNS 196; and see the Bills of Exchange Act 1882 ss 24, 32(1); and PARAS 1425, 1491, 1503.

1491. Transfer by indorsement. In order to operate as a negotiation[1] the indorsement[2] must be written[3] on the bill itself[4] and be signed by the indorser[5]. The simple signature of the indorser on the bill without additional words is sufficient[6]. When written on an allonge[7], or on a copy of the bill issued or negotiated in a country where copies are recognised, it is deemed to be written on the bill itself[8]. Notwithstanding the primary meaning of the term, a signature on the face of a bill may be a valid indorsement[9].

The indorsement must be an indorsement of the entire instrument[10]. A partial indorsement, that is to say an indorsement which purports to transfer to the indorsee[11] a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the instrument[12], but may authorise the indorsee to receive payment of the amount specified[13].

An instrument which is payable to two or more payees[14] or indorsees may be indorsed by one of them if they are partners in a trading firm or if he has authority to indorse for them all; otherwise all payees or indorsees must indorse it[15].

Where in an indorsement on an instrument the indorsee is wrongly designated or his name misspelt, he may indorse the instrument as therein described, adding, if he thinks fit, his proper signature[16].

Where there are two or more indorsements on an instrument, each indorsement is deemed to have been made in the order in which it appears on the instrument until the contrary is proved[17].

1 As to the meaning of 'negotiation' see PARA 1407.
2 As to the meaning of 'indorsement' see PARA 1407.
3 As to the meaning of 'writing' see PARA 1405 note 2.
4 Bills of Exchange Act 1882 s 32(1). As to the meaning of 'bill' see PARA 1405. The important thing is that the indorsement should appear on the bill itself. An assignment in writing, but not on the instrument itself, is not an indorsement: *Re Barrington and Burton* (1804) 2 Sch & Lef 112. 'But it is proved that according to a well established usage it is the common and almost invariable practice of bill-brokers in the city of London not to go through the form of putting their names upon every bill which they rediscount with their bankers, but to give instead a general indemnity or guarantee to their bankers, by which they undertake to be liable to the bankers upon each bill which they rediscount with them just as if they had indorsed that bill ... I am aware of no authority and I can see no principle for holding that the liability [inter partes] which is created by such a guarantee differs from that which is created by the indorsement of a bill of exchange': *Re Fox, Walker & Co, ex p Bishop* (1880) 15 ChD 400 at 414, CA, per James LJ.
5 As to the meaning of 'indorser' see PARA 1407 note 8.
6 Bills of Exchange Act 1882 s 32(1). Although additional words are unnecessary, they are not harmful so long as they do not conflict with the presumed intention to indorse; where the holder writes on the back of an instrument 'I bequeath ... pay the within contents to ... or his order at my death', and gives it to the person named, the writing is not an indorsement, but a testamentary gift void for want of witness: *Re Patterson's Estate, Mitchell v Smith* (1864) 4 De GJ & Sm 422. But it is not uncommon, and in some countries (see *Hirschfeld v Smith* (1866) LR 1 CP 340) it is obligatory, that the indorsement should recite the consideration given.
7 An allonge is a slip which may be attached to the bill and used in the event of the indorsements being numerous or lengthy enough to occupy the whole available space on the back of the bill itself. Precautions should, and in some countries must, be taken to avoid fraud by making the last writing on the bill and the first on the allonge part of the same indorsement.
8 Bills of Exchange Act 1882 s 32(1).
9 *Re Smith, ex p Yates* (1857) 2 De G & J 191.
10 Bills of Exchange Act 1882 s 32(2).
11 As to the meaning of 'indorsee' see PARA 1407.
12 Bills of Exchange Act 1882 s 32(2).
13 *Heilbut v Nevill* (1869) LR 4 CP 354 at 358 per Willes J. Although an indorsement must not transfer the bill to two or more indorsees severally, it may do so alternatively: Bills of Exchange Act 1882 s 7(2). As to alternative payees impliedly applicable to indorsees by virtue of s 34(3) see PARA 1492. See *Absolon v Marks* (1847) 17 LJQB 7; *Watson v Evans* (1863) 32 LJEx 137.
14 As to the meaning of 'payee' see PARA 1406.
15 Bills of Exchange Act 1882 s 32(3); *Carvick v Vickery* (1783) 2 Doug KB 653n. The usage in the case of dividend warrants payable to two or more persons is to accept the indorsement of one of them. This usage is preserved by the Bills of Exchange Act 1882 s 97(3)(d); see PARA 1619.
16 Bills of Exchange Act 1882 s 32(4); *Leonard v Wilson* (1834) 2 Cr & M 589; but see *Kirk v Blurton* (1841) 9 M & W 284. An instrument payable to 'A B per X' should be indorsed 'A B

per X' and not simply 'X': *Slingsby v District Bank Ltd* [1932] 1 KB 544, CA. When an indorsement is addressed to a married woman as 'Mrs John Smith', she may sign her name as 'Emma Smith, wife of John Smith'. As to indorsement by a rubber stamp with variations of a company's name see *Bird & Co (London) Ltd v Thomas Cook & Son Ltd* [1937] 2 All ER 227, where it was held that the intention of the indorser governs any misdescription of an indorsee. See also *Arab Bank Ltd v Ross* [1952] 2 QB 216, [1952] 1 All ER 709, CA (cited in PARA 1485 note 8).

17 Bills of Exchange Act 1882 s 32(5); *Macdonald v Whitfield* (1883) 8 App Cas 733, PC.

B. DIFFERENT KINDS OF INDORSEMENTS

1492. Blank or special indorsements. The indorsement[1] on an instrument[2] may be either in blank or special[3]. When it is in blank it consists merely of the signature of the indorser[4], that is, it specifies no indorsee[5], and an instrument so indorsed becomes payable to bearer[6] and may therefore be thenceforward negotiated by delivery[7]. When it is special it specifies the person[8] to whom, or to whose order, the instrument is to be payable[9]; such a person is known as the indorsee, and, subject to necessary modifications, he is in a position similar to that of the original payee[10].

Where an instrument has been indorsed in blank, any holder[11] may convert the blank indorsement into a special indorsement by writing[12] above the indorser's signature a direction to pay the instrument to or to the order of himself or some other person[13].

1 As to the meaning of 'indorsement' see PARA 1407.
2 As to the meaning of 'instrument' see PARA 1402 note 1. It is today unnecessary to indorse a cheque payable to order unless it is to be negotiated: see the Cheques Act 1957 s 1; and PARA 832.
3 Bills of Exchange Act 1882 s 32(6).
4 As to the meaning of 'indorser' see PARA 1407 note 8.
5 As to the meaning of 'indorsee' see PARA 1407.
6 Bills of Exchange Act 1882 s 34(1). As to the meaning of 'bearer' see PARA 1407. As to instruments payable to bearer see PARA 1428.
7 See the Bills of Exchange Act 1882 31(2); and PARA 1489. See also *Peacock v Rhodes* (1781) 2 Doug KB 633.
8 As to the meaning of 'person' see PARA 1401 note 4.
9 Bills of Exchange Act 1882 s 34(2). The special indorsement may be 'to A B', 'to the order of A B', or 'to A B or order'.
10 Bills of Exchange Act 1882 s 34(3). As to the meaning of 'payee' see PARA 1406. For the position of the original payee see ss 7, 8; and PARAS 1430–1431, 1489.
11 As to the meaning of 'holder' see PARA 1407.
12 As to the meaning of 'writing' see PARA 1405 note 2.
13 Bills of Exchange Act 1882 s 34(4). See *Hirschfeld v Smith* (1866) LR 1 CP 340 at 353 per Erle CJ. An instrument is not payable to bearer, unless expressly made so, or unless the only or last indorsement is an indorsement in blank: Bills of Exchange Act 1882 s 8(3); and see PARA 1428.

1493. Conditional indorsements. An indorsement[1] may be conditional, but the condition may be disregarded by the payer, and payment to the indorsee[2] is valid whether the condition has been fulfilled or not[3].

1 As to the meaning of 'indorsement' see PARA 1407.
2 As to the meaning of 'indorsee' see PARA 1407.
3 Bills of Exchange Act 1882 s 33.

1494. Restrictive indorsements. The indorsement[1] of the instrument[2] may also contain terms making it restrictive[3].

A restrictive indorsement is an indorsement which does one of the following[4]: (1) prohibits the further negotiation[5] of the instrument[6]; or (2) expresses that it is a mere authority to deal with the instrument as directed by the indorsement and not a transfer of the ownership[7], as, for example, if the indorsement constitutes the indorsee[8] the agent of the indorser[9] for a special purpose[10], or vests[11] the title in the indorsee in trust for or to the use of some other person[12].

The effect of a restrictive indorsement is to confer upon the indorsee[13]:

(a) the right to receive payment of the instrument;

(b) the same right against any other party to the instrument that his indorser had[14];

(c) the power, but only in accordance with the express terms of his authority, to transfer the instrument and his rights on it to another[15].

Where a restrictive indorsement authorises further transfer, all subsequent indorsees take the instrument with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement[16].

1 As to the meaning of 'indorsement' see PARA 1407.
2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 Bills of Exchange Act 1882 s 32(6).
4 Bills of Exchange Act 1882 s 35(1).
5 As to the meaning of 'negotiation' see PARA 1407.
6 Eg where the indorsement is 'Pay to A B only': Bills of Exchange Act 1882 s 35(1).
7 Eg where the indorsement is 'Pay D or order for collection': Bills of Exchange Act 1882 s 35(1).
8 As to the meaning of 'indorsee' see PARA 1407.
9 As to the meaning of 'indorser' see PARA 1407 note 8.
10 *Lloyd v Sigourney* (1829) 5 Bing 525; *Williams, Deacon & Co v Shadbolt* (1885) Cab & El 529.
11 Eg where the indorsement is 'Pay D for the account of X': Bills of Exchange Act 1882 s 35(1).
12 *Ancher v Bank of England* (1781) 2 Doug KB 637.
13 Bills of Exchange Act 1882 s 35(2).
14 *Evans v Cramlington* (1687) Carth 5. But where a bill is restrictively indorsed for collection and the indorsee pays the amount to the indorser, he cannot acquire rights on the bill against the acceptor before maturity, the indorsee for collection being an agent only: *Williams, Deacon & Co v Shadbolt* (1885) Cab & El 529.
15 See *Lloyd v Sigourney* (1829) 5 Bing 525. As to transfer generally see PARA 1489 et seq.
16 Bills of Exchange Act 1882 s 35(3). See *Truettel v Barandon* (1817) 8 Taunt 100.

1495. Indorsements negativing or extending liability. The indorser[1] may insert an express stipulation negativing or limiting his own liability to the holder[2], or he may waive as regards himself some or all of the holder's duties[3].

In the special case of a person[4] who is under obligation to indorse in a representative capacity, he may indorse the instrument[5] in such terms as to negative personal responsibility[6]. Such indorsements[7] are more properly termed qualified indorsements.

1 As to the meaning of 'indorser' see PARA 1407 note 8.
2 See the Bills of Exchange Act 1882 s 16(1); and PARA 1440. As to the meaning of 'holder' see PARA 1407. Thus he may indorse sans recours or make other reservation as to his personal liability. Cf *Goupy v Harden* (1816) 7 Taunt 159; *Castrique v Buttigieg* (1856) 10 Moo PCC 94. See also *Wakefield v Alexander & Co and Chapronière* (1901) 17 TLR 217 (the right to indorse sans recours applies to any indorser or quasi indorser and is not confined to an indorser who can give title to a bill; a quasi indorser is one who is not a party to the instrument: see PARA 1579).
3 See the Bills of Exchange Act 1882 s 16(2); and PARA 1440. Thus he may waive duties as regards due presentment (see PARA 1516 et seq) or notice of dishonour (see PARA 1524 et seq).
4 As to the meaning of 'person' see PARA 1401 note 4.
5 As to the meaning of 'instrument' see PARA 1402 note 1.

6 Bills of Exchange Act 1882 s 31(5). See also s 26(1); and PARA 1476 note 1.
7 As to the meaning of 'indorsement' see PARA 1407.

C. DURATION OF NEGOTIABILITY

1496. Cessation of negotiability. An instrument which is negotiable[1] in its origin continues to be negotiable until it has been either restrictively indorsed[2] or discharged by payment or otherwise[3].

Subject to certain limitations[4], the fact that an instrument is overdue, or even that it has been dishonoured and a claim brought upon it, is no bar to its further negotiation[5]. Except where an indorsement[6] bears date after the maturity of the instrument, every negotiation is prima facie deemed to have been effected before it was overdue[7].

1 As to the meaning of 'negotiable instrument' see PARA 1402.
2 Bills of Exchange Act 1882 s 36(1)(a). A restrictive indorsement bars the negotiation of the bill. As to restrictive indorsements see PARA 1494.
3 Bills of Exchange Act 1882 s 36(1)(b); *Callow v Lawrence* (1814) 3 M & S 95 at 97 per Lord Ellenborough CJ ('A bill of exchange is negotiable ad infinitum until it has been paid by or discharged on behalf of the acceptor'). As to the meaning of 'discharge of the instrument' see PARA 1550.
4 See PARA 1497.
5 Cf *Deuters v Townsend* (1864) 33 LJQB 301. As to the meaning of 'negotiation' see PARA 1407.
6 As to the meaning of 'indorsement' see PARA 1407.
7 Bills of Exchange Act 1882 s 36(4).

1497. Overdue instrument. Where an overdue[1] instrument[2] is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person[3] who takes it can acquire or give a better title than that of the person from whom he took it[4].

If, however, the person from whom the holder[5] took it had at the time when the instrument matured a good title, the holder is not affected by a defect in the title of a previous holder[6].

Where an instrument, in its origin an accommodation bill, is negotiated after maturity, the mere absence of consideration is immaterial[7]. But a negotiation[8] in breach of an agreement expressed or implied that such a bill shall not be negotiated after maturity invalidates the holder's right to be a holder in due course[9].

Where there is no defect in the title of the person from whom the holder took the overdue instrument, a set-off or other matter of counterclaim outstanding between that person and a prior party does not affect the holder's right[10], even if its existence was known to the holder when he took the instrument[11].

1 As to when an instrument payable on demand is overdue see PARA 1433.
2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 As to the meaning of 'person' see PARA 1401 note 4.
4 Bills of Exchange Act 1882 s 36(2); *Redfern & Son v Rosenthal Bros* (1902) 86 LT 855, CA. Defect of title, as a phrase, is the statutory equivalent in this connection of an equity attaching to the bill: see *Tinson v Francis* (1807) 1 Camp 19; *Sturtevant v Ford* (1842) 4 Man & G 101. Thus where a bill is indorsed by the drawer to a person to have it discounted, and that person, in fraud of the drawer, further indorses it when overdue to the plaintiff, the plaintiff cannot recover on the bill from the acceptor: *Lloyd v Howard* (1850) 15 QB 995. So where an overdue bill is purchased by an official of a bank with money stolen by him from the bank, and indorsed to another party, the claim of the bank constitutes an equity attaching to the bill in the hands of the indorsee: *Re European Bank, ex p Oriental Commercial Bank* (1870) 5 Ch App 358. Similarly, where a bill is accepted subject to a condition expressly agreed on by the drawer and

acceptor, and is indorsed when overdue to another party, that party is bound by the original condition: *Holmes v Kidd* (1858) 28 LJEx 112.

However, where a bill drawn and accepted in England was indorsed in blank and delivered in Norway to the agent of an English firm, and, having been seized in that country in execution of a judgment obtained there against a member of the English firm, was subsequently sold after maturity to a holder who indorsed it to a holder in England, who took the bill without knowledge of his indorser's title, it was held that, as that indorser's title was good in Norway, the holder in England who took it from him could recover from the acceptor: *Alcock v Smith* [1892] 1 Ch 238, CA.

Title to an instrument is not defective on the ground of sovereign immunity if the state which claims immunity has never been a party to the instrument: *Cardinal Financial Investments Corpn v Central Bank of Yemen* [2001] Lloyd's Rep Bank 1, CA.

5 As to the meaning of 'holder' see PARA 1407.

6 Eg where a bill accepted for an illegal consideration is indorsed before it is due to a holder in due course, a party to whom the latter indorses it after maturity can recover on it: *Chalmers v Lanion* (1808) 1 Camp 383: *Fairclough v Pavia* (1854) 9 Exch 690. See the Bills of Exchange Act 1882 s 29(3); and PARA 1486. As to the meaning of 'holder in due course' see PARA 1407.

7 *Sturtevant v Ford* (1842) 4 Man & G 101; *Stein v Yglesias* (1834) 1 Cr M & R 565; *Charles v Marsden* (1808) 1 Taunt 224. As to defect of title see note 4. As to accommodation bills see PARA 1482.

8 As to the meaning of 'negotiation' see PARA 1407.

9 *Parr v Jewell* (1855) 16 CB 684. As to the meaning of 'holder in due course' see PARA 1407. As to an agreed set-off see *Collenridge v Farquharson* (1816) 1 Stark 259; *Oulds v Harrison* (1854) 10 Exch 572 at 579 per Parke B.

10 *Burrough v Moss* (1830) 10 B & C 558; and see *Holmes v Kidd* (1858) 28 LJEx 112 at 113 per Crompton J; *Oulds v Harrison* (1854) 10 Exch 572; *Re Overend, Gurney & Co Ltd, ex p Swan* (1868) LR 6 Eq 344.

11 *Whitehead v Walker* (1842) 10 M & W 696.

1498. Negotiation after dishonour. Where a bill which is not overdue has been dishonoured, any person[1] who takes it with notice of the dishonour takes it subject to any defect of title attaching to it at the time of dishonour[2]. But a holder in due course[3] ex hypothesi has no such notice, and there is no such defect in his title[4]. Moreover, where a bill is dishonoured by non-acceptance[5] and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission are not prejudiced thereby[6].

1 As to the meaning of 'person' see PARA 1401 note 4.

2 Bills of Exchange Act 1882 s 36(5); *Hornby v McLaren* (1908) 24 TLR 494, CA; *Crossley v Ham* (1811) 13 East 498 (where an indorsee taking a bill with notice of its dishonour was held bound by an agreement made in regard to the bill by prior indorsers before its dishonour).

3 As to the meaning of 'holder in due course' see PARA 1407.

4 Bills of Exchange Act 1882 s 36(5).

5 As to dishonour by non-acceptance see PARA 1515.

6 Bills of Exchange Act 1882 s 48(1). See also *Clifford Chance v Silver* (1992) Financial Times, 31 July, [1992] 2 Bank LR 11, CA (where an instrument was dishonoured and notice was given, it was arguable that the holders in due course relinquished their rights by accepting a smaller sum in part payment).

1499. 'Not negotiable' cheque. In the case of a cheque[1] crossed 'not negotiable', the person[2] who takes it does not acquire and cannot give a better title to it than that of the person from whom he took it[3]. The legal effect of adding the words 'not negotiable' to a cheque is, therefore, not to impede transfer, but to perpetuate in the hands of any transferee whatever defect or infirmity of title may affect the person who first transferred the cheque with those words on it[4].

1 As to the meaning of 'cheque' see PARA 1405.

2 As to the meaning of 'person' see PARA 1401 note 4.

3 Bills of Exchange Act 1882 s 81; and see PARA 1411. See *Fisher v Roberts* (1890) 6 TLR 354, CA (where, two persons being partners, one of the partners in fraud of the other indorsed a cheque drawn in favour of the firm, crossed and marked 'not negotiable', to the defendant, who gave cash for it; and in an action brought by the partner who was defrauded, it was held that the amount could be recovered). See also *Wilson and Meeson v Pickering* [1946] KB 422, [1946] 1 All ER 394, CA (where it was held that a 'person' included the payee whose name had been entered in a blank cheque by an employee of the drawer and contrary to his instructions). As to crossed cheques generally see PARAS 838, 880. In *Great Western Rly Co v London and County Banking Co* [1901] AC 414, HL, the object of the provision was defined by Lord Brampton, at 422, as being 'to afford to the drawer or the holder of a cheque who is desirous of transmitting it to another person as much protection as can reasonably be afforded to it against dishonesty or accidental miscarriage in the course of its transit'.

4 As to the effect of the crossing 'not negotiable' upon the liability of a banker through whom fraudulent cheques have been collected see *Crumplin v London Stock Bank Ltd* (1913) 109 LT 856; *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356, CA. As to the effect of the words on a bill other than a cheque see *Hibernian Bank Ltd v Gysin and Hanson* [1938] 2 KB 384, [1938] 2 All ER 575; affd [1939] 1 KB 483, [1939] 1 All ER 166, CA. See PARA 894. As to transfer generally see PARA 1489 et seq.

1500. Non-transferable cheques. In the case of a cheque[1] which is crossed and bears across its face the words 'account payee' or 'a/c payee', either with or without the word 'only', the cheque is not transferable, and is valid only as between the parties to it[2].

A banker[3] is not negligent[4] by reason only of his failure to concern himself with any purported indorsement[5] of a cheque which is not transferable, regardless of how it was made so[6].

1 As to the meaning of 'cheque' see PARA 1405.

2 Bills of Exchange Act 1882 s 81A(1) (s 81A added by the Cheques Act 1992 s 1). As to the effect of the words 'account payee' see also PARA 894. As to transfer generally see PARA 1489 et seq.

3 As to the meaning of 'banker' see PARA 1403 note 7.

4 Ie for the purposes of the Bills of Exchange Act 1882 s 80: see PARA 1575.

5 As to the meaning of 'indorsement' see PARA 1407.

6 Ie whether it was made not transferable in accordance with the Bills of Exchange Act 1882 s 81A(1) or otherwise: s 81A(2) (as added: see note 2).

1501. Negotiation back to prior party. Where an instrument[1] is negotiated back to a prior party (whether drawer[2], acceptor[3] or indorser[4]), that party may, subject to the provisions in regard to discharge[5], reissue[6] and further negotiate it[7]. However, he is not entitled to enforce payment against any intervening party to whom he was personally liable in his former capacity[8], though he may do so against persons to whom he was not so liable[9].

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 As to the meaning of 'drawer' see PARA 1406.

3 As to the meaning of 'acceptor' see PARA 1406.

4 As to the meaning of 'indorser' see PARA 1407 note 8.

5 As to discharges generally see PARA 1550 et seq.

6 As to the meaning of 'issue' see PARA 1406.

7 Bills of Exchange Act 1882 s 37. The discharge of a bill operates as a bar to its further negotiation: s 36(1)(b); and see PARA 1496. In the case of an acceptor, his becoming the holder of it at or after its maturity operates ipso facto as a discharge. See also *Attenborough v Mackenzie* (1856) 25 LJEx 244.

8 Bills of Exchange Act 1882 s 37.

9 'When the relations between the prior parties are such that the second could not sue the first, the fact that the third party is also the first is no answer for the second party when sued by the third': *Re Gooch, ex p Judd* [1921] 2 KB 593 at 605, CA, per Scrutton LJ. But if, as payee or prior indorser, he formerly indorsed 'sans recours', he is able to sue the intervening parties, for the object of the rule is to prevent the possibility of actions which would nullify the effect of each other, and in the case supposed the intervening parties would have no right of action

against him: *Wilkinson & Co v Unwin* (1881) 7 QBD 636, CA; *JW Holmes & Co v Durkee* (1883) Cab & El 23; *Glenie v Bruce Smith* [1907] 2 KB 507; affd [1908] 1 KB 263, CA, which was followed in *Re Gooch, ex p Judd* above, in preference to *MT Shaw & Co Ltd v Holland* [1913] 2 KB 15, CA.

1502. Striking out indorsements. The holder[1] or his agent may at any time[2] strike out any indorsement[3] which is not necessary to his title, with the result that he thereby frees the indorser[4] whose indorsement is struck out, and all indorsers subsequent to him, from liability on the instrument[5].

If an instrument is paid by an indorser, or being a bill payable to drawer's order[6] is paid by the drawer, the payer, who is thereby remitted to his former rights as regards the acceptor[7] or antecedent parties, may, if he thinks fit, strike out his own and[8] subsequent indorsements and again negotiate it[9].

1 As to the meaning of 'holder' see PARA 1407.
2 Even at the trial: *Mayer v Jadis* (1833) 1 Mood & R 247.
3 As to the meaning of 'indorsement' see PARA 1407.
4 As to the meaning of 'indorser' see PARA 1407 note 8.
5 See the Bills of Exchange Act 1882 s 63(2) and PARA 1556; *Fairclough v Pavia* (1854) 9 Exch 690. However an indorser whose indorsement is struck out by mistake is not relieved (*Wilkinson v Johnson* (1824) 3 B & C 428); and title may sometimes be made through a cancelled indorsement: *Fairclough v Pavia* above per curiam at 695. As to the meaning of 'instrument' see PARA 1402 note 1.
6 As to bills payable to order see PARA 1428. As to the meaning of 'drawer' see PARA 1406.
7 As to the meaning of 'acceptor' see PARA 1406.
8 Note that the word 'and' appears to be needed between the words 'own' and 'subsequent' but does not appear in the Queen's printers copy of the Act.
9 See the Bills of Exchange Act 1882 s 59(2)(b); and PARA 1558.

D. EFFECT OF FORGERY ON TRANSFER

1503. Forgery and unauthorised signature. Where a signature on a bill or note[1] is forged or placed there without the authority of the person[2] whose signature it purports to be[3], the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a valid discharge[4] for it or to enforce payment of it against any party thereto can be acquired through or under that signature unless the party against whom it is sought to retain the bill or enforce payment of it is precluded from setting up the forgery or want of authority as a defence[5].

If a signature on the bill has been forged and the forgery comes to the knowledge of the party whose signature has been forged, that party, if he does not give information of the forgery to the holder[6], may be estopped from setting it up or relying upon it[7]. An acceptor[8] who has admitted the authority of his signature cannot afterwards refuse to honour it on the ground that it is forged[9], but if he has paid a bill on which his signature as acceptor has been forged, he is not estopped from refusing to pay a similar bill on the ground that that is forged also[10].

Independently of any other estoppel the acceptor of a bill is precluded from denying to a holder in due course[11] the genuineness of the drawer's[12] signature or his authority to draw[13], and the indorser[14] from denying to a holder in due course the genuineness and regularity in all respects of the signature of the drawer and all previous indorsers[15].

Where the signature of a party to an instrument[16] has been forged, the fact that the holder has subsequently obtained the genuine signature of that party does not restore validity to the instrument[17], but, presumably, that party may be

estopped thereafter from setting up the forgery. An instrument on which it is proved that a forged signature has been placed may be ordered by the court to be delivered up[18].

A holder who on presenting an instrument has been paid in good faith and has received payment in good faith, but whose title is derived through a forged indorsement[19], may be compelled to return the money paid[20].

Where an indorsement is forged abroad, and the instrument gets into the hands of a bona fide holder, the title of the holder must be determined according to the laws of the country where the instrument was transferred[21].

Where a paper bearing only a signature is stolen and then filled up and negotiated to a bona fide holder for value[22], the signer is not estopped from setting up the fraud[23].

1 As to the meanings of 'bill' and 'note' see PARA 1405.
2 As to the meaning of 'person' see PARA 1401 note 4.
3 If a person of the same name as the payee named in a bill of exchange indorses the bill, knowing he is not the person in whose favour it is drawn, he is guilty of forgery: see *Mead v Young* (1790) 4 Term Rep 28. A genuine signature by an agent who indicates on the face of the bill that he signs as an agent, but who is fraudulently misusing his authority, is not a forgery: see *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356, CA; and for a conflicting view see *Alexander Stewart & Son of Dundee Ltd v Westminster Bank Ltd* [1926] WN 271, CA (in which it was held that the signature of a person who indorses an instrument intending to steal is an unauthorised signature).
4 As to discharges generally see PARA 1550 et seq.
5 Bills of Exchange Act 1882 ss 24, 89 (see PARA 1425); *Robarts v Tucker* (1851) 16 QB 560. In the case of cheques, bankers are specially protected: see the Bills of Exchange Act 1882 ss 60, 80; the Cheques Act 1957 ss 1, 4; PARAS 1552, 1575; and PARAS 836, 882. Where there is a conflict of laws other considerations may arise; see PARA 1589 et seq.
6 As to the meaning of 'holder' see PARA 1407.
7 *William Ewing & Co v Dominion Bank* [1904] AC 806, PC; *Greenwood v Martins Bank Ltd* [1933] AC 51, HL. A reasonable time may be allowed: cf *M'Kenzie v British Linen Co* (1881) 6 App Cas 82, HL. But where a customer of a bank, whose signature was forged by one of the clerks of the bank, was requested by one of the agents of the bank to maintain silence in the interests of the bank, he was not estopped from relying on the forgery in an action against the bank: *Ogilvie v West Australian Mortgage and Agency Corpn Ltd* [1896] AC 257, PC.
8 As to the meaning of 'acceptor' see PARA 1406.
9 *Leach v Buchanan* (1802) 4 Esp 226; and see *Brown v Westminster Bank Ltd* [1964] 2 Lloyd's Rep 187.
10 *Morris v Bethell* (1869) LR 5 CP 47.
11 As to the meaning of 'holder in due course' see PARA 1407.
12 As to the meaning of 'drawer' see PARA 1406.
13 See the Bills of Exchange Act 1882 s 54(2)(a); and PARA 1457. See *Bank of England v Vagliano Bros* [1891] AC 107, HL.
14 As to the meaning of 'indorser' see PARA 1407 note 8.
15 See the Bills of Exchange Act 1882 s 55(2)(b); and PARA 1578: cf *Heilbut v Nevill* (1870) LR 5 CP 478. See also PARA 1457.
16 As to the meaning of 'instrument' see PARA 1402 note 1.
17 *Esdaile v La Nauze* (1835) 1 Y & C Ex 394.
18 *Esdaile v La Nauze* (1835) 1 Y & C Ex 394.
19 As to the meaning of 'indorsement' see PARA 1407.
20 *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49, PC; and see *London and River Plate Bank v Bank of Liverpool* [1896] 1 QB 7. See PARA 1551.
21 *Embiricos v Anglo-Austrian Bank* [1905] 1 KB 677, CA. See PARA 1591.
22 As to the meaning of 'holder for value' see PARA 1407.
23 *Baxendale v Bennett* (1878) 3 QBD 525, CA; *Smith v Prosser* [1907] 2 KB 735, CA. Cf *Guildford Trust Ltd v Goss* (1927) 136 LT 725.

1504. Theft. A valid title vests in a holder in due course[1] who has taken a bill or note[2] for value[3] and without notice of its prior theft[4], so that no order can in

such case be made for restitution of money paid to such a holder, and no claim can be maintained for the recovery of the instrument[5].

1 As to the meaning of 'holder in due course' see PARA 1407.
2 As to the meanings of 'bill' and 'note' see PARA 1405.
3 As to the meaning of 'value' see PARA 1401 note 8.
4 As to theft see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 282.
5 *Chichester v Hill & Son* (1882) 52 LJQB 160. See also *Moss v Hancock* [1899] 2 QB 111, DC. As to the meaning of 'instrument' see PARA 1402 note 1.

E. RIGHTS OF TRANSFEREE

1505. Rights of transferee of altered instrument. Where an alteration, even though material, has been made in an instrument[1], if it is not apparent, a holder in due course[2] may avail himself of the instrument as if it had not been altered, and may enforce payment of it according to its original tenor[3].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 As to the meaning of 'holder in due course' see PARA 1407.
3 Bills of Exchange Act 1882 s 64(1) proviso. The alteration of an amount of money to the equivalent decimal amount is not a material alteration for this purpose: see the Decimal Currency Act 1969 s 3(2); and PARA 1418 note 12. As to alteration of an instrument or an acceptance see PARA 1559. As to rights of holder to hold an instrument free from defects in title see PARA 1488.

1506. Transfer in foreign country. Where an instrument[1] is transferred in a foreign country, and different parties claim it, the title of the transferee depends upon the law of the place of transfer[2].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 *Alcock v Smith* [1892] 1 Ch 238, CA; *Embiricos v Anglo-Austrian Bank* [1905] 1 KB 677, CA; and see PARA 1591.

F. LOSS OF INSTRUMENT

1507. Duplicate of lost bill. Where an instrument[1] has been lost before it is overdue, the person[2] who was its holder[3] may apply to the drawer[4] to give him another bill[5] of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost should be found again[6]; and if the drawer refuses to comply with such application he may be compelled to do so[7]. The Bills of Exchange Act 1882 contains no provision for obtaining the signatures of the indorsers[8] or acceptor[9] on the duplicate.

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 As to the meaning of 'person' see PARA 1401 note 4.
3 As to the meaning of 'holder' see PARA 1407.
4 As to the meaning of 'drawer' see PARA 1406.
5 As to the meaning of 'bill' see PARA 1405.
6 Bills of Exchange Act 1882 s 69.
7 Bills of Exchange Act 1882 s 69. See *King v Zimmerman* (1871) LR 6 CP 466, where in an action under the Common Law Procedure Act 1854 s 87, the provisions of which are similar to those of the Bills of Exchange Act 1882 s 70 (see PARA 1508 note 4), the plaintiff sued on a lost bill without offering to give an indemnity against the claims of other persons on the bill, and the court would only order that the loss of the bill should not be set up as a defence on the terms that the plaintiff paid the costs of the action up to the time that the order was made, beside giving a proper indemnity.
8 As to the meaning of 'indorser' see PARA 1407 note 8.
9 As to the meaning of 'acceptor' see PARA 1406.

1508. Claim on lost bill. In any action[1] upon an instrument[2] the court or a judge may order that the loss of the instrument in question is not to be set up as a defence, provided that an indemnity is given to the satisfaction of the court or judge against the claim of any other person[3] upon the instrument in question[4].

1 For the purposes of the Bills of Exchange Act 1882, this includes counterclaim and set-off: s 2.
2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 As to the meaning of 'person' see PARA 1401 note 4.
4 Bills of Exchange Act 1882 s 70. See also the Common Law Procedure Act 1854 s 87 (see EQUITY vol 16(2) (Reissue) PARA 446), which applies to all negotiable instruments, and is similar to the Bills of Exchange Act 1882 s 70 in its terms.

(xiii) Duties of Holder

A. PRESENTMENT FOR ACCEPTANCE

1509. Presentment of bills. Presentment for acceptance[1] applies to bills of exchange[2], but not to promissory notes[3] or to cheques[4]. In the case of bills of exchange, though not always required by the form of the particular instrument[5], acceptance is necessary in order to render the drawee[6] a party liable thereon[7], but is not necessary in order that a party, to whom it has been negotiated prior to acceptance, may, as a holder in due course[8], sue an acceptor[9] who subsequently accepts[10].

The bills which require presentment for acceptance[11] are:

(1) those which are payable after sight[12];
(2) those on the face of which it is expressly stipulated that they shall be presented for acceptance[13];
(3) those which are drawn payable elsewhere than at the residence or place of business of the drawee[14].

In the class under head (1) above, presentment is required to fix the maturity of the instrument[15]; in the classes under heads (2) and (3) above, presentment for acceptance must precede presentment for payment[16]. In no other case is presentment for acceptance necessary in order to render a party liable on the bill[17].

It is, however, prudent for the holder[18] to present the bill for acceptance in every case, for acceptance obtains the security of the acceptor's signature. If a bill is dishonoured by non-acceptance[19], the holder will obtain[20] the immediate liability of all previous parties to the bill and relief from the necessity of presentment for payment[21].

1 As to the meaning of 'acceptance' see PARA 1406.
2 As to the meaning of 'bill of exchange' see PARA 1405.
3 As to the meaning of 'promissory note' see PARA 1405. There is no acceptor to a note: see the Bills of Exchange Act 1882 s 89(3)(a).
4 As to the meaning of 'cheque' see PARA 1405. There is no acceptor to a cheque: see *Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] AC 176, [1944] 2 All ER 83, PC; and PARA 1454. As to marked cheques see PARA 1412; and see also PARAS 835, 847.
5 As to the meaning of 'instrument' see PARA 1402 note 1.
6 As to the meaning of 'drawee' see PARA 1406.
7 See the Bills of Exchange Act 1882 ss 17, 53(1); and PARA 1451 et seq. But a bill may be validly drawn requiring payment without acceptance: *R v Kinnear* (1838) 2 Mood & R 117.
8 As to the meaning of 'holder in due course' see PARA 1407.
9 As to the meaning of 'acceptor' see PARA 1406.
10 *National Park Bank of New York v Berggren & Co* (1914) 19 Com Cas 234.
11 As to excuses for non-presentment see PARA 1514.

12 Bills of Exchange Act 1882 s 39(1). As to the meaning of 'bill payable after sight' see PARA 1435.
13 Bills of Exchange Act 1882 s 39(2). As to presentment for payment see PARA 1516 et seq.
14 Bills of Exchange Act 1882 s 39(2).
15 Bills of Exchange Act 1882 s 39(1).
16 Bills of Exchange Act 1882 s 39(2).
17 Bills of Exchange Act 1882 s 39(3).
18 As to the meaning of 'holder' see PARA 1407.
19 See PARA 1515.
20 Subject to compliance with requirements as to notice of dishonour and protest (see PARA 1524 et seq).
21 Bills of Exchange Act 1882 s 43(2).

1510. Time and mode of presentment. Presentment for acceptance[1] should be made by or on behalf of the holder[2], at a reasonable hour on a business day[3] and before the bill[4] is overdue, to the drawee[5] or to some person[6] authorised to accept or refuse on his behalf[7]. The mere exhibition of the bill by a servant of the holder to some person unknown to him on the premises of the drawee is not a due presentment[8].

The drawee may, however, accept when the bill is overdue, if he is willing to do so[9]. A presentment through a postal operator[10] is sufficient where it is authorised by agreement or by usage[11].

1 As to presentment for acceptance see PARA 1509.
2 As to the meaning of 'holder' see PARA 1407.
3 As to the meaning of 'business day' see PARA 1437.
4 As to the meaning of 'bill' see PARA 1405. Presentment for acceptance does not apply to promissory notes or to cheques: see PARA 1509.
5 As to the meaning of 'drawee' see PARA 1406.
6 As to the meaning of 'person' see PARA 1401 note 4.
7 Bills of Exchange Act 1882 s 41(1)(a). If a bill is handed to an agent for presentment, the agent must not be guilty of negligence in presenting the bill: *Bank of Van Diemen's Land v Bank of Victoria* (1871) LR 3 PC 526. The manner of presentment depends on various circumstances. If the place of presentment is a bank, then the bill must be presented in banking hours: *Parker v Gordon* (1806) 7 East 385; *Elford v Teed* (1813) 1 M & S 28. If it is the place of business of a merchant or trader, then it must be within business hours: *Allen v Edmundson* (1848) 2 Exch 719 at 723 per Parke B. If it is at a private residence, then any time during which the drawee may be expected to be found is reasonable: *Wilkins v Jadis* (1831) 2 B & Ad 188, where 8 pm was held reasonable.
8 *Cheek v Roper* (1804) 5 Esp 175.
9 See the Bills of Exchange Act 1882 s 18(2); and PARA 1459.
10 As to the meaning of 'postal operator' see the Postal Services Act 2000 s 125(1) (see POST OFFICE): Bills of Exchange Act 1882 s 2 (definition added by SI 2001/1149).
11 Bills of Exchange Act 1882 s 41(1)(e) (amended by SI 2001/1149).

1511. Several drawees. If a bill[1] is addressed to two or more drawees[2] who are not partners, presentment[3] must be made to them all, unless one has authority to accept for all, in which case presentment may be made to him only[4].

1 As to the meaning of 'bill' see PARA 1405.
2 As to the meaning of 'drawee' see PARA 1406.
3 As to presentment for acceptance (which does not apply to promissory notes or to cheques) see PARA 1509.
4 Bills of Exchange Act 1882 s 41(1)(b). In the case of partners (as to which see PARA 1467), it is clear that if the partnership is a trading one, then one member of the partnership can bind all his colleagues.

1512. Bills payable after sight. Except when one or more of the grounds of excuse referred to below[1] exists, a bill payable after sight[2] must either be

presented by the holder[3] for acceptance[4] or further negotiated within a reasonable time[5], otherwise the drawer[6] and all indorsers[7] prior to that holder are discharged[8].

In determining what is a reasonable time for this purpose, the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case are to be taken into consideration[9]; and the interests of the holder, as well as those of the drawee[10], are to be taken into account[11].

1 See PARA 1513 et seq.
2 As to the meaning of 'bill payable after sight' see PARA 1435.
3 As to the meaning of 'holder' see PARA 1407.
4 As to presentment for acceptance (which does not apply to promissory notes or to cheques) see PARA 1509.
5 Bills of Exchange Act 1882 s 40(1).
6 As to the meaning of 'drawer' see PARA 1406.
7 As to the meaning of 'indorser' see PARA 1407 note 8.
8 Bills of Exchange Act 1882 s 40(2). As to discharge of parties see PARA 1564 et seq.
9 Bills of Exchange Act 1882 s 40(3). What is a reasonable time has at times been treated as a pure question of fact, but it would seem that it is really a mixed question of law and fact: *Ramchurn Mullick v Luchmeechund Radakissen* (1854) 9 Moo PCC 46 at 66 per Parke B. See also *Straker v Graham* (1839) 4 M & W 721 (where a bill was drawn in Newfoundland on London, payable 90 days after sight, and no reason being given for delay in presentment, two months was held to be an unreasonable time, but some emphasis was laid on the fact that the bill was drawn in sets; as to bills in a set see PARA 1586 et seq); and contrast *Mellish v Rawdon* (1832) 9 Bing 416 (where the payee of a bill payable 60 days after sight in Rio De Janeiro refrained from presentment for four months, as the rate of exchange was against Rio, and the delay was held to be not unreasonable). No doubt the term would be interpreted with much greater strictness in the case of an inland bill, but when a bill drawn in Windsor and payable in London one month after date was withheld for presentment for four days the delay was held not unreasonable: *Fry v Hill* (1817) 7 Taunt 397; cf *Shute v Robins* (1828) 3 C & P 80. Given the rapidity of modern means of communication, these early cases must be treated with caution.
10 As to the meaning of 'drawee' see PARA 1406.
11 *Ramchurn Mullick v Luchmeechund Radakissen* (1854) 9 Moo PCC 46 at 67 per Parke B.

1513. Delay. Where there is not time for the holder[1] of a bill[2] drawn payable elsewhere than at the place of business or residence of the drawee[3], with the exercise of reasonable diligence, to present it for acceptance[4] before presenting it for payment on the day it falls due, the delay caused by presenting it for acceptance before presenting it for payment is excused and does not discharge the drawers[5] and indorsers[6].

1 As to the meaning of 'holder' see PARA 1407.
2 As to the meaning of 'bill' see PARA 1405.
3 As to the meaning of 'drawee' see PARA 1406.
4 As to presentment for acceptance (which does not apply to promissory notes or to cheques) see PARA 1509.
5 As to the meaning of 'drawer' see PARA 1406. As to discharge of parties see PARA 1564 et seq.
6 Bills of Exchange Act 1882 s 39(4). As to the meaning of 'indorser' see PARA 1407 note 8.

1514. Excuses for non-presentment. In the case of a drawee[1] who is dead or bankrupt, presentment for acceptance[2] is excused, and the bill may be treated as dishonoured by non-acceptance[3], or it may be presented for acceptance to the dead man's personal representative or to the bankrupt or his trustee[4].

Due presentment for acceptance is also excused, and the bill may be treated as dishonoured by non-acceptance if: (1) the drawee is a fictitious person[5] or a person not having the capacity to contract by bill[6]; or (2) after the exercise of

reasonable diligence, presentment cannot be effected[7]; or (3) although the presentment has been irregular, the acceptance has been refused on some other ground[8].

The fact that the holder[9] has reason to believe that the bill on presentment will be dishonoured does not excuse presentment[10].

1 As to the meaning of 'drawee' see PARA 1406.
2 As to presentment for acceptance see PARA 1508.
3 As to dishonour by non-acceptance see PARA 1515. As to the meaning of 'bill' see PARA 1405. Presentment for acceptance does not apply to promissory notes or to cheques; see PARA 1509.
4 Bills of Exchange Act 1882 s 41(1)(c), (d), (2)(a). A bankrupt includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy: s 2. See generally BANKRUPTCY AND INDIVIDUAL INSOLVENCY.
5 As to the meaning of 'person' see PARA 1401 note 4.
6 Bills of Exchange Act 1882 s 41(2)(a). Where the drawer and drawee are the same person or the drawee is a fictitious person or a person not having the capacity to contract the holder may treat the bill, if he wishes, as a promissory note (s 5(2)), to which presentment for acceptance would not apply: s 89(3). As to drawer and drawee being the same person see PARA 1408. As to the meaning of 'fictitious person' see PARA 1431. As to persons not having the capacity to contract by bill see PARA 1469.
7 Bills of Exchange Act 1882 s 41(2)(b). Due diligence is a question of fact in each case: *Bateman v Joseph* (1810) 12 East 433; *The Staffordshire* (1872) LR 4 PC 194 at 208.
8 Bills of Exchange Act 1882 s 41(2)(c).
9 As to the meaning of 'holder' see PARA 1407.
10 Bills of Exchange Act 1882 s 41(3); *Re Agra Bank, ex p Tondeur* (1867) LR 5 Eq 160 at 165.

1515. Dishonour by non-acceptance and notice thereof. A bill[1] is dishonoured by non-acceptance when it is duly presented for acceptance[2], and such acceptance as is prescribed by the Bills of Exchange Act 1882 is refused or cannot be obtained[3]; it is also dishonoured by non-acceptance when presentment for acceptance is excused[4] and the bill is not accepted[5]. When a bill is duly presented for acceptance, and is not in fact accepted within the customary time, the person[6] presenting it must treat it as dishonoured by non-acceptance[7], and notice of dishonour must be given to the drawer[8] and each indorser[9], for otherwise the holder[10] will lose his right of recourse against them[11]. Liability for dishonour on the part of both drawer and indorser is subject to the proviso that the requisite proceedings on dishonour be duly taken[12].

If the required notices are duly given on dishonour by non-acceptance it is unnecessary to give notice of a subsequent dishonour by non-payment, unless the bill has in the meantime been accepted[13].

Even if the required notice is not given, the rights of a holder in due course[14] subsequent to the omission are not prejudiced[15].

1 As to the meaning of 'bill' see PARA 1405.
2 As to presentment for acceptance (which does not apply to promissory notes or to cheques) see PARA 1509.
3 Bills of Exchange Act 1882 s 43(1)(a).
4 See PARA 1514.
5 Bills of Exchange Act 1882 s 43(1)(b).
6 As to the meaning of 'person' see PARA 1401 note 4.
7 Bills of Exchange Act 1882 s 42. The customary time is 24 hours, after which the drawee to whom the bill was delivered for acceptance must redeliver it with acceptance granted or declined. In reckoning the 24 hours non-business days must be excluded: see *Bank of Van Diemen's Land v Bank of Victoria* (1871) LR 3 PC 526; and PARA 1437. As to the time for giving notice of dishonour see the Bills of Exchange Act 1882 s 49(12); and PARA 1531.
8 As to the meaning of 'drawer' see PARA 1406.
9 Bills of Exchange Act 1882 s 48. As to the meaning of 'indorser' see PARA 1407 note 8. As to notice of dishonour see PARA 1524. An inland bill may, and a foreign bill must, also be protested for non-acceptance: see PARAS 1542–1543.

10 As to the meaning of 'holder' see PARA 1407.
11 Bills of Exchange Act 1882 ss 42, 48. If the indorsers on the bill are discharged by the failure of the holder at the time in not giving due notice of the dishonour of it, their responsibility cannot be revived by the shifting of the bill into other hands: *Roscow v Hardy* (1810) 12 East 434 at 436 per Lord Ellenborough CJ. They are released not only from liability on the bill, but also from liability on the consideration therefor: see *Bridges v Berry* (1810) 3 Taunt 130 (where the defendant, who was the acceptor of a bill which he could not pay on presentment, and who on time being given to him indorsed to the plaintiff a bill drawn by himself to his own order, was held to be released from liability on both bills by the delay of the plaintiff, who omitted to give him notice of the dishonour by non-acceptance of the second bill); *Peacock v Pursell* (1863) 32 LJCP 266.
12 Bills of Exchange Act 1882 s 55. As to liability of drawer see PARA 1574; as to liability of indorser see PARA 1577.
13 See the Bills of Exchange Act 1882 s 48(2); and PARA 1524.
14 As to the meaning of 'holder in due course' see PARA 1407.
15 See the Bills of Exchange Act 1882 s 48(1); and PARA 1524. *Dunn v O'Keeffe* (1816) 5 M & S 282, in which the drawer was held not to be discharged for want of notice, the bill being in the hands of a bona fide indorsee for value without notice of the dishonour.

B. PRESENTMENT FOR PAYMENT

1516. Presentment of bills and notes. Bills of exchange and promissory notes[1] must be duly presented for payment, except where otherwise provided by statute, and unless a bill is duly presented for payment, where that is necessary, the drawer[2] and indorsers[3] are discharged[4].

A bill, the acceptance[5] of which is qualified by the requirement of presentment for payment, must be so presented, but the acceptor[6], in the absence of an express stipulation to that effect, is not discharged by the omission to present it for payment on the day that it matures[7].

Although in general presentment for payment is not necessary in order to charge the person[8] primarily liable[9] on the instrument[10], it is necessary in order to obtain the right of recourse against the drawer and indorsers[11], and even in relation to the person primarily liable it is the more prudent course, for, if a claim is brought upon the instrument without presentment for payment, the court will be disposed to charge the claimant with the costs[12], and to fix the time from which interest is to be calculated at the date at which the action is begun[13].

1 As to the meanings of 'bill of exchange' and 'promissory note' see PARA 1405.
2 As to the meaning of 'drawer' see PARA 1406.
3 As to the meaning of 'indorser' see PARA 1407 note 8.
4 Bills of Exchange Act 1882 ss 45, 89; and see *Hamilton Finance Co Ltd v Coverley Westray, Walbaum and Tosetti Ltd and Portland Finance Co Ltd* [1969] 1 Lloyd's Rep 53. As to the exceptions see PARA 1517. As to bills which must be presented for acceptance before presentment for payment see PARA 1509. As to mode of presentment see PARA 1522. As to discharge of parties see PARA 1564 et seq.
5 As to the meaning of 'acceptance' see PARA 1406.
6 As to the meaning of 'acceptor' see PARA 1406.
7 Bills of Exchange Act 1882 s 52(2); *Smith v Vertue* (1860) 30 LJCP 56. Unless the terms of the acceptance state expressly that it is to be payable at a particular place only, the acceptance is deemed to be a general one; see PARA 1462.
8 As to the meaning of 'person' see PARA 1401 note 4.
9 Ie the acceptor in the case of a bill, the maker in the case of a note: Bills of Exchange Act 1882 ss 52(1), 87(1), 89(1), (2); *Rowe v Young* (1820) 2 Bligh 391; *Price v Mitchell* (1815) 4 Camp 200.
10 As to the meaning of 'instrument' see PARA 1402 note 1.
11 Bills of Exchange Act 1882 ss 45, 87(2), 89(2); and see *Yeoman Credit Ltd v Gregory* [1963] 1 All ER 245, [1963] 1 WLR 343.
12 *Macintosh v Haydon* (1826) Ry & M 362 at 363.
13 Cf *Pierce v Fothergill* (1835) 2 Bing NC 167.

1517. Excuses for non-presentment. Presentment is dispensed with, however, where after the exercise of reasonable diligence it cannot be effected as the statute requires[1], or where the drawee[2] is a fictitious person[3], or where it is expressly or impliedly waived[4]. Further, presentment is not required in order to charge the drawer[5] where the drawee or acceptor[6] is not bound, as between himself and the drawer, to accept or pay the bill[7], and the drawer has no reason to believe that the bill would be paid if presented[8]; nor in order to charge an indorser[9] where the instrument was made or accepted for his accommodation[10], and he has no reason to expect it to be paid if presented[11].

The fact that the holder[12] has reason to believe that the bill will be dishonoured on presentment does not dispense with the necessity for presentment[13].

1 Bills of Exchange Act 1882 s 46(2)(a). See *Hamilton Finance Co Ltd v Coverley Westray, Walbaum and Tosetti Ltd and Portland Finance Co Ltd* [1969] 1 Lloyd's Rep 53. What amounts to due diligence is a matter of fact to be decided in each case. Thus, where a note was made payable at a town where the maker had no residence, a presentment at two banks was held sufficient: *Hardy v Woodroofe* (1818) 2 Stark 319; see also *Hine v Allely* (1833) 4 B & Ad 624; *Buxton v Jones* (1840) 1 Man & G 83. But where a bill was accepted on behalf of the drawee by his agent, and in the drawee's absence at maturity no presentment was made to the agent, it was held that insufficient diligence was shown: *Phillips v Astling* (1809) 2 Taunt 206. This subsection operates to dispense with the need for presentment where it is impossible owing to occupation of territory by the enemy: *Cornelius v Banque Franco-Serbe* [1942] 1 KB 29, [1941] 2 All ER 728 (where it was also decided that the illegality of the presentment does not preclude the holder from suing on the bill). See also *Re Francke and Rasch* [1918] 1 Ch 470 at 479.

2 As to the meaning of 'drawee' see PARA 1406.

3 Bills of Exchange Act 1882 s 46(2)(b); *Smith v Bellamy* (1817) 2 Stark 223. As to the meaning of 'fictitious person' see PARA 1431.

4 Bills of Exchange Act 1882 s 46(2)(e); *Hopley v Dufresne* (1812) 15 East 275. But waiver of notice of dishonour does not of itself imply waiver of the fact of presentment: *Hill v Heap* (1823) Dow & Ry NP 57. See also *Barclays Bank plc v Bank of England* [1985] 1 All ER 385 at 394 per Bingham J. As to presentment for payment of bills and notes see PARA 1516.

5 As to the meaning of 'drawer' see PARA 1406.

6 As to the meaning of 'acceptor' see PARA 1406.

7 As to the meaning of 'bill' see PARA 1405.

8 Bills of Exchange Act 1882 s 46(2)(c). Where the drawer knows he has not sufficient funds to meet the bill, presentment is not necessary to charge the drawer: *Terry v Parker* (1837) 6 Ad & El 502; *Wirth v Austin* (1875) LR 10 CP 689. See also *Fiorentino Comm Giuseppe Srl v Farnesi* [2005] EWHC 160 (Ch), [2005] 2 All ER 737 (a payee of a cheque should be able to satisfy the second condition of the Bills of Exchange Act 1882 s 46(2)(c) at any time when he could show that the drawer had no reason to believe *at that time* that the cheque would be paid if presented).

9 As to the meaning of 'indorser' see PARA 1407 note 8.

10 As to accommodation bills see PARA 1482.

11 Bills of Exchange Act 1882 s 46(2)(d). However where the instrument is drawn for the accommodation of the drawer, it must be presented if it is desired to charge an indorser: *Saul v Jones* (1858) 28 LJQB 37 at 40 per Lord Campbell CJ. Where it is desired to charge a person who was not a party to the bill, but merely guaranteed its payment (at all events on behalf of the acceptor), presentment is not necessary: *Carter v White* (1883) 25 ChD 666 at 670, CA, per Cotton LJ. Quaere if this is so where the party guaranteed by the surety was the drawer or an indorser, for by the terms of the Bills of Exchange Act 1882 s 45 (see PARAS 1516, 1518 et seq), want of due presentment discharges the drawer or indorsers; and in any case this would not apply to a case where by custom a broker, instead of indorsing a number of bills individually, gives a guarantee of liability to the bankers who discount them: cf *Re Fox, Walker & Co, ex p Bishop* (1880) 15 ChD 400, CA.

12 As to the meaning of 'holder' see PARA 1407.

13 Bills of Exchange Act 1882 s 46(2)(a). This is so even when the acceptor has told the holder that he will not pay the bill when due: *Re Brereton, ex p Bignold* (1836) 1 Deac 712; *Hill v Heap* (1823) Dow & Ry NP 57. Presentment must also be made when the acceptor becomes bankrupt (*Warrington v Furbor* (1807) 8 East 242 at 245 per Lord Ellenborough CJ; cf *Esdaile v Sowerby*

(1809) 11 East 114), or when the maker of a note becomes insolvent and absconds without leaving effects behind: *Sands v Clarke* (1849) 8 CB 751; *Camidge v Allenby* (1827) 6 B & C 373.

1518. Time for presentment: bills and notes. When the instrument[1] is not payable on demand it must be presented on the day that it falls due[2].

When it is payable on demand, then in the case of a bill[3] it must be presented within a reasonable time after its issue[4] in order to render the drawer[5] liable, and within a reasonable time after its indorsement[6] in order to render the indorser[7] liable[8]; and in the case of a note[9] which has been indorsed it must be presented within a reasonable time after its indorsement, or the indorser will be discharged[10]. In determining what is a reasonable time in the case of either instrument, the nature of the instrument, the usage of trade, and the facts of the particular case will be taken into consideration[11].

When a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder[12] with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue[13].

Delay in making presentment for payment is excused where it is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence, but when the cause of delay ceases to operate presentment must be made with reasonable diligence[14].

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 Bills of Exchange Act 1882 s 45(1); and see *Yeoman Credit Ltd v Gregory* [1963] 1 All ER 245, [1963] 1 WLR 343. As to presentment for payment of bills and notes see PARA 1516.

3 As to the meaning of 'bill' see PARA 1405.

4 As to the meaning of 'issue' see PARA 1406.

5 As to the meaning of 'drawer' see PARA 1406.

6 As to the meaning of 'indorsement' see PARA 1407.

7 As to the meaning of 'indorser' see PARA 1407 note 8.

8 Bills of Exchange Act 1882 s 45(2).

9 As to the meaning of 'note' see PARA 1405.

10 Bills of Exchange Act 1882 s 86(1); *Chartered Mercantile Bank of India, London and China v Dickson* (1871) LR 3 PC 574. As to discharge of parties see PARA 1564 et seq.

11 Bills of Exchange Act 1882 ss 45(2), 86(2). The nature of the instrument, whether bill or note, differs widely, for while it is true that 'a prompt and regular demand of payment may frequently obtain payment from an acceptor of a bill and maker of a note, who is in a state of progressive insolvency, when a subsequent application of the same nature would become unavailing' (see Story's Bills of Exchange (4th Edn) s 325), yet a note, being more likely than a bill to be intended as a continuing security, may be reasonably the subject of a comparatively long delay before presentment. See *Chartered Mercantile Bank of India, London and China v Dickson* (1871) LR 3 PC 574; and PARA 1515 note 7.

12 As to the meaning of 'holder' see PARA 1407.

13 Bills of Exchange Act 1882 s 86(3); *Brooks v Mitchell* (1841) 9 M & W 15 (where it was held that such a note could not be deemed overdue because it was indorsed years after its date, and no interest had been paid on it for a considerable time before indorsement); *Glasscock v Balls* (1889) 24 QBD 13, CA. As to a banker's liability for presentment see PARA 1519.

14 Bills of Exchange Act 1882 s 46(1). As to delay when a bill payable elsewhere than at the place of business or residence of the drawee is presented late for acceptance see PARA 1513. The difficulty of communication incident to wars or political disturbance may excuse delay (*Patience v Townley* (1805) 2 Smith KB 223). But in ordinary times, delay which is unexplained, even when of very short duration, will result in the holder being found guilty of laches: see *Anderton v Beck* (1812) 16 East 248 (where the delay was for one day only). A delay by request of the drawer or indorser, if he is the person sought to be charged, would no doubt be held excusable: *Lord Ward v Oxford, Worcester and Wolverhampton Rly Co* (1852) 2 De GM & G 750.

1519. Time for presentment: cheques. A cheque is a bill[1] drawn on a banker[2] payable on demand[3], and should be presented for payment within a reasonable time of its issue[4]. But failure so to present it does not discharge the drawer[5], as a right of action subsists against him[6], and is only barred by the operation of the Statutes of Limitation[7].

Where, however, a cheque is not presented within a reasonable time of its issue, and the drawer or the person[8] on whose account it is drawn has the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage[9].

Where the drawer or the person on whose account the cheque is drawn is so discharged, the holder[10] becomes the creditor of the banker to the extent of such discharge, and is entitled to recover the amount from him[11].

An indorser[12] is discharged if the presentment is not duly made within reasonable time after indorsement[13].

What is a reasonable time is a question of fact in each case, and in determining it regard must be had to the nature of the instrument[14], the usage of trade and of bankers, and the facts of the particular case[15]. A banker who takes an unreasonable time in presenting a cheque paid in by his customer is liable to his customer for the loss (if any) which results from the delay[16].

1 As to the meaning of 'bill' see PARA 1405.
2 As to the meaning of 'banker' see PARA 1403 note 7.
3 See the Bills of Exchange Act 1882 s 73; and PARA 1405.
4 Bills of Exchange Act 1882 ss 45(2), 73. See PARA 881. As to presentment for payment of bills and notes see PARA 1516.
5 As to the meaning of 'drawer' see PARA 1406. As to discharge of parties see PARA 1564 et seq.
6 *Robinson v Hawksford* (1846) 9 QB 52; *Laws v Rand* (1857) 3 CBNS 442; *King and Boyd v Porter* [1925] NI 107, CA.
7 As to claims barred by lapse of time see PARA 1604. As to limitation periods generally see LIMITATION OF ACTIONS.
8 As to the meaning of 'person' see PARA 1401 note 4.
9 Bills of Exchange Act 1882 s 74(1). The extent of the damage is the extent to which the drawer or the person on whose account the cheque is drawn is a creditor of the banker to a larger amount than he would have been had the cheque been paid: s 74(1). See PARA 881.
10 As to the meaning of 'holder' see PARA 1407.
11 Bills of Exchange Act 1882 s 74(3).
12 As to the meaning of 'indorser' see PARA 1407 note 8.
13 Bills of Exchange Act 1882 ss 45(2), 73. As to the meaning of 'indorsement' see PARA 1407.
14 As to the meaning of 'instrument' see PARA 1402 note 1.
15 Bills of Exchange Act 1882 s 74(2); *Serle v Norton* (1841) 2 Mood & R 401. The provision as to reasonable time is held to be complied with where (1) the holder and the banker on whom it is drawn are in the same place, if the cheque is presented for payment on the day after it is received (*Alexander v Burchfield* (1842) 7 Man & G 1061); and (2) the holder and the banker on whom it is drawn are in different places, if the cheque is forwarded for presentment for payment on the day after it is received, and the agent to whom it is forwarded presents it or again forwards it on the day after he receives it: *Hare v Henty* (1861) 30 LJCP 302; *Prideaux v Criddle* (1869) LR 4 QB 455. But allowance will be made for special circumstances, eg where the payee is ill: *Firth v Brooks* (1861) 4 LT 467. In determining the question, non-business days (see PARA 1437) must of course be excluded.
16 *Hare v Henty* (1861) 30 LJCP 302; cf *Forman v Bank of England* (1902) 18 TLR 339. See further PARA 881.

1520. Proper place of presentment: bills and notes. A bill or note[1] is presented at the proper place when a place of payment is specified in the instrument[2], and it is presented there[3]; if alternative places are specified, then presentment may be made at either[4].

Where a note is in the body of it made payable at a particular place, it must be presented at that place in order to render either the maker[5] or an indorser[6] liable[7], but where a place of payment is indicated by way of memorandum only, presentment at that place will render the indorser liable, while a presentment to the maker elsewhere, if sufficient in other respects, is equally effective[8].

Where no place of payment is specified, but the address of the person[9] to make payment is given in the instrument, it may be there presented[10]. Where no place is specified, and no address is given, the instrument may be presented at the usual place of business, if known, and if not, then at the ordinary residence, if known, of the person to make payment[11]. In any other case, the instrument may be presented to the person to make payment wherever he can be found or at his last known place of business or residence[12].

Where an instrument is presented at the proper place, and after the exercise of reasonable diligence no person authorised to pay or to refuse payment can be found there, no further presentment to the person primarily liable is required[13].

If two or more persons, who are not partners, are primarily liable, and no place of payment is specified, presentment must be made to them all[14], unless one of them has authority to act for the others[15].

If the person primarily liable is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be and if, with the exercise of reasonable diligence, he can be found[16].

1 As to the meanings of 'bill' and 'note' see PARA 1405.
2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 Bills of Exchange Act 1882 ss 45(4)(a), 87. The place may be specified either by the drawer (*Gibb v Mather* (1832) 2 Cr & J 254) or by the acceptor (*Saul v Jones* (1858) 28 LJQB 37). See also *Yeoman Credit Ltd v Gregory* [1963] 1 All ER 245, [1963] 1 WLR 343. As to presentment for payment of bills and notes see PARA 1516. As to cheques drawn on a branch see PARA 881. As to provisions relating to alternative places of presentment of cheques see PARA 1521.
4 *Beeching v Gower* (1816) Holt NP 313.
5 Bills of Exchange Act 1882 s 87(1); *Spindler v Grellett* (1847) 1 Exch 384; *Sands v Clarke* (1849) 8 CB 751. 'In the body of it' means in the terms of the actual contract to pay: *Re British Trade Corpn* [1932] 2 Ch 1, CA. As to the meaning of 'maker' see PARA 1406.
6 As to the meaning of 'indorser' see PARA 1407 note 8.
7 Bills of Exchange Act 1882 s 87(3); *Roche v Campbell* (1812) 3 Camp 247. Presentment for payment at the specified place is of the essence of a claimant's cause of action upon a bill so expressed and accordingly a defence of failure to comply with that requirement is not a statutory defence and need not be pleaded in the county court: *Pritchard v Couch* (1913) 57 Sol Jo 342.
8 Bills of Exchange Act 1882 s 87(3); *Saunderson v Judge* (1795) 2 Hy Bl 509; *Price v Mitchell* (1815) 4 Camp 200; *Williams v Waring* (1829) 10 B & C 2; *Masters v Baretto* (1849) 8 CB 433.
9 As to the meaning of 'person' see PARA 1401 note 4.
10 Bills of Exchange Act 1882 s 45(4)(b); *Buxton v Jones* (1840) 1 Man & G 83.
11 Bills of Exchange Act 1882 s 45(4)(c); cf *Crosse v Smith* (1813) 1 M & S 545.
12 Bills of Exchange Act 1882 s 45(4)(d).
13 Bills of Exchange Act 1882 s 45(5); *Hine v Allely* (1833) 4 B & Ad 624. See also *Bailey v Porter* (1845) 14 M & W 44 (where it was decided that where a bill is accepted payable at a banker's, and that banker becomes the holder, further presentment is superfluous). As to the person primarily liable see PARA 1516 note 9.
14 Bills of Exchange Act 1882 s 45(6).
15 See the Bills of Exchange Act 1882 s 41(1)(b); and PARA 1511.
16 Bills of Exchange Act 1882 s 45(7).

1521. Alternative place of presentment: cheques. Where the banker[1] on whom a cheque[2] is drawn has by notice published in the London, Edinburgh and Belfast Gazettes specified an address at which cheques drawn on him may be

presented[3]; and has not by notice so published cancelled the specification of that address[4], the cheque is also presented at the proper place if it is presented there[5].

1 As to the meaning of 'banker' see PARA 1403 note 7.
2 As to the meaning of 'cheque' see PARA 1405.
3 Bills of Exchange Act 1882 s 74A(a) (s 74A added by SI 1996/2993). As to the proper place of presentment for bills and notes see PARA 1520.
4 Bills of Exchange Act 1882 s 74A(b) (as added: see note 3).
5 Bills of Exchange Act 1882 s 74A (as added: see note 3).

1522. Mode of presentment. Presentment for payment, to be sufficient, must be made personally by the holder[1] or by some person[2] authorised to receive payment on his behalf[3], except where presentment through a postal operator[4] is authorised by special agreement or general usage[5]. Moreover, presentment for payment must be made at a reasonable hour[6], on a business day[7], and at the proper place[8]; and it must be made to the person designated by the bill[9] as payer[10], or to some person authorised to pay or to refuse payment on his behalf, if with the exercise of reasonable diligence such person can be found at the place of presentment[11].

It is the duty of the holder, when he presents an instrument[12] for payment, to exhibit it to the person from whom payment is demanded, and on receiving payment to deliver it up to the party paying it[13].

1 As to the meaning of 'holder' see PARA 1407.
2 As to the meaning of 'person' see PARA 1401 note 4.
3 Bills of Exchange Act 1882 s 45(3). As to presentment for payment see PARA 1516. The person who presents the instrument must be able to give a valid discharge in case of payment (see s 41(1)(a); and PARA 1510); where the presentment is made by an agent of the holder, the agent is bound to use due diligence on behalf of his principal: *Bank of Van Diemen's Land v Bank of Victoria* (1871) LR 3 PC 526.
4 As to the meaning of 'postal operator' see PARA 1510 note 10.
5 Bills of Exchange Act 1882 s 45(8) (amended by SI 2001/1149); *Heywood v Pickering* (1874) LR 9 QB 428. An alternative means of presentment for payment is also available to a banker when presenting a cheque for payment: see PARA 1523.
6 Where the bill is payable at a bank presentment must be within banking hours: *Parker v Gordon* (1806) 7 East 385; *Whitaker v Bank of England* (1835) 6 C & P 700. The inference that presentment was within such hours cannot be drawn from it being made by a notary: *Elford v Teed* (1813) 1 M & S 28. Where it is payable at the business premises of a merchant or trader, the hours are not so strict (*Barclay v Bailey* (1810) 2 Camp 527), nor at those of a solicitor (*Triggs v Newnham* (1825) 1 C & P 631; subsequent proceedings 10 Moore CP 249). In both these cases the time was 8 pm. When at a private house, in the opinion of the court 12 midnight would be unreasonable, but 7 to 8 pm would not, though at the time the house was shut up, and there was no one there to pay the bill: *Wilkins v Jadis* (1831) 2 B & Ad 188.
7 As to what is a business day see PARA 1437. As to when the instrument falls due on a non-business day see the Bills of Exchange Act 1882 s 14; and PARA 1437.
8 As to the proper place see PARA 1520.
9 As to the meaning of 'bill' see PARA 1405.
10 In general this will be the acceptor or the drawee of a bill or the maker of a note.
11 Bills of Exchange Act 1882 s 45(3).
12 As to the meaning of 'instrument' see PARA 1402 note 1.
13 Bills of Exchange Act 1882 s 52(4); *Ramuz v Crowe* (1847) 1 Exch 167. This duty is dispensed with where the alternative means of presentment applicable to cheques is used: see PARA 1523. As to the case of a bill lost or destroyed see PARA 1507.

1523. Alternative means of presentment: cheques. Where a banker[1] presents a cheque[2] for payment to the banker on whom it is drawn, he may simply notify to the latter its essential features[3] by electronic means or otherwise instead of

presenting the cheque itself[4], and this renders both bankers subject to the same duties in relation to the collection and payment of the cheque as if the cheque itself had been presented for payment[5].

Where a cheque is presented for payment in this way, presentment need not be made at the proper place or at a reasonable hour on a business day[6]; nor do the duties to present an instrument[7] for payment and to deliver the instrument up after payment[8] apply[9].

1 As to the meaning of 'banker' see PARA 1403 note 7.
2 As to the meaning of 'cheque' see PARA 1405.
3 For these purposes, the essential features of a cheque are: (1) the serial number of the cheque; (2) the code which identifies the banker on whom the cheque is drawn; (3) the account number of the drawer of the cheque; and (4) the amount of the cheque is entered by the drawer of the cheque: Bills of Exchange Act 1882 s 74B(6) (s 74B added SI 1996/2993). Although, under head (4) above, the word 'is' appears in the Queen's printers copy of the statutory instrument, the word 'as' appears to be intended.
4 Bills of Exchange Act 1882 s 74B(1) (as added: see note 3). This mode of presentment has effect in relation to cheques drawn on or after 28 November 1996: Deregulation (Bills of Exchange) Order 1996, SI 1996/2993, art 4(2).
5 Bills of Exchange Act 1882 s 74B(5) (as added: see note 3). However, if, before the close of business on the next business day following such a presentment, the banker on whom the cheque is drawn requests the banker by whom the cheque was presented to present the cheque itself then (1) the presentment must be disregarded; and (2) this mode of presentment will not apply to the subsequent presentment of the cheque: s 74B(3)(a), (b) (as so added). Such a request for the presentment of a cheque does not constitute dishonour of the cheque by non-payment: s 74B(4) (as so added).
6 Bills of Exchange Act 1882 s 74B(2) (as added: see note 3). As to what constitutes a reasonable hour, a business day and the proper place when this alternative mode of presentment does not apply see PARA 1522.
7 As to the meaning of 'instrument' see PARA 1402 note 1.
8 Ie as required by the Bills of Exchange Act 1882 s 52(4): see PARA 1522.
9 Bills of Exchange Act 1882 s 74C (added by SI 1996/2993).

C. NOTICE OF DISHONOUR

1524. Necessity for notice of dishonour. As in the case of dishonour by non-acceptance[1], so also in that of dishonour by non-payment[2], notice of dishonour must be given to the drawer[3] and each indorser[4]; otherwise the drawer or any indorser to whom such notice is not given is discharged[5]. But where a bill[6] has been dishonoured by non-acceptance, and due notice of dishonour has been given, it is unnecessary to give notice of a subsequent dishonour by non-payment unless the bill has in the meantime been accepted[7].

The rules for giving due notice of dishonour[8] are the same whether the dishonour has been by non-acceptance or non-payment.

1 See PARA 1515 (where also the effect on the rights of a subsequent holder in due course of want of dishonour by non-acceptance is described).
2 As to dishonour by non-payment see PARA 1525.
3 As to the meaning of 'drawer' see PARA 1406.
4 Bills of Exchange Act 1882 s 48. As to the meaning of 'indorser' see PARA 1407 note 8. A drawer or indorser is not liable until he has received notice: *Warrington v Furbor* (1807) 8 East 242; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL. As to the necessity for protest on dishonour see PARAS 1542–1543.
5 Bills of Exchange Act 1882 s 48; and see *Yeoman Credit Ltd v Gregory* [1963] 1 All ER 245, [1963] 1 WLR 343. Cf *Forster v Jurdison* (1812) 16 East 105 (where the holder of a bill gave notice to the drawer of dishonour, but added that, having reason to believe that it would be taken up on behalf of the acceptor, he would hold it (unless the drawer sent instructions to the contrary) until the end of the week; this was held a sufficient notice to make the drawer liable without further notice at the expiration of the week). Mere knowledge that the bill is

dishonoured is not an equivalent to notice: *Cory v Scott* (1820) 3 B & Ald 619, distinguishing *Bickerdike v Bollman* (1786) 1 Term Rep 405; *Caunt v Thompson* (1849) 7 CB 400; *Re Fenwick, Stobart & Co, Deep Sea Fishery Co's (Ltd) Claim* [1902] 1 Ch 507; *Carter v Flower* (1847) 16 M & W 743. As to discharge of parties see PARA 1564 et seq.

6 As to the meaning of 'bill' see PARA 1405.

7 See the Bills of Exchange Act 1882 s 48(2); and PARA 1515.

8 See PARA 1526 et seq.

1525. Dishonour by non-payment. An instrument[1] is dishonoured by non-payment either when it is duly presented for payment and payment is refused or cannot be obtained, or when, presentment being excused, the instrument is overdue and unpaid[2].

There accrues to the holder[3] immediately after dishonour by non-payment the right of recourse against all persons[4] secondarily liable on the instrument[5]. The onus of proof of dishonour, that is, that the right of action has arisen, lies on the claimant suing on the bill[6].

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 Bills of Exchange Act 1882 s 47(1). As to presentment for payment and excuses for non-presentment see PARA 1516 et seq.

3 As to the meaning of 'holder' see PARA 1407.

4 As to the meaning of 'person' see PARA 1401 note 4.

5 Bills of Exchange Act 1882 s 47(2). This right is stated to be subject to the provisions of the Act: relevant provisions include s 16(1) (enabling a drawer or indorser to negative or limit his liability) (see PARA 1440), s 48 (dealing with notice) (see PARA 1524), s 51 (dealing with protest) (see PARAS 1537–1549) and ss 65–68 (dealing with bills accepted for honour) (see PARAS 1566–1570).

6 *Castrique v Bernabo* (1844) 6 QB 498. As to the meaning of 'bill' see PARA 1405.

1526. By whom and for whom notice may be given. Notice of dishonour must be given by or on behalf of the holder[1], or by or on behalf of an indorser[2] who at the time of giving it is himself liable on the instrument[3].

If the instrument is in an agent's hands when dishonoured, the agent may give notice either to his principal or to the parties liable on the instrument[4], and if he adopts the latter course he may give notice in his own name or in the name of any party entitled to give notice, whether that party is his principal or not[5].

1 As to the meaning of 'holder' see PARA 1407.

2 As to the meaning of 'indorser' see PARA 1407 note 8.

3 Bills of Exchange Act 1882 s 49(1). As to the meaning of 'instrument' see PARA 1402 note 1.

4 Bills of Exchangte Act 1882 s 49(13); *Clode v Bayley* (1843) 12 M & W 51.

5 Bills of Exchange Act 1882 s 49(2); *Lysaght v Bryant* (1850) 19 LJCP 160. Where an agent for one party to an instrument gives notice by mistake on behalf of another party (for whom he is not agent), this does not avoid the notice, but any defence in relation thereto, available against the party in whose name notice was given, may be set up: *Harrison v Ruscoe* (1846) 15 M & W 231. As to the time for giving notice see PARA 1531.

1527. Effect of notice. Notice given by or on behalf of the holder[1] enures for the benefit of all subsequent holders and all prior indorsers[2] who have a right of recourse against the party to whom it is given[3].

Where given by or on behalf of an indorser entitled to give notice[4], it enures for the benefit of the holder[5] and all indorsers subsequent to the party to whom notice is given[6].

1 As to the meaning of 'holder' see PARA 1407.

2 As to the meaning of 'indorser' see PARA 1407 note 8.

3 Bills of Exchange Act 1882 s 49(3).

4 See PARA 1526.

5 Including, no doubt, a subsequent holder.
6 Bills of Exchange Act 1882 s 49(4).

1528. To whom notice must be given. It is unnecessary in order to render the acceptor[1] of a bill[2] or the maker[3] of a note[4] liable on it that he should be given notice of dishonour[5]. But in order to render the drawer[6] or any indorser[7] liable notice is, as a rule, necessary[8].

It is for the holder[9] to give notice to such parties as he desires to charge. He may give notice to all prior parties or only to his immediate indorser, and the latter may in turn give notice to his immediate indorser, and so forth until the chain is complete up to the drawer himself[10].

However, the sequence may be broken at any point by a failure to give notice within the proper time, the effect of which is to release from liability all parties antecedent to the indorser who has thus broken the sequence[11]. In addition to this, there is the increased difficulty of proving the sending of notice in each case. Hence it is the more prudent course for the holder to give notice to all prior parties at once.

1 As to the meaning of 'acceptor' see PARA 1406.
2 As to the meaning of 'bill' see PARA 1405.
3 As to the meaning of 'maker' see PARA 1406.
4 As to the meaning of 'note' see PARA 1405.
5 Bills of Exchange Act 1882 ss 52(3), 89(1), (2); *Pearse v Pemberthy* (1812) 3 Camp 261.
6 As to the meaning of 'drawer' see PARA 1406.
7 As to the meaning of 'indorser' see PARA 1407 note 8.
8 Bills of Exchange Act 1882 ss 48, 89(1), (2). For the exceptions see PARA 1529.
9 As to the meaning of 'holder' see PARA 1407.
10 *Rowe v Tipper* (1853) 13 CB 249.
11 See *Harrison v Ruscoe* (1846) 15 M & W 231 at 234 per Parke B.

1529. When notice unnecessary. In the case of the drawer[1], notice of dishonour is not required[2] where: (1) the drawer and the drawee[3] are the same person[4]; (2) the drawee is a fictitious person or a person not having the capacity to contract[5]; (3) the drawer is the person to whom the bill is presented for payment[6]; (4) the drawee or acceptor[7] is as between himself and the drawer under no obligation to accept or pay the bill[8]; (5) the drawer has countermanded payment.

In the case of an indorser[9] it is not required[10] where: (a) the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time that he indorsed the instrument[11]; (b) the indorser is the person to whom the bill is presented for payment; (c) the instrument was accepted or made for his accommodation.

As regards persons who are not parties to the instrument, notice of dishonour is not required in the case of guarantors[12], but it would seem that persons who are liable on the consideration are entitled to notice[13].

1 As to the meaning of 'drawer' see PARA 1406.
2 Bills of Exchange Act 1882 s 50(2)(c). In all these cases the drawer is in the position, usually occupied by the acceptor, of the person primarily liable; see PARAS 1456–1457. In the first and second case the instrument may be treated at the option of the holder as a bill or note: s 5(2); see PARA 1408.
3 As to the meaning of 'drawee' see PARA 1406.
4 As to the meaning of 'person' see PARA 1401 note 4. As to the drawer and drawee being the same person see PARA 1408.
5 As to fictitious or non-existing payees see PARA 1431. As to restrictions on capacity see PARA 1469.

6 In this case the drawer has first-hand knowledge of the payment or non-payment of the bill: *Caunt v Thompson* (1849) 7 CB 400. As to the meaning of 'bill' see PARA 1405.
7 As to the meaning of 'acceptor' see PARA 1406.
8 Ie where the bill is an accommodation bill (under the Bills of Exchange Act 1882 s 28); see PARA 1482. Where the drawer of a bill makes it payable at his own house, that fact is evidence that the bill is a mere accommodation bill: *Sharp v Bailey* (1829) 9 B & C 44.
9 As to the meaning of 'indorser' see PARA 1407 note 8.
10 Bills of Exchange Act 1882 s 50(2)(d). In these cases, again, the indorser is in the position of a party primarily liable on the instrument. However where the indorser for whose accommodation the instrument was accepted or made is not the first indorser, the previous indorsers cannot be sued unless they have had notice of dishonour: *Turner v Samson* (1876) 2 QBD 23, CA. Even where the indorser gave no value for the instrument, the holder is not absolved from the duty of giving notice of dishonour: *Carter v Flower* (1847) 16 M & W 743.
11 As to the meaning of 'instrument' see PARA 1402 note 1.
12 *Carter v White* (1883) 25 ChD 666, CA.
13 *Smith v Mercer* (1867) LR 3 Exch 51 (where the defendants gave an approved banker's bill to the plaintiffs for the price of goods supplied; the bill was dishonoured at maturity, but the defendants did not receive notice thereof; on action brought for the price of the goods it was held that both on principle and on authority, if the plaintiffs meant to have recourse to the defendants, they should have given them notice upon finding the bill was dishonoured); *Camidge v Allenby* (1827) 6 B & C 373; *Robson v Oliver* (1847) 10 QB 704; contra *Swinyard v Bowes* (1816) 5 M & S 62; *Van Wart v Woolley* (1824) 3 B & C 439.

1530. Notice to party liable or his agent, etc. Notice may be given to any party whom it is sought to render liable by giving it either to the party himself or to his agent in that behalf[1].

If the drawer[2] or indorser[3] is dead to the knowledge of the party giving notice, the notice must be given to a personal representative of the deceased, if there is one and if with reasonable diligence he can be found[4]. If the drawer or indorser is bankrupt[5], notice may be given either to the party himself or to his trustee in bankruptcy[6].

Where there are two or more parties to be made jointly liable, and they are partners, notice to any one partner is notice to all[7], but where they are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others[8].

1 Bills of Exchange Act 1882 s 49(8). In general, notice delivered at the business premises of the party is sufficient (*Crosse v Smith* (1813) 1 M & S 545; *Allen v Edmundson* (1848) 2 Exch 719 at 723; *Viale v Michael* (1874) 30 LT 463; and cf *The Elmville* [1904] P 319); and in the case of a non-trader a message orally given to the wife of the party has been held a valid notice: *Housego v Cowne* (1837) 2 M & W 348. It would appear that, if one person makes another his agent for the purpose of indorsing an instrument, that person is also an agent for the purpose of receiving notice of dishonour (*Firth v Thrush* (1828) 8 B & C 387 at 391 per Lord Tenterden); but where the name of a person is inserted by an indorser as a referee in case of need (as to which see PARA 1409), notice to that person is insufficient (*Re Leeds Banking Co, ex p Prange* (1865) LR 1 Eq 1). For the purpose of receiving notice each branch of a bank must be considered as a separate entity: *Clode v Bayley* (1843) 12 M & W 51. See also *Fielding & Co v Corry* [1898] 1 QB 268, CA. Where there were three separate companies, and company No 1 had drawn a bill on company No 2 to its own order and indorsed it to company No 3, notice of dishonour to No 3 must not be taken to be notice to No 1, although No 1 and No 3 had the same secretary, for, on the particular facts of the case, the secretary knew of the dishonour as secretary of No 3 in circumstances in which it was not his duty to communicate it to company No 1: *Re Fenwick, Stobart & Co, Deep Sea Fishery Co's (Ltd) Claim* [1902] 1 Ch 507. See also AGENCY vol 1 (2008) PARA 138.
2 As to the meaning of 'drawer' see PARA 1406.
3 As to the meaning of 'indorser' see PARA 1407 note 8.
4 Bills of Exchange Act 1882 s 49(9). Presumably, if there is no personal representative, notice may be sent to the last residence or last place of business of the deceased: see PARA 1520 text to note 11, where similar contingencies are provided for in the case of presentment for payment.
5 As to the meaning of 'bankrupt' see PARA 1514 note 4.

6 Bills of Exchange Act 1882 s 49(10); *Re Bellman, ex p Baker* (1877) 4 ChD 795, CA.
7 So even where the drawer is one of the partners in a firm which accepted a bill, the notice received by any member of the firm of the dishonour of the bill is sufficient to bind the partner who drew the bill (*Hills v Thorowgood* (1836) 5 LJKB 214); and where a bill drawn by partners is dishonoured after the dissolution of the partnership, notice of dishonour to the continuing partner is sufficient notice to the retiring partner (*Goldfarb v Bartlett and Kremer* [1920] 1 KB 639). As to partnerships see PARA 1467.
8 Bills of Exchange Act 1882 s 49(11). Quaere whether, if the joint parties are not partners, notice to one of them would bind even him.

1531. Time of notice. Time is an element of the utmost importance in regard to the due sending of notice of dishonour[1].

Notice may be given as soon as the instrument[2] is dishonoured[3], and it must at all events be given within a reasonable time thereafter[4]. What is a 'reasonable time' must, as in the case of presentment for payment[5], be to some extent a matter of fact dependent upon the circumstances of the case[6]; but in respect of notices of dishonour the rules laid down by law for its determination are much more precise.

In the absence of special circumstances[7], notice is not deemed to have been given within a reasonable time unless (1) where the party giving and the party to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the instrument[8]; or (2) where the party giving and the party to receive notice reside in different places, the notice is sent off on the day after the dishonour of the instrument, if there is a post at a convenient hour on that day, or, if there is no such post on that day, then by the next post thereafter[9].

As notice of dishonour is one of the things required by the statute to be done in less than three days, non-business days are excluded in reckoning the time[10].

1 As to the necessity for notice of dishonour see PARA 1524.
2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 Bills of Exchange Act 1882 s 49(12). As to time for giving notice see *Yeoman Credit Ltd v Gregory* [1963] 1 All ER 245 at 255. As to notice given on the same day as dishonour where dishonour was certain see *Eaglehill Ltd v J Needham Builders Ltd* [1973] AC 992, [1972] 3 All ER 895, HL. The time when notice was given may be a matter for inference: see *Ladup Ltd v Shaikh* [1983] QB 225 at 233, [1982] 3 WLR 172 at 177.
4 Bills of Exchange Act 1882 s 49(12); *Hirschfeld v Smith* (1866) LR 1 CP 340.
5 See PARAS 1518–1519.
6 See *The Elmville* [1904] P 319 at 330 per Gorell Barnes J.
7 'Special circumstances' is a term which is no doubt intended to leave the court a wide discretion. It would cover the facts in *The Elmville* [1904] P 319 (notice delivered as soon as possible after inquiries made). It would also cover the facts in a case where an indorsee, who was a Jew, omitted to send notice on a Jewish festival, on which he was forbidden by his religious law to attend to secular business: *Lindo v Unsworth* (1811) 2 Camp 602. In *Lombard Banking Ltd v Central Garage and Engineering Co Ltd* [1963] 1 QB 220, [1962] 2 All ER 949, it was held that where the plaintiffs sent off notices of dishonour only after the dishonoured bills were returned to them by their bankers, they acted reasonably and that the circumstances were special exempting them from the timetable set out in the Bills of Exchange Act 1882 s 49(12), (13). As to s 49(13) see PARA 1532.
8 Bills of Exchange Act 1882 s 49(12)(a). See *Yeoman Credit Ltd v Gregory* [1963] 1 All ER 245, [1963] 1 WLR 343. If, in the ordinary course of post, the notice would reach its destination on the right day, it is sufficient (*Hilton v Fairclough* (1811) 2 Camp 633), but where an indorser received notice one day and posted it on so late on the following day that the next party in order received it on the day after that, it was held insufficient (*Smith v Mullett* (1809) 2 Camp 208). As to what is the 'same place' see *Hamilton Finance Co Ltd v Coverley Westray, Walbaum and Tosetti Ltd and Portland Finance Co Ltd* [1969] 1 Lloyd's Rep 53.
9 Bills of Exchange Act 1882 s 49(12)(b); *Williams v Smith* (1819) 2 B & Ald 496.
10 See the Bills of Exchange Act 1882 s 92; and PARA 1437. Where a bill was dishonoured in a place where the post went out at 9.30 am and the day was Saturday, it was held a sufficient

notice when sent out by the post on Tuesday morning: *Hawkes v Salter* (1828) 4 Bing 715. So, too, an indorser who received notice on a Sunday was held to have given sufficient notice by sending it out on Tuesday morning, for he was not obliged to open the letter apprising him of the dishonour on the Sunday: *Wright v Shawcross* (1819) 2 B & Ald 501n.

1532. Time for passing on notice. Where a party receives due notice of dishonour, he has the same period of time after the receipt of such notice for giving notice to antecedent parties as the holder[1] has after the dishonour[2].

So, too, if a dishonoured instrument[3] is in the hands of an agent who elects to give notice to his principal instead of to the parties liable on the instrument, he must give the notice within the same time as if he were the holder, and the principal upon receipt of the notice has himself the same time for giving notice as if the agent had been an independent holder[4].

1 As to the meaning of 'holder' see PARA 1407.

2 Bills of Exchange Act 1882 s 49(14); *Rowe v Tipper* (1853) 13 CB 249. As to whom notice of dishonour must be given see PARA 1528. In the case of a sequence of holders, each successive notice must be given in due time, so that, if there has between any parties been a failure to give such due notice, a prior party cannot be made liable by showing that, having regard to the total time between the dishonour and the time that such prior party has received notice, he has received it as soon as he should; for where the break in the sequence occurred the party to whom notice was given too late has become a stranger to the bill, and cannot himself give notice to another: *Turner v Leech* (1821) 4 B & Ald 451. The fact that a party sent notice to an indorser, which notice, owing to the intervention of a Sunday, might have been sent to reach that indorser a day later than it actually did, does not excuse the latter for not sending notice to the drawers within the required time: *Miers v Brown* (1843) 11 M & W 372. See also *Studdy v Beesty and Higgins* (1889) 60 LT 647, CA.

3 As to the meaning of 'instrument' see PARA 1402 note 1. As to dishonour by non-acceptance see PARA 1515. As to dishonour by non-payment see PARA 1525.

4 Bills of Exchange Act 1882 s 49(13); *Clode v Bayley* (1843) 12 M & W 51; *Goodall v Polhill* (1845) 14 LJCP 146; *Prince v Oriental Bank Corpn* (1878) 3 App Cas 325, PC; *Fielding & Co v Corry* [1898] 1 QB 268, CA. The principal may not add on to his own time for giving notice any time saved by the agent in giving notice to him: *Yeoman Credit Ltd v Gregory* [1963] 1 All ER 245, [1963] 1 WLR 343.

1533. Delay in giving notice. Delay in giving notice of dishonour is excused when the delay is caused by circumstances which are beyond the control of the party giving notice and are not imputable to his default, misconduct or negligence, but when the cause of delay ceases to operate the notice must be given with reasonable diligence[1].

1 Bills of Exchange Act 1882 s 50(1); see *The Elmville* [1904] P 319, cited in PARA 1531 note 7. See also *Gladwell v Turner* (1870) LR 5 Exch 59 (where all the parties lived in the same place; on the morning after the bill was dishonoured the holder applied to his indorser for information as to the residence of the drawer; his indorser was out at the time, and although he obtained the information from him later in the day and then posted notice to the drawer, the notice did not reach the drawer that day, as it should have done; it was held, however, that he had acted with reasonable diligence, and the notice was therefore sufficient). As to delay in post see *Hamilton Finance Co Ltd v Coverley Westray, Walbaum and Tosetti Ltd and Portland Finance Co Ltd* [1969] 1 Lloyd's Rep 53 at 74.

1534. Form and service of notice. Notice may be given in writing[1] or by personal communication[2]. When it is in writing it need not be delivered personally. It may be sent through the post, and in that case if it is duly addressed and posted, a fact which it rests with the sender to prove, the sender is absolved from liability for any miscarriage by a postal operator[3].

It may also be sent by special messenger[4], but if it thereby reaches its destination on a later day than that on which it would have been delivered in the ordinary course by a postal operator, it is ineffectual[5].

A written notice need not be signed[6], and an insufficient written notice may be supplemented and validated by oral communication[7].

It may be given in any terms which sufficiently identify the instrument[8] and intimate that it has been dishonoured by non-acceptance or non-payment, as the case may be[9].

A misdescription of the instrument does not vitiate the notice unless the party to whom notice is given is in fact misled thereby[10].

The return of a dishonoured instrument to the drawer[11] or indorser[12] is in point of form deemed to be a sufficient notice of dishonour[13].

1 As to the meaning of 'writing' see PARA 1405 note 2.

2 Bills of Exchange Act 1882 s 49(5); *Metcalfe v Richardson* (1852) 11 CB 1011; *Prideaux v Criddle* (1869) LR 4 QB 455. As to the necessity for notice of dishonour see PARA 1524.

3 Bills of Exchange Act 1882 s 49(15) (amended by SI 2001/1149). As to the meaning of 'postal operator' see PARA 1510 note 10; *Dobree v Eastwood* (1827) 3 C & P 250. As to being duly addressed, the notice should be sent to the place of business of the person whom it is desired to notify, or to his residence: *Berridge v Fitzgerald* (1869) LR 4 QB 639. It should not in general be addressed to Messrs ———— at some larger place, eg London (*Walter v Haynes* (1824) Ry & M 149); but where the party in question has so described himself on the instrument, such an address will suffice (*Burmester v Barron* (1852) 17 QB 828). Where notice was by mistake sent to the wrong branch of a large bank, a subsequent telegram correcting the address has been held sufficient: *Fielding & Co v Corry* [1898] 1 QB 268, CA. As to due posting see *Saunderson v Judge* (1795) 2 Hy Bl 509.

4 See *Pearson v Crallan* (1805) 2 Smith KB 404.

5 *Darbishire v Parker* (1805) 6 East 3.

6 Bills of Exchange Act 1882 s 49(7); *Armstrong v Christiani* (1848) 5 CB 687. As to a banker giving notice see *Maxwell v Brain* (1864) 10 LT 301.

7 Bills of Exchange Act 1882 s 49(7); cf *Fielding & Co v Corry* [1898] 1 QB 268, CA.

8 As to the meaning of 'instrument' see PARA 1402 note 1.

9 Bills of Exchange Act 1882 s 49(5). As to dishonour by non-acceptance see PARA 1515. As to dishonour by non-payment see PARA 1525. See *Caunt v Thompson* (1849) 7 CB 400 at 411 per Cresswell J, summing up the previous cases ('In substance these cases seem to establish that in order to make a prior holder responsible he must derive from some person entitled to call for payment information that the bill has been dishonoured, and that the party is in a condition to sue him, from which he may infer that he is responsible'). Cf *Hedger v Steavenson* (1837) 2 M & W 799 at 805 per Parke B, holding that if the notice discloses by a reasonable intendment, and if it would be inferred from it by any man of business, that the bill had been presented to the acceptor and had not been paid by him, it is sufficient, although it does not so state in terms. See also *Paul v Joel* (1859) 4 H & N 355 (which points out that the contrary decision in *Solarte v Palmer* (1834) 1 Bing NC 194 was a decision on particular facts only) and *Bailey v Porter* (1845) 14 M & W 44.

As to what is a sufficient description of the bill see *Shelton v Braithwaite* (1841) 7 M & W 436 (which decides that, if it is set up that there is more than one bill to which the notice might apply, proof thereof lies on the defendant).

10 Bills of Exchange Act 1882 s 49(7); *Bromage v Vaughan* (1846) 9 QB 608; *Mellersh v Rippen* (1852) 7 Exch 578. In *Rowlands v Springett* (1845) 14 LJEx 227, a card was left at the house of the drawer of a bill with the name and address of an indorser, and on the back was written 'Bill for £30 drawn by S on W dishonoured lies due as on the other side'; in fact, the indorser was not then the holder, and the bill was not at his address, but the notice was held sufficient. It is immaterial if in the notice the instrument is described as a note when it should have been a bill (*Stockman v Parr* (1843) 11 M & W 809), or vice versa (*Messenger v Southey* (1840) 1 Man & G 76); nor is it material if the capacities in which the parties sign the bill are wrongly described: *Mellersh v Rippen* (1852) 7 Exch 578.

11 As to the meaning of 'drawer' see PARA 1406.

12 As to the meaning of 'indorser' see PARA 1407 note 8.

13 Bills of Exchange Act 1882 s 49(6).

1535. When notice dispensed with. Notice of dishonour is dispensed with altogether where despite the exercise of reasonable diligence it cannot be given to or does not reach the drawer[1] or indorser[2] whom it is sought to charge[3].

1 As to the meaning of 'drawer' see PARA 1406.
2 As to the meaning of 'indorser' see PARA 1407 note 8.
3 Bills of Exchange Act 1882 s 50(2)(a). As to the necessity for notice of dishonour otherwise see PARA 1524. The question of reasonable diligence is a question of fact in each case: *Bateman v Joseph* (1810) 12 East 433. Where the drawer told the holder before maturity that he had no regular residence, and would call and see if the bill was honoured by the acceptor, the holder was held absolved from the duty of giving notice to him: *Phipson v Kneller* (1815) 4 Camp 285. So, too, where the holder went to the place of business of the drawer and found it shut up, it was held that notice might be dispensed with (*Allen v Edmundson* (1848) 2 Exch 719), but where the holder failed to find the drawer at the address given, yet was afterwards, but before action brought, informed of a place where the drawer was to be found, he was held not to be absolved from the duty of giving notice (*Studdy v Beesty and Higgins* (1889) 60 LT 647, CA).

1536. Waiver of notice. Notice of dishonour may be waived expressly[1] or by implication[2], and either before the time for giving notice has arrived[3], or after the omission to give[4] due notice[5]; but an admission of liability by the drawer[6] or an indorser[7] must be made with full knowledge of the facts, or it will not operate as a waiver of notice[8].

1 As to express waiver see the Bills of Exchange Act 1882 s 16(2); and PARA 1440. If the drawer or an indorser so waives his right to notice of dishonour, no subsequent party need give him notice, but it does not affect the duty of giving notice to prior parties: *Turner v Leech* (1821) 4 B & Ald 451.
2 As to implied waiver, suffering judgment by default in an action by the second indorser is evidence of notice or of a waiver of notice in a claim by the first indorser: *Rabey v Gilbert* (1861) 6 H & N 536.
3 *Phipson v Kneller* (1815) 4 Camp 285 (where the drawer, who had told the holder that he had no fixed address, promised, shortly before the bill fell due, to call in a few days to see if the bill had been paid); *Brett v Levett* (1811) 13 East 213 (where the drawer told the holder that the bill would not be paid when it fell due).
4 *Mills v Gibson* (1847) 16 LJCP 249; *Woods v Dean* (1862) 3 B & S 101 (where an indorser, who had not received notice of dishonour, on being told that the holder was going to sue him, said he would pay if given time); *Cordery v Colvin* (1863) 14 CBNS 374 (where the drawer of a bill, made payable at his own house, repeatedly promised, after its dishonour, to pay it).
5 Bills of Exchange Act 1882 s 50(2)(b).
6 As to the meaning of 'drawer' see PARA 1406.
7 As to the meaning of 'indorser' see PARA 1407 note 8.
8 Thus, where the drawer after the maturity of a bill wrote to the holder admitting liability in ignorance of the fact that it had not been presented, it was held that he had not by his admission dispensed with the duty of presentment or the consequences of the want of it: *Keith v Burke* (1885) Cab & El 551; cf *Pickin v Graham* (1833) 1 Cr & M 725.

D. NOTING AND PROTEST

1537. Noting. A notary public is a duly appointed officer whose duty it is to draw, attest or certify documents[1]. In the case of bills of exchange[2] the notary or his clerk makes a formal demand upon the drawee[3] or acceptor[4] for acceptance or payment[5], as the case may be, and on refusal notes the bill; that is, he writes a minute on the face of the bill. This minute consists of his initials, the date, the noting charges, and a reference to the notary's register.

A ticket or label is also attached to the bill, on which is written the answer given to the notary's clerk who makes the presentment, for example, 'No orders' or 'No effects'. Before sending out the bill the notary makes a full copy of it in his register and subsequently adds the answer, if any[6].

Where an instrument[7] is required by the statute to be protested within a specified time or before some further proceeding is taken, it is sufficient that the instrument has been noted for protest before the expiration of the specified time or the taking of that proceeding, and the formal protest may be extended at any time thereafter as of the date of the noting[8].

1 See NOTARIES vol 33 (Reissue) PARA 701.
2 As to the meaning of 'bill of exchange' see PARA 1405.
3 As to the meaning of 'drawee' see PARA 1406.
4 As to the meaning of 'acceptor' see PARA 1406.
5 As to presentment for acceptance see PARA 1509 et seq. As to presentment for payment see PARA 1516 et seq.
6 For the function of notaries in respect of bills of exchange see NOTARIES vol 33 (Reissue) PARA 728. An entry made in the notary's register by the clerk who presented the instrument at the time of the dishonour is receivable as evidence in an action on proof of the death of the clerk: *Poole v Dicas* (1835) 1 Bing NC 649. The costs of the notary are recoverable as damages: see PARA 1602.
7 As to the meaning of 'instrument' see PARA 1402 note 1.
8 Bills of Exchange Act 1882 s 93. As to the course to be pursued where no notary public is available see PARA 1540. As to notice of protest see PARA 1548. As to the situation arising upon formal protest after noting see PARA 1566.

1538. Time of noting or protest. The noting of a dishonoured instrument[1] may take place on the day of its dishonour and must take place not later than the next succeeding business day[2], but when it has been duly noted the protest[3] may subsequently be extended as of the date of the noting[4].

1 As to the meaning of 'instrument' see PARA 1402 note 1. As to dishonour by non-acceptance see PARA 1515. As to dishonour by non-payment see PARA 1525. As to noting see PARA 1537.
2 As to the meaning of 'business day' see PARA 1437.
3 As to the meaning of 'protest' see PARA 1539.
4 Bills of Exchange Act 1882 s 51(4) (amended by the Bills of Exchange (Time of Noting) Act 1917 s 1). It may be extended up to any time, even at or after commencement of proceedings: *Geralopulo v Wieler* (1851) 20 LJCP 105.

1539. Meaning of protest; protest before notary. A protest is a declaration on behalf of the holder[1] that the bill[2] has been presented for payment and was unpaid[3]. It must be made and signed by a notary public[4].

The object of requiring the protest to be made by a notary public is that his office is universally recognised not only in the courts of this country, but also in many foreign countries. By the law of nations his acts have credit everywhere[5].

1 As to the meaning of 'holder' see PARA 1407.
2 As to the meaning of 'bill' see PARA 1405.
3 See PARA 1537.
4 Bills of Exchange Act 1882 s 51(7). As to the meaning of 'notary public' see PARA 1537. Signature is, as a matter of fact, always issued with the official seal of the notary. See NOTARIES vol 33 (Reissue) PARA 728.
5 *Hutcheon v Mannington* (1802) 6 Ves 823 at 824 per Lord Eldon LC.

1540. Protest where no notary available. In cases where a protest is necessary[1], and where the services of a notary cannot be obtained at the time and place where they are required, any householder or substantial resident of the place may in the presence of two witnesses give a certificate signed by them attesting the dishonour of the instrument[2], and such a certificate operates, in all respects, as if it were a notarial protest[3].

1 See PARAS 1542–1543.

2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 Bills of Exchange Act 1882 s 94. For form of protest for use in such a case see Sch 1.

1541. Contents of protest. A protest[1], besides being made and signed, must contain a copy of the instrument[2], and must specify: (1) the person[3] at whose request the instrument is protested[4]; (2) the place and date of protest[5]; (3) the cause or reason for protesting the instrument[6]; (4) the demand made[7]; and (5) the answer given, if any, or the fact that the drawee[8] or acceptor[9] could not be found[10].

Where an instrument is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written[11] particulars thereof[12].

A protest may be made out in duplicate, and the second copy is as much primary evidence as the copy first drawn out[13].

No witnesses are required to attest a protest by a notary public[14].

1 As to the meaning of 'protest' see PARA 1539.
2 Bills of Exchange Act 1882 s 51(7). As to the meaning of 'instrument' see PARA 1402 note 1. As to the requirement for a protest to be made and signed see PARA 1539.
3 As to the meaning of 'person' see PARA 1401 note 4.
4 Bills of Exchange Act 1882 s 51(7)(a).
5 Bills of Exchange Act 1882 s 51(7)(b).
6 Bills of Exchange Act 1882 s 51(7)(b).
7 Bills of Exchange Act 1882 s 51(7)(b).
8 As to the meaning of 'drawee' see PARA 1406.
9 As to the meaning of 'acceptor' see PARA 1406.
10 Bills of Exchange Act 1882 s 51(7)(b).
11 As to the meaning of 'writing' see PARA 1405 note 2.
12 Bills of Exchange Act 1882 s 51(8). As to protest made on a copy see PARA 1549. As to lost instruments see PARAS 1507–1508.
13 *Geralopulo v Wieler* (1851) 20 LJCP 105.
14 Brooke's Notary (11th Edn, 1992) p 98. As to the meaning of 'notary public' see PARA 1537.

1542. Necessity for protest: inland instruments. Where the instrument[1] which has been dishonoured is an inland instrument[2], it may, if the holder[3] thinks fit, be noted for non-acceptance or non-payment[4]; but it is not necessary to note or protest[5] it in order to preserve the recourse against the drawer[6] or indorser[7]. There are certain advantages in causing even an inland instrument to be noted. Not only is the notary a person whose business it is to know and to adopt the proper measures when an instrument is dishonoured, and therefore both the best agent for the carrying out of such measures and the best witness at a trial of their having been carried out, but his minute on the instrument itself is the most satisfactory record of the non-payment of the instrument for the information of the parties who may thereafter be called upon to pay.

The costs of noting an inland instrument are recoverable as damages[8].

It is necessary if it is desired to obtain an acceptance or payment for honour that the instrument should first be protested, or at least noted for protest[9].

Protest is dispensed with altogether by any circumstance which would dispense with notice of dishonour[10].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 As to the meaning of 'inland bill' and 'inland note' see PARA 1432.
3 As to the meaning of 'holder' see PARA 1407.
4 As to noting see PARA 1537.
5 As to the meaning of 'protest' see PARA 1539.
6 As to the meaning of 'drawer' see PARA 1406.

7 Bills of Exchange Act 1882 s 51(1). As to the meaning of 'indorser' see PARA 1407 note 8. It is of course in any case unnecessary to note or protest in order to render liable the acceptor or maker: see s 52(3); and PARA 1528.
8 Bills of Exchange Act 1882 s 57(1)(c). See also PARA 1602.
9 See the Bills of Exchange Act 1882 ss 65(1), 68(1); and PARAS 1566, 1571. As to noting for protest see PARA 1537.
10 Bills of Exchange Act 1882 s 51(9). As to when notice of dishonour can be dispensed with see PARA 1535; and *Legge v Thorpe* (1810) 12 East 171 (where it was held that in the case of an action against a drawer, who could not reasonably have expected the bill to be honoured by the drawee, protest might be dispensed with); *Campbell v Webster* (1845) 15 LJCP 4 (where it was held that a promise to pay constitutes waiver of protest and notice).

1543. Necessity for protest: foreign bills. Protest[1] is only necessary in the case of a foreign bill[2] appearing on its face to be such. Where such a bill has been dishonoured by non-acceptance[3], it must be duly protested for non-acceptance; and where it has not been previously dishonoured by non-acceptance, but is dishonoured by non-payment[4], it must be duly protested for non-payment, otherwise the drawer[5] and indorsers[6] are discharged[7]. The costs of protest, when necessary, can be recovered as liquidated damages[8].

A bill which has been protested for non-acceptance may be subsequently protested for non-payment[9].

However, a bill which is in reality a foreign bill, but does not on the face of it appear to be so, need not be protested in case of dishonour[10]. Nor is protest necessary, for the purposes of English law, where a foreign promissory note is dishonoured[11].

1 As to the meaning of 'protest' see PARA 1539.
2 As to the meaning of 'foreign bill' see PARA 1432.
3 As to dishonour by non-acceptance see PARA 1515.
4 As to dishonour by non-payment see PARA 1525.
5 As to the meaning of 'drawer' see PARA 1406.
6 As to the meaning of 'indorser' see PARA 1407 note 8.
7 Bills of Exchange Act 1882 s 51(2). As to discharge of parties see PARA 1564 et seq.
8 See PARA 1602.
9 Bills of Exchange Act 1882 s 51(3).
10 Bills of Exchange Act 1882 s 51(2). A foreign bill, that does not appear on the face of it to be so, may be treated by the holder as an inland bill: see s 4(2); and PARA 1432. See also note 11.
11 Bills of Exchange Act 1882 s 89(4); *Bonar v Mitchell* (1850) 5 Exch 415. As to the meaning of 'promissory note' see PARA 1405. However both in this case and in the case of a foreign bill which does not appear to be such it must be remembered that the release from duty to protest applies to English law only. In order to charge a party in a foreign country, protest should be made in case it is required by the laws of that country.

1544. Protest for better security. Where the acceptor[1] becomes a bankrupt[2] or insolvent, or suspends payment before maturity of the bill[3], the holder[4] may cause the bill to be protested[5] for better security against the drawer[6] and indorsers[7]. The advantage of this course, beyond the inherent one of having the circumstances placed on record for the information of the drawer and indorsers, is that it enables the bill to be accepted for honour[8].

The expenses, however, of a protest for better security are not recoverable, whereas those for protest for non-acceptance or non-payment are[9].

1 As to the meaning of 'acceptor' see PARA 1406.
2 As to the meaning of 'bankrupt' see PARA 1514 note 4.
3 As to the meaning of 'bill' see PARA 1405.
4 As to the meaning of 'holder' see PARA 1407.
5 As to the meaning of 'protest' see PARA 1539.
6 As to the meaning of 'drawer' see PARA 1406.

7 Bills of Exchange Act 1882 s 51(5). As to the meaning of 'indorser' see PARA 1407 note 8.
8 See the Bills of Exchange Act 1882 s 65(1); and PARA 1566.
9 Bills of Exchange Act 1882 s 57(1)(c). The expenses of noting, or, when protest is necessary and the protest has been extended, the expenses of protest, are part of the damages recoverable on dishonour: s 57(1)(c). See PARAS 1542, 1543. However protest for better security is not 'necessary', and the expenses therefor cannot be recovered: *Re English Bank of the River Plate, ex p Bank of Brazil* [1893] 2 Ch 438. If, after noting or protest, the drawee determines to honour the bill, he must repay to the holder the expenses of noting or protest: Bills of Exchange Act 1882 s 57(1)(c).

1545. Protest where acceptance partial or qualified. Where there is a qualified acceptance[1] the holder[2] is entitled to treat the bill as dishonoured by non-acceptance[3], and the better course is so to treat it and to protest[4] absolutely for want of acceptance according to the tenor of the bill, unless the holder is authorised by antecedent parties to assent to the qualification; otherwise any antecedent party (whether drawer[5] or indorser[6]) who has not authorised or does not subsequently assent[7] to the qualification is released from his liability on the bill[8].

In the case of a foreign bill[9] which has been accepted in part the bill must be protested as to the balance[10].

The provisions described above do not apply to a partial acceptance, whereof due notice has been given[11].

1 As to the meaning of 'qualified acceptance' see PARA 1462.
2 As to the meaning of 'holder' see PARA 1407.
3 See the Bills of Exchange Act 1882 s 44(1); and PARA 1464.
4 As to the meaning of 'protest' see PARA 1539.
5 As to the meaning of 'drawer' see PARA 1406.
6 As to the meaning of 'indorser' see PARA 1407 note 8.
7 Where the drawer or indorser receives notice of a qualified acceptance and does not within a reasonable time express his dissent to the holder, he is deemed to have assented thereto: see the Bills of Exchange Act 1882 s 44(3); and PARA 1464.
8 See the Bills of Exchange Act 1882 s 44(2); and PARA 1464.
9 As to the meaning of 'foreign bill' see PARA 1432.
10 See the Bills of Exchange Act 1882 s 44(2); and PARA 1464.
11 See the Bills of Exchange Act 1882 s 44(2); and PARA 1464.

1546. Place of protest. The general rule is that a bill[1] must be protested[2] at the place where it is dishonoured[3]; but when it has been presented through a postal operator[4], and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day[5].

When, being drawn payable at the place of business or residence of some person[6] other than the drawee[7], it has been dishonoured by non-acceptance[8], it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to or demand on the drawee is necessary[9].

1 As to the meaning of 'bill' see PARA 1405.
2 As to the meaning of 'protest' see PARA 1539.
3 Bills of Exchange Act 1882 s 51(6); *Mitchell v Baring* (1829) 10 B & C 4 (where upon protest for non-acceptance a bill drawn abroad on a firm in Liverpool and payable to a firm in London was accepted in London for the honour of the payee, the acceptance for honour being in these terms: 'if regularly protested and refused when due'. The bill was presented at maturity to the drawees at Liverpool, and on being dishonoured by them was duly protested there. It was held that the bill was rightly presented and protested there.)
4 As to the meaning of 'postal operator' see PARA 1510 note 10.

5 Bills of Exchange Act 1882 s 51(6)(a) (amended by SI 2001/1149).
6 As to the meaning of 'person' see PARA 1401 note 4.
7 As to the meaning of 'drawee' see PARA 1406.
8 As to dishonour by non-acceptance see PARA 1515.
9 Bills of Exchange Act 1882 s 51(6)(b).

1547. Excuses for delay. Delay in noting or protesting[1] is excused when the delay is caused by circumstances beyond the control of the holder[2] and not imputable to his default, misconduct, or negligence; but, when the cause of delay ceases to operate, the instrument[3] must be noted or protested with reasonable diligence[4].

1 As to noting and protest see PARA 1537 et seq.
2 As to the meaning of 'holder' see PARA 1407.
3 As to the meaning of 'instrument' see PARA 1402 note 1.
4 Bills of Exchange Act 1882 s 51(9). As to delay in giving notice of dishonour see PARA 1533; see also *Rothschild v Currie* (1841) 1 QB 43 (where, in the case of a foreign bill drawn on a firm in Paris and payable there, the day on which the protest and registration should have taken place was the *fête du roi*, and the public registry was therefore closed at 12 noon, in consequence of which and of the pressure on the office by the accumulated business on the following day the notary was unable to complete registration until after post-time on that day, and notice was not sent out until the day after that, but it was nevertheless held that due diligence had in fact been used).

1548. Notice of protest. It is not necessary for purposes of proceedings in England to send a copy of the protest[1] or even to state in the notice of dishonour[2] that the bill[3] has been protested[4].

1 As to noting and protest see PARA 1537 et seq.
2 As to notice of dishonour see PARA 1524 et seq.
3 As to the meaning of 'bill' see PARA 1405.
4 *Re Lowenthal, ex p Lowenthal (No 2)* (1874) 9 Ch App 591 at 593 per James LJ.

1549. Protest on copy. If the instrument[1] has been lost or destroyed or is wrongly detained from the person entitled to hold it[2], such person may cause protest[3] to be made on a copy or written[4] particulars thereof[5].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 As to lost bills see PARA 1507. As to the meaning of 'holder' see PARA 1407. As to the meaning of 'person' see PARA 1401 note 4.
3 As to the meaning of 'protest' see PARA 1539.
4 As to the meaning of 'writing' see PARA 1405 note 2.
5 See the Bills of Exchange Act 1882 s 51(8); and PARA 1541. However, the person entitled is not discharged from the duty of giving notice of dishonour: *Thackray v Blackett* (1812) 3 Camp 164.

(xiv) Discharge

A. BY STATUTE

1550. Payment in due course. Discharge of the instrument[1], that is to say the ending of the life of the instrument and of all rights of action thereon, may be caused in a variety of ways.

By statute, an instrument may be discharged by payment in due course to the holder[2] by or on behalf of the drawee[3] or acceptor[4] (if the instrument is a bill[5]) or the maker[6] (if it is a note)[7].

Payment in due course means payment[8] at or after the maturity of the instrument[9], for otherwise a subsequent holder might take the instrument in

ignorance of the fact of its payment[10]. The payment must be to the holder, and it must be made in good faith[11] and without notice of defect in his title to the instrument[12].

1 As to the meaning of 'instrument' see PARA 1402 note 1. 'Discharge of the instrument' is to be distinguished from the release or discharge of a party to the instrument; a clear example of the distinction is afforded by comparison of the Bills of Exchange Act 1882 s 62(1) and s 62(2) (see PARA 1564). For the survival of rights of action notwithstanding the discharge where they arise out of the circumstances of the transaction see PARA 1564.
2 As to the meaning of 'holder' see PARA 1407.
3 As to the meaning of 'drawee' see PARA 1406.
4 As to the meaning of 'acceptor' see PARA 1406.
5 As to the meaning of 'bill' see PARA 1405.
6 As to the meaning of 'maker' see PARA 1406.
7 Bills of Exchange Act 1882 ss 59(1), 89. As to the meaning of 'note' see PARA 1405. For the effect of payment by a stranger see PARA 1562 text to note 11. A bill paid at maturity cannot be reissued, and no action can afterwards be maintained upon it by a subsequent indorsee: *Burbridge v Manners* (1812) 3 Camp 193 at 195 per Lord Ellenborough CJ.
8 As to the meaning of 'payment' see *Jones v Broadhurst* (1850) 9 CB 173; and CONTRACT vol 9(1) (Reissue) PARA 942 et seq. In *London Banking Corpn Ltd v Horsnail, Hayward and Cooper* (1898) 14 TLR 266, 3 Com Cas 105 Bigham J held that a 'banker's payment' (ie an order given by a bank directing payment at the banker's clearing house) constituted payment in law, but because with the assent of both parties the banker's payment had not been acted upon there had been no payment in fact, and the bill had not been discharged.
9 Bills of Exchange Act 1882 ss 59(1), 89.
10 A payment before the instrument becomes due does not extinguish it any more than if it were merely discounted: *Burbridge v Manners* (1812) 3 Camp 193 at 195 per Lord Ellenborough CJ. See also *Morley v Culverwell* (1840) 7 M & W 174; *Factory Investments (Pty) v Ismails* 1960 (2) SA 10 (promissory note paid before due date, no defence to claim by holder in due course).
11 As to the meaning of 'good faith' see PARA 1401 note 7.
12 Bills of Exchange Act 1882 ss 59(1), 89. As to defect of title see PARAS 1478, 1483–1484, 1498. As to payment of bearer cheques see PARA 837.

1551. Payment to wrong person. There is a general right to recover money paid under a mistake, whether of fact or law[1], subject to the defences available in the law of restitution[2].

If agents for an acceptor[3] honour a bill[4] when due, mistakenly believing a forged signature to be that of the acceptor, they cannot recover the money paid from the holder[5], for he was deprived of the opportunity of giving notice of dishonour and is therefore deemed to have changed his position[6]. Nor can repayment be recovered from an agent where money has been received by an innocent agent who has paid it out to his principal or on his instructions[7].

If the party primarily liable on an instrument[8] pays the amount thereof to a wrong person, who holds it under a forged or unauthorised indorsement[9], he remains liable for the amount to the true owner, though he may recover the amount from the person whom he has wrongly paid[10].

1 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL; *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941, [1999] 1 WLR 1249. As to money paid under mistake of law see MISTAKE vol 32 (2005 Reissue) PARA 69. As to the abolition of the distinction between mistake of law and mistake of fact see MISTAKE vol 32 (2005 Reissue) PARA 11.
2 As to these defences see RESTITUTION vol 40(1) (2007 Reissue) PARA 38 et seq.
3 As to the meaning of 'acceptor' see PARA 1406.
4 As to the meaning of 'bill' see PARA 1405.
5 As to the meaning of 'holder' see PARA 1407.
6 *Cocks v Masterman* (1829) 9 B & C 902; *London and River Plate Bank v Bank of Liverpool* [1896] 1 QB 7; *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49, PC. These authorities were reviewed in *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654, [1974] 3 All ER 834, and *Barclays Bank Ltd v WJ Simms Son & Cooke*

(Southern) Ltd [1980] QB 677, [1979] 3 All ER 522. For the application of this principle to banking see PARA 852. For the general discussion of the law relating to change of position see *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL.

7 *Transvaal and Delagoa Bay Investment Co Ltd v Atkinson* [1944] 1 All ER 579 (secretary paid cheques acquired in fraud of employer into banking account of wife who knew nothing of the fraud and had paid away the money; no right to recover against wife); but see *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJKB 465, HL.

8 As to the meaning of 'instrument' see PARA 1402 note 1.

9 As to the meaning of 'indorsement' see PARA 1407.

10 Cf *London and River Plate Bank v Bank of Liverpool* [1896] 1 QB 7; *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654, [1974] 3 All ER 834.

1552. Payment by banker. A banker[1] is in a somewhat exceptional position, for where a bill is drawn on him payable to order on demand[2], and he pays the bill in good faith[3] and in the ordinary course of business, it is not incumbent on him to show that any indorsement[4] on the instrument[5] was made by or under the authority of the person[6] whose indorsement it purports to be; and he is deemed to have paid the bill in due course although the indorsement has been forged or made without authority[7].

The need for indorsement of cheques was abolished in the majority of cases by the Cheques Act 1957 so that a banker paying a cheque[8] in good faith[9] and in the ordinary course of business which is not indorsed or is irregularly indorsed does not in so doing incur any liability by reason only of the absence of, or irregularity in, indorsement and he is deemed to have paid in due course[10]. But if he pays a cheque on which his customer's signature as drawer[11] is forged, he cannot charge him with the money paid[12].

1 As to the meaning of 'banker' see PARA 1403 note 7.

2 As to bills payable to order see PARA 1428.

3 As to the meaning of 'good faith' see PARA 1401 note 7.

4 As to the meaning of 'indorsement' see PARA 1407.

5 As to the meaning of 'instrument' see PARA 1402 note 1.

6 As to the meaning of 'person' see PARA 1401 note 4.

7 Bills of Exchange Act 1882 s 60. Protection is also afforded to a banker who pays a crossed cheque in accordance with the crossing, in good faith and without negligence: see s 80; and PARA 1575 note 18. 'Crossed cheque' includes a cheque which is not transferable either under the Bills of Exchange Act 1882 s 81A (see PARA 1500; and PARA 880) or otherwise: s 80 (amended by the Cheques Act 1992 s 2). As to crossed cheques see PARA 1411. As to payment of cheques by banker see PARA 836 et seq.

8 As to the meaning of 'cheque' see PARA 1405.

9 As to the meaning of 'good faith' see PARA 1401 note 7; definition applied by the Cheques Act 1957 s 6(1).

10 Bills of Exchange Act 1882 s 1(1); see also PARA 836.

11 As to the meaning of 'drawer' see PARA 1406.

12 See *London and River Plate Bank v Bank of Liverpool* [1896] 1 QB 7; *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654, [1974] 3 All ER 834; see also PARA 850; MISTAKE vol 32 (2005 Reissue) PARA 67 et seq.

1553. Accommodation bill. In the case of an accommodation bill[1], the party accommodated is in reality the principal debtor and a payment in due course[2] by him operates as a discharge of the bill[3]. The reason is that although, on the face of the bill, the acceptor[4] of the accommodation bill is the person primarily liable, he is in fact only a surety for the debt of the party accommodated; evidence is admissible in a claim to show the real relationship of the parties[5].

1 As to accommodation bills see PARA 1482.

2 As to the meaning of 'payment in due course' see PARA 1550.

3 Bills of Exchange Act 1882 s 59(3); *Lazarus v Cowie* (1842) 3 QB 459; *Parr v Jewell* (1855) 16 CB 684; *Cook v Lister* (1863) 13 CBNS 543. As to the meaning of 'bill' see PARA 1405.

4 As to the meaning of 'acceptor' see PARA 1406.

5 See *Overend, Gurney & Co (Liquidators) v Oriental Financial Corpn (Liquidators)* (1874) LR 7 HL 348; *Ewin v Lancaster* (1865) 6 B & S 571.

1554. Acceptor becoming holder. Another mode of discharge of the instrument[1] referable to the same principle[2] arises when the acceptor of a bill[3] or maker of a note[4] becomes the holder[5] of it in his own right at or after its maturity[6].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 Ie the principle given at PARA 1553.
3 As to the meaning of 'acceptor' see PARA 1406. As to the meaning of 'bill' see PARA 1405.
4 As to the meaning of 'maker' see PARA 1406. As to the meaning of 'note' see PARA 1405.
5 As to the meaning of 'holder' see PARA 1407.

6 Bills of Exchange Act 1882 s 61; *Harmer v Steele* (1849) 4 Exch 1. However this is not so if he is not the holder in his own right: *Nash v De Freville* [1900] 2 QB 72, CA. "In his own right' must mean something more than 'not in a representative capacity' as executor for instance. It could not possibly mean that, if a thief stole the note from the holder and placed it in the possession of the maker at or after maturity, the note should ipso facto be satisfied. I think 'in his own right' must mean having a right not subject to that of anyone else, but his own—good against all the world' (at 89 per Collins LJ).

1555. Renunciation by the holder. The discharge of the instrument[1] is also achieved in certain cases by the action of the holder[2], as where either at or after its maturity he absolutely and unconditionally renounces his rights against the maker[3] or acceptor[4], and the liabilities of any party to an instrument may be absolutely and unconditionally renounced by the holder before, at, or after maturity[5]. However, a renunciation will not affect the rights of a holder in due course[6] who has no notice of the renunciation[7]. The renunciation must be in writing[8], unless the instrument is actually delivered up to the maker or acceptor[9].

1 As to the meaning of 'discharge of the instrument' see PARA 1550.
2 As to the meaning of 'holder' see PARA 1407.
3 As to the meaning of 'maker' see PARA 1406.

4 Bills of Exchange Act 1882 ss 62(1), 89; *Whatley v Tricker* (1807) 1 Camp 35; *Re Dickinson, Dickinson v Lucas* (1909) 101 LT 27. As to the meaning of 'acceptor' see PARA 1406.

5 Bills of Exchange Act 1882 ss 62(2), 89.
6 As to the meaning of 'holder in due course' see PARA 1407.

7 Bills of Exchange Act 1882 ss 62(2), 89. Cf *De la Torre v Barclay and Salkeld* (1814) 1 Stark 7.

8 Bills of Exchange Act 1882 ss 62(1), 89; *Rimalt v Cartwright* (1924) 93 LJKB 823, CA; *Re George, Francis v Bruce* (1890) 44 ChD 627 at 632 per Chitty J. Quaere whether it need be signed. As to the meaning of 'writing' see PARA 1405 note 2.

9 Bills of Exchange Act 1882 ss 62(1), 89. Where the renunciation is not in writing, a delivery of the instrument to the legatees or devisees of the maker or acceptor is insufficient to discharge the instrument: *Edwards v Walters* [1896] 2 Ch 157, CA. See also *Abrey v Crux* (1869) LR 5 CP 37. It seems, however, that, had it been delivered up to the executors, that would have been sufficient, because they might have been sued on the instrument as standing in the place of the maker or acceptor.

1556. Cancellation by holder. Discharge of the instrument[1] also occurs where it is cancelled by the holder or his agent[2] in such a way that the cancellation is apparent on the instrument[3]. It must be cancelled intentionally, for a cancellation made unintentionally or under a mistake or without the authority of the holder is inoperative[4]. Where, however, the instrument appears to be cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally or under a mistake or without authority[5].

Where the signature of any party to an instrument is intentionally cancelled by the holder or his agent, the party whose signature is cancelled, and any subsequent party to whom that party is liable, is released from his liability on the instrument[6].

1 As to the meaning of 'discharge of the instrument' see PARA 1550.
2 As to the meaning of 'holder' see PARA 1407. As to agents see PARAS 1473–1477.
3 Bills of Exchange Act 1882 s 63(1); *Ingham v Primrose* (1859) 7 CBNS 82.
4 Bills of Exchange Act 1882 s 63(3); *Sweeting v Halse* (1829) 9 B & C 365.
5 Bills of Exchange Act 1882 s 63(3); *Raper v Birkbeck* (1812) 15 East 17; *Novelli v Rossi* (1831) 2 B & Ad 757; *Prince v Oriental Bank Corpn* (1878) 3 App Cas 325, PC. See also *Dominion Bank v Anderson & Co* (1888) 15 R 408, Ct of Sess. Where an instrument is allowed by an agent to be cancelled without his principal's authority, the agent is liable for the loss: *Bank of Scotland v Dominion Bank, Toronto* [1891] AC 592, HL.
6 Bills of Exchange Act 1882 s 63(2).

1557. Discharge under statute. One or more of the parties to an instrument may be discharged by circumstances that do not operate as a discharge of the instrument[1].

1 As to the meaning of 'discharge of the instrument' see PARA 1550. The cases specifically noted by the Bills of Exchange Act 1882 are: s 44(2) (see PARA 1464); ss 42, 45; s 48 (see PARAS 1515–1516); s 59(2)(b) (see PARA 1558); s 62(1), (2) (see PARA 1555); s 63(2) (see PARA 1556); s 64(1) (see PARAS 1559–1561). As to discharge of parties at common law see PARA 1565.

1558. Payment by indorser or drawer. If the instrument[1] is paid by an indorser[2], the liability of the indorser to his indorsee[3] and all subsequent parties is extinguished, and he resumes the rights which he possessed as a holder[4] before he indorsed the instrument as regards the acceptor[5] or maker[6] and other antecedent parties[7]. He may therefore at his discretion strike out his own subsequent[8] indorsements[9] and again negotiate the instrument[10].

The effect is the same in the case of a bill payable to drawer's[11] order[12] which is paid by the drawer, for then the drawer is also the first indorser[13].

But where the instrument is a bill drawn payable to a third party, payment thereof by the drawer, though it releases him from liability and entitles him to enforce payment against the acceptor[14], does not entitle him to reissue[15] the bill[16], for that would be to vary the contract by substituting himself for the payee[17] and thereby materially to alter the bill[18].

Payment of an accommodation bill by the drawer or indorser for whose accommodation it was drawn discharges the instrument[19].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 As to the meaning of 'indorser' see PARA 1407 note 8.
3 As to the meaning of 'indorsee' see PARA 1407.
4 As to the meaning of 'holder' see PARA 1407.
5 As to the meaning of 'acceptor' see PARA 1406.
6 As to the meaning of 'maker' see PARA 1406.
7 Bills of Exchange Act 1882 s 59(2)(b).
8 The word 'and' appears to be needed between the words 'own' and 'subsequent' but does not appear in the Queen's printers copy of the Act.
9 As to the meaning of 'indorsement' see PARA 1407.
10 Bills of Exchange Act 1882 s 59(2)(b).
11 As to the meaning of 'drawer' see PARA 1406.
12 As to instruments payable to order see PARA 1428.
13 Bills of Exchange Act 1882 s 59(2)(b); *Jones v Broadhurst* (1850) 9 CB 173; *Kemp v Balls* (1854) 10 Exch 607.
14 Bills of Exchange Act 1882 s 59(2)(a).
15 As to the meaning of 'issue' see PARA 1406.

16 Bills of Exchange Act 1882 s 59(2)(a); *Williams v James* (1850) 15 QB 498 at 505 per Patteson J.
17 As to the meaning of 'payee' see PARA 1406.
18 As to the effect of material alterations see PARA 1559.
19 See PARA 1553.

B. BY ALTERATION

1559. Alteration of instrument or of acceptance. Where an instrument[1], or if a bill[2] the acceptance[3] thereon, is materially altered[4] without the assent of all the parties liable on it, the instrument is avoided[5] as regards all the parties except any one who has himself made, authorised, or assented to the alteration, and those who have become parties to the instrument subsequent to the material alteration[6]. But where the alteration, although material, is not apparent[7], a holder in due course[8], in whose hands the instrument is, may avail himself of the instrument as if it had not been altered, and may enforce payment of it according to its original tenor[9].

The materiality of an alteration has been said to be a question of law[10]. It does not matter whether the parties ever benefited or not[11] by the alteration. The onus is on a person claiming on a bill manifestly altered to show that the alterations do not alter the liability of parties, either by English law, or, if the bill is governed by foreign law, by that law[12].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 As to the meaning of 'bill' see PARA 1405.
3 As to the meaning of 'acceptance' see PARA 1406.
4 As to material alterations see PARA 1560. The alteration must be made once the bill is complete: see *Foster v Driscoll* [1929] 1 KB 470, CA; *Koch v Dicks* [1933] 1 KB 307, CA.
5 The effect of the word 'avoided' is that a stolen non-negotiable cheque or a stolen banker's draft that has been fraudulently and materially altered by the deletion of the original payee's name and the insertion of the name of a third party becomes a worthless piece of paper, and no action for damages in conversion for its face value can be brought against a bank collecting such a cheque or paying such a draft: *Smith v Lloyds TSB Group plc; Harvey Jones Ltd v Woolwich plc* [2001] QB 541, [2001] 1 All ER 424, CA.
6 Bills of Exchange Act 1882 ss 64(1), 89; *Master v Miller* (1793) 2 Hy Bl 141; *Hamelin v Bruck* (1846) 9 QB 306. The alteration has the same effect upon the parties to the instrument if the alteration is made by one who is not a party to it; for the party who may suffer if a bill is avoided by alteration has no right to complain, since there cannot be any alteration except through fraud or laches on his part, ie a fraudulent alteration effected by the party, or carelessness permitting it to be effected by another: *Davidson v Cooper* (1844) 13 M & W 343. As to accidental alteration, the provisions of the Bills of Exchange Act 1882 s 64 relate only to alterations effected at the will of the person by whom or under whose directions they are made and do not apply to a change made due to pure accident, which negatives the possibility of assent: *Hong Kong and Shanghai Bank Corpn v Lo Lee Shi* [1928] AC 181, PC.
7 'Apparent' means noticeable on reasonable scrutiny by an intending holder: *Woollatt v Stanley* (1928) 138 LT 620.
8 As to the meaning of 'holder in due course' see PARA 1407.
9 Bills of Exchange Act 1882 s 64(1) proviso, s 89; *Scholfield v Earl of Londesborough* [1896] AC 514, HL (where the drawer altered an acceptance for £500 to one for £3,500, and a holder in due course was permitted to recover £500 only); *Bank of Montreal v Exhibit and Trading Co* (1906) 11 Com Cas 250 (where the word 'Limited' was added to the name of the makers of a promissory note by an indorser); *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49, PC. See also *Smith v Prosser* [1907] 2 KB 735 at 746, CA, per Vaughan Williams LJ; *Lewes Sanitary Steam Laundry Co v Barclay & Co Ltd* (1906) 11 Com Cas 255. These cases leave unimpaired the authority of *Young v Grote* (1827) 4 Bing 253 (where it was held that if a cheque was so carelessly drawn as to enable it to be tampered with without the alteration being apparent, the drawer was estopped by his own negligence from setting up the alteration, for a customer owes his banker a duty of care in the manner in which he fills his cheque, but no such duty exists as between the acceptor and the holder of a bill). In *London Joint Stock Bank v*

Macmillan and Arthur [1918] AC 777, HL (where the House of Lords expressly approved *Young v Grote* above), a trusted clerk presented to his employer for signature an uncompleted cheque bearing the figure '2' in such a position that the clerk in completing the cheque for £2, as he was authorised to do, was enabled to surround the '2' with other figures making it £120; having inserted 'one hundred and twenty' pounds in the space provided for words the clerk presented the cheque, was paid in cash and absconded; the bank was held entitled to debit the employer's account with the full amount of the cheque. In view of this judgment the statements of the Privy Council to a contrary effect in *Colonial Bank of Australasia Ltd v Marshall* [1906] AC 559, PC, have lost their authority; and see *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 101, [1985] 2 All ER 947 at 952–953, PC, per Lord Scarman; *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110, CA; *Lumsden & Co v London Trustee Savings Bank* [1971] 1 Lloyd's Rep 114.

Leaving a space to the right of the payee's name between that and the words 'or order' is not a breach of the duty of care: *Slingsby v District Bank Ltd* [1932] 1 KB 544, CA.

10 *Vance v Lowther* (1876) 1 ExD 176 at 178. See *Suffell v Bank of England* (1882) 9 QBD 555 at 568, CA, per Brett LJ ('any alteration seems to me material which would alter the business effect of the instrument if used for any ordinary business purpose').

11 *Gardner v Walsh* (1855) 5 E & B 83 at 89; *Koch v Dicks* [1933] 1 KB 307 at 320–321, CA, per Scrutton LJ.

12 *Koch v Dicks* [1933] 1 KB 307 at 321, CA, per Scrutton LJ.

1560. Material alterations. The following alterations are specifically declared to be material[1]: any alteration of: (1) the date[2]; (2) the sum payable[3]; (3) the time of payment[4]; (4) the place of payment[5], or the addition of a place of payment where none is mentioned by the acceptor[6], without the acceptor's assent[7].

Other alterations which have held to be material are the addition[8] or alteration[9] of a rate of interest, the insertion of a particular rate of exchange[10], the alteration of the description of the payee[11], the alteration of the place of drawing of a complete bill[12], which changes the bill from an inland to a foreign bill[13], the addition of the name of a new maker to a joint and several note[14], or the elimination of the name of an existing maker[15], and the conversion of a joint note into a joint and several note[16].

A crossing of a cheque as authorised by the Bills of Exchange Act 1882 becomes a material part of the cheque, so that an obliteration of the crossing or an addition thereto, when not so authorised, is a material alteration of the cheque, and is not lawful[17].

In general terms, a materially altered cheque is a worthless piece of paper and, since it accordingly has no value, no action may be brought in conversion with respect to the face value of the instrument[18].

1 Bills of Exchange Act 1882 ss 64(2), 89.

2 Bills of Exchange Act 1882 ss 64(2), 89. See *Outhwaite v Luntley* (1815) 4 Camp 179; *Vance v Lowther* (1876) 1 ExD 176; *Hirschman v Budd* (1873) LR 8 Exch 171.

3 Bills of Exchange Act 1882 ss 64(2), 89. See *Hamelin v Bruck* (1846) 9 QB 306; *Scholfield v Earl of Londesborough* [1896] AC 514, HL; *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49, PC; and see the Decimal Currency Act 1969 s 3(2) (conversion to decimal currency of a bill or note made or issued before 15 February 1971 is not a material alteration); and PARA 1418.

4 Bills of Exchange Act 1882 ss 64(2), 89. See *Outhwaite v Luntley* (1815) 4 Camp 179; *Vance v Lowther* (1876) 1 ExD 176; *Alderson v Langdale* (1832) 3 B & Ad 660.

5 Bills of Exchange Act 1882 ss 64(2), 89. See *Tidmarsh v Grover* (1813) 1 M & S 735.

6 As to the meaning of 'acceptor' see PARA 1406.

7 Bills of Exchange Act 1882 s 64(2). See *Cowie v Halsall* (1821) 4 B & Ald 197; *Burchfield v Moore* (1854) 23 LJQB 261. Aliter, where the acceptor assents: *Walter v Cubley* (1833) 2 Cr & M 151.

8 *Warrington v Early* (1853) 23 LJQB 47.

9 *Sutton v Toomer* (1827) 7 B & C 416.

10 *Hirschfeld v Smith* (1866) LR 1 CP 340.

11 *Slingsby v District Bank Ltd* [1932] 1 KB 544, CA. See also *Smith v Lloyds TSB Group plc; Harvey Jones Ltd v Woolwich plc* [2001] QB 541, [2001] 1 All ER 424, CA (original payee's name deleted and replaced by name of fraudster). As to the meaning of 'payee' see PARA 1406.

12 As to the meaning of 'bill' see PARA 1405.

13 *Koch v Dicks* [1933] 1 KB 307, CA; but see *Foster v Driscoll* [1929] 1 KB 470, CA (alteration of place of drawing of incomplete bill held not to be material). As to the meanings of 'inland bill' and 'foreign bill' see PARA 1432.

14 *Gardner v Walsh* (1855) 5 E & B 83; *Flanagan v National Bank Ltd* [1939] IR 352. As to joint and several makers of a note see PARA 1427.

15 *Mason v Bradley* (1843) 11 M & W 590; *Nicholson v Revill* (1836) 4 Ad & El 675.

16 *Perring v Hone* (1826) 4 Bing 28.

17 Bills of Exchange Act 1882 s 78. As to crossing of cheques see PARA 1411. As to cheques materially altered generally see PARA 849.

18 *Smith v Lloyds TSB Bank plc; Harvey Jones Ltd v Woolwich plc* [2001] 1 All ER 424, [2000] 2 All ER (Comm) 693.

1561. Alterations not material. The following alterations have been held to be immaterial: the addition of a wrong date for the maturity of the instrument[1], the elimination of the words 'or order' in an instrument payable to order[2], the conversion of an instrument payable to the payee[3] 'or bearer' into one payable to him 'or order'[4], the alteration of the style of the drawee[5] (when wrongly stated in the bill) to his true style as signed by him in his acceptance[6], the alteration of the place where the bill was drawn[7] (unless it has the effect of changing the bill from an inland to a foreign bill[8]), or the addition to a promissory note[9] of the name of an addressee[10].

The conversion of a blank indorsement into a special indorsement is sanctioned by statute[11].

Though the materiality or otherwise of an alteration has been said to be a matter of law[12], the circumstances in which the alteration took place are a matter of fact; and where an instrument appears to have been altered, it rests with the party who seeks to enforce the instrument to give some evidence of what those circumstances were[13].

A holder[14] who cannot recover on an instrument that has been materially altered cannot recover on the consideration which he gave for it[15], unless the alteration was made without his knowledge and before he took the instrument[16], or, where the alteration was made while in his possession, provided it was not made fraudulently, and the party from whom he seeks payment would have had no right of recourse if the alteration had not been made[17]; in this last case, if the bill is given for goods sold, the holder can sue for the price.

1 *Fanshawe v Peet* (1857) 26 LJEx 314. As to the meaning of 'instrument' see PARA 1402 note 1.

2 Cf *Meyer & Co v Decroix, Verley et Cie* [1891] AC 520, HL.

3 As to the meaning of 'payee' see PARA 1406.

4 *Atwood v Griffin* (1826) 2 C & P 368. As to instruments payable to bearer or to order see PARA 1428.

5 As to the meaning of 'drawee' see PARA 1406.

6 *Farquhar v Southey* (1826) Mood & M 14. As to the meaning of 'acceptance' see PARA 1406. Cf *Bank of Montreal v Exhibit and Trading Co* (1906) 11 Com Cas 250 (where the question whether the addition of the word 'Limited' to the name of the makers of a promissory note was material was not decided).

7 *Foster v Driscoll* [1929] 1 KB 470 at 494, CA (alteration made while bill was incomplete); and see note 8. As to the meaning of 'bill' see PARA 1405.

8 See *Koch v Dicks* [1933] 1 KB 307, CA, in which Greer LJ distinguishing *Foster v Driscoll* [1929] 1 KB 470, CA, said that 'it may be said that in the present case [*Koch v Dicks*] it was too late, when the alteration was made, to undo the mistake that had been made by those who signed the bills as drawers ... If, however, instead of altering the bills after they had passed into

the hands of the holder ... the drawers had recalled them ... and had then altered them, it would seem that the alteration would have been effective ... '. As to the meanings of 'foreign bill' and 'inland bill' see PARA 1432.

9 As to the meaning of 'promissory note' see PARA 1405.

10 *Haseldine v Winstanley* [1936] 2 KB 101, [1936] 1 All ER 137.

11 See the Bills of Exchange Act 1882 s 34(4); and PARA 1492.

12 See PARA 1559 note 10.

13 *Knight v Clements* (1838) 8 Ad & El 215; *Clifford v Parker* (1841) 2 Man & G 909. Where a note originally in the form 'Pay —— or other' was altered to 'Pay —— or order', and the person who prepared the note stated in evidence that he could not say if the alteration was in his handwriting, but that it was what he ought to have written, the evidence was held sufficient: *Cariss v Tattersall* (1841) 2 Man & G 890.

14 As to the meaning of 'holder' see PARA 1407.

15 *Alderson v Langdale* (1832) 3 B & Ad 660. As to consideration see PARA 1478 et seq.

16 *Burchfield v Moore* (1854) 23 LJQB 261.

17 *Atkinson v Hawdon* (1835) 2 Ad & El 628.

C. BY COMMON LAW

1562. Discharge of instrument at common law. An instrument[1] may be discharged by any form of discharge which at common law applies to a simple contract for the payment of money and is not inconsistent with the terms of the Bills of Exchange Act 1882[2].

Thus, if sufficiently long[3], lapse of time, although it does not discharge the instrument, will operate as a bar to an action on it[4].

A release granted to the principal debtor on the instrument[5] operates as a discharge, but the release must be at or after maturity, for otherwise, though good between the parties, it will not discharge the instrument[6]. A release by one of two or more joint holders[7] or a release to one of two or more joint acceptors[8] or makers[9] operates as a valid discharge[10].

Accord and satisfaction as between the holder and the principal debtor, whether acceptor or maker, will also discharge the instrument; and this may be the case if the satisfaction be afforded on behalf of the principal debtor by a third party who is a stranger to the instrument[11]. However, an accord and satisfaction, even when afforded by another party to the instrument, does not discharge the principal debtor, unless expressly made on his behalf[12].

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 Rules of common law continue to apply except where they are inconsistent with the Bills of Exchange Act 1882 Act: see s 97(2); and PARA 1400 note 3. For forms of discharge applying to contracts at common law see CONTRACT vol 9(1) (Reissue) PARA 920 et seq.

3 As to the statutory periods of limitation see PARA 1604; and for a general account of limitation of actions see LIMITATION OF ACTIONS.

4 *Re Rutherford, Brown v Rutherford* (1880) 14 ChD 687 at 692, CA, per Jessel MR (note made in May 1857 on which it was sought unsuccessfully to prove in the administration of an estate, interest paid on it until August 1858; thereafter no demand for payment either of principal or interest). If this is the case in respect of a note, it should be so a fortiori in the case of a bill, 'for a note payable on demand is intended to be a continuing security': *Brooks v Mitchell* (1841) 9 M & W 15 at 18 per Parke B.

5 *Foster v Dawber* (1851) 6 Exch 839; *Overend, Gurney & Co (Liquidators) v Oriental Finance Corpn (Liquidators)* (1874) LR 7 HL 348; *Woodcock v Eames* (1925) 69 Sol Jo 444.

6 See *Ashton v Freestun* (1840) 2 Man & G 1; *Dod v Edwards* (1827) 2 C & P 602. Cf PARA 1550 note 10. The appointment by the holder of the principal debtor as executor of his will discharges the instrument from the date of the death of the testator: *Freakley v Fox* (1829) 9 B & C 130; *Jenkins v Jenkins* [1928] 2 KB 501, DC.

7 As to the meaning of 'holder' see PARA 1407. As to joint payees see PARA 1430.

8 As to the meaning of 'acceptor' see PARA 1406. As to acceptance by partners see PARA 1458.

9 As to the meaning of 'maker' see PARA 1406. As to joint makers of a note see PARA 1427.

10 *Nicholson v Revill* (1836) 4 Ad & El 675; *Jenkins v Jenkins* [1928] 2 KB 501, DC.

11 See *Belshaw v Bush* (1851) 11 CB 191; *Hirachand Punamchand v Temple* [1911] 2 KB 330, CA. As to accord and satisfaction see CONTRACT vol 9(1) (Reissue) PARA 1043 et seq.
12 *Jones v Broadhurst* (1850) 9 CB 173.

1563. Renewal as conditional satisfaction only. Prima facie the giving of a new instrument[1] in place of an existing one (such as payment of a bill[2] by cheque[3] with the bill attached) has the effect not of discharging the instrument then existing, but of being a conditional satisfaction of it[4], so that if the new instrument is duly paid at maturity the first instrument is discharged[5]; but if not, then the dormant rights on the first instrument are revived[6]. Parties to the first instrument who do not assent to its renewal are in any case discharged[7].

Where there is an agreement to renew, the renewal must be applied for within a reasonable time of the maturity of the instrument, though it need not be before maturity[8]. Where there is an agreement to renew, it is prima facie an agreement for one renewal only[9].

If the consideration on which the instrument to be renewed was based was either absent[10] or illegal[11], the new instrument is vitiated by the same defect in the hands of parties with notice.

So, too, a party who could not have sued upon the first instrument, owing to participation in or cognisance of fraud in connection with it, equally cannot sue upon the new one[12]. If a party primarily liable on a bill that is materially altered[13] without his knowledge renews the bill in ignorance of the facts, he is not liable on the renewed bill any more than on the old one[14].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 As to the meaning of 'bill' see PARA 1405.
3 As to the meaning of 'cheque' see PARA 1405.
4 *Kendrick v Lomax* (1832) 2 Cr & J 405.
5 *Dillon v Rimmer* (1822) 1 Bing 100; *Mascarenhas v Mercantile Bank of India Ltd, Da Silva v Mercantile Bank of India Ltd* (1931) 47 TLR 611, PC (negotiable debentures exchanged for new ones; held that the original owners of the old ones, who had been defrauded of them by their agents, could not claim against the bank to whom the agent had pledged the originals and to whom the new debentures had been issued; the bank were holders in due course of the new ones which were new and independent obligations).
6 *Ex p Barclay* (1802) 7 Ves 597; cf *Norris v Aylett* (1809) 2 Camp 329. As to payment of interest on the first instrument see *Lumley v Musgrave* (1837) 4 Bing NC 9; *Lumley v Hudson* (1837) 4 Bing NC 15.
7 Cf *Latham v Chartered Bank of India* (1874) LR 17 Eq 205 at 214 per Bacon V-C; *Hall v Cole* (1836) 4 Ad & El 577. It is otherwise, however, where the parties are cognisant of the renewal and do not dissent: *Torrance v Bank of British North America* (1873) LR 5 PC 246.
8 *Maillard v Page* (1870) LR 5 Exch 312.
9 *Innes v Munro* (1847) 1 Exch 473.
10 *Southall v Rigg, Forman v Wright* (1851) 11 CB 481; *Edwards v Chancellor* (1888) 52 JP 454.
11 *Chapman v Black* (1819) 2 B & Ald 588. But where the consideration, though illegal at the time the first instrument was given, has ceased to be so in the interval, the new instrument can be recovered on: *Flight v Reed* (1863) 1 H & C 703. As to consideration see PARA 1478 et seq.
12 *Lee v Zagury* (1817) 8 Taunt 114. However where a party accepted a bill, and a bill exactly similar, whereon his signature as acceptor was forged, was presented to him by a holder in due course for payment, and he thereupon gave a new bill for the same amount, it was held that he was liable on the new bill: *Mather v Lord Maidstone* (1856) 18 CB 273.
13 As to material alterations see PARA 1560.
14 *Bell v Gardiner* (1842) 4 Man & G 11.

1564. Discharge of instrument not necessarily discharge of parties. A discharge of the instrument[1] may leave surviving rights of action between the parties to the instrument arising out of the circumstances of the relation of those parties to one another in respect of the instrument: for example, where there are

two or more joint makers of a note[2], and the note is discharged by payment by one of them, there remains a claim for contribution by that one as against the other[3], or where a bill drawn for the accommodation of one party[4] has been discharged by payment by another, there remains a right of action against the party for whose accommodation the bill was drawn on the implied contract of indemnity[5].

1 As to the meaning of 'discharge of the instrument' see PARA 1550.
2 As to joint and several makers of a note see PARA 1427.
3 *Harmer v Steele* (1849) 4 Exch 1 per curiam at 13.
4 As to accommodation bills see PARA 1482.
5 *Stratton v Mathews* (1848) 3 Exch 48. He is in the position of a surety, and has all a surety's rights: *Bechervaise v Lewis* (1872) LR 7 CP 372. Moreover, where two persons become parties to a bill for the accommodation of a third, and one of the two is compelled to pay the amount of the bill, the relation inter se of the two is that of co-sureties, and the one who has paid is entitled to call upon the other for contribution without regard to their respective liabilities on the face of the bill: *Reynolds v Wheeler* (1861) 30 LJCP 350; *Godsell v Lloyd* (1911) 27 TLR 383. As to sureties generally see PARA 1013 et seq.

1565. Discharge by giving of time. The giving of time to the acceptor[1] or maker[2] may discharge those secondarily liable[3].

Where there is a binding agreement to give time, all the persons secondarily liable are discharged, and the acceptor or maker remains the sole party against whom there is a right of action[4], unless the agreement by its terms reserves the rights of the holder[5] against such parties[6]. However, mere delay in enforcing payment against the acceptor or maker does not have this result[7].

Where persons are jointly liable on an instrument[8] the discharge of one operates as a discharge of them all, whether they are principals[9] or merely sureties[10]; and if they are jointly and severally liable, a discharge of one of them prima facie operates as a discharge of the others[11].

1 As to the meaning of 'acceptor' see PARA 1406.
2 As to the meaning of 'maker' see PARA 1406.
3 As to the liability of parties see PARA 1574 et seq.
4 For the effect of agreement to give time see PARA 1224 et seq; and cf *Philpot v Briant* (1828) 4 Bing 717; *Polak v Everett* (1876) 1 QBD 669, CA. An agreement made with any party other than the maker or acceptor does not discharge the other parties: *Fraser v Jordan* (1857) 26 LJQB 288.
5 As to the meaning of 'holder' see PARA 1407.
6 *Oriental Financial Corpn v Overend, Gurney & Co* (1871) 7 Ch App 142, CA.
7 But the agreement itself may by its terms require payment to be demanded within a certain time, and if this is exceeded, the parties will be discharged: *Lawrence v Walmsley* (1862) 31 LJCP 143.
8 As to the meaning of 'instrument' see PARA 1402 note 1.
9 Eg the joint makers of a note: *King v Hoare* (1844) 13 M & W 494; and see PARA 1427.
10 *Ward v National Bank of New Zealand Ltd* (1883) 8 App Cas 755, PC; *Mayhew v Boyes* (1910) 103 LT 1, CA.
11 *Beaumont v Greathead* (1846) 2 CB 494; *Ward v National Bank of New Zealand Ltd* (1883) 8 App Cas 755 at 764, PC; *Re EWA (a debtor)* [1901] 2 KB 642, CA. It is otherwise if there is a reservation of rights, or in the case of discharge by operation of law: *Re Jacobs, ex p Jacobs* (1875) 10 Ch App 211 (composition in bankruptcy agreed to by holder of a bill). However see PARA 1562 note 6.

(xv) Acceptance and Payment for Honour

A. ACCEPTANCE FOR HONOUR

1566. Acceptor for honour. Upon the protest or noting for protest of a bill[1] a new party to the bill may be joined in the person of the acceptor for honour supra protest[2].

He may intervene either where a bill has been protested for dishonour by non-acceptance or where it has been protested for better security and is not overdue[3]. But in either case he must be a person[4] who is not already liable as a party to the bill[5]; and he must have the consent of the holder[6].

His acceptance may be for the honour of the drawer[7] or the indorser[8], or one or more of them, or for the honour of the bill, that is, of all the parties liable on it[9]; but where an acceptance for honour does not expressly state for whose honour it is made, it is presumed to be for the honour of the drawer[10]. The acceptance for honour may be for part only of the sum for which the bill is drawn[11].

In order to be valid, an acceptance for honour supra protest must be written[12] on the bill, signed by the acceptor for honour, and indicate that it is an acceptance for honour[13].

1 As to the meaning of 'bill' see PARA 1405. Provisions of the Bills of Exchange Act 1882 relating to acceptance supra protest are not applicable to promissory notes: s 89(3)(c). As to noting and protest see PARA 1537 et seq.
2 Bills of Exchange Act 1882 s 65(1).
3 Bills of Exchange Act 1882 s 65(1). As to protest for dishonour see PARA 1539, and as to protest for better security see PARA 1544. As to the date of maturity of a bill payable after sight which has been accepted for honour see PARA 1435.
4 As to the meaning of 'person' see PARA 1401 note 4.
5 Bills of Exchange Act 1882 s 65(1). This phrase would seem to include the drawee, who, though declining to accept the bill outright, may yet accept it for the honour of the drawer or an indorser, and thereby incur a minor risk of ultimate loss.
6 Bills of Exchange Act 1882 s 65(1). As to the meaning of 'holder' see PARA 1407.
7 As to the meaning of 'drawer' see PARA 1406.
8 As to the meaning of 'indorser' see PARA 1407 note 8.
9 Bills of Exchange Act 1882 s 65(1).
10 Bills of Exchange Act 1882 s 65(4).
11 Bills of Exchange Act 1882 s 65(2).
12 As to the meaning of 'writing' see PARA 1405 note 2.
13 Bills of Exchange Act 1882 s 65(3)(a), (b). It is the usual practice for the acceptance for honour to be attested by a notarial 'act of honour' recording the acceptance. See *Mitchell v Baring* (1829) 10 B & C 4; and PARA 1571.

1567. Second acceptor for honour. It remains in doubt whether, after one has accepted a bill supra protest for the honour of one party[1], another may accept it supra protest for the honour of another party, for such a proceeding would be repugnant to the principle that there cannot be more than one general acceptance of a bill[2]; but it may be that if the acceptor for honour becomes bankrupt[3] or insolvent or suspends payment before the bill matures, a second acceptance for honour may be obtained.

1 As to acceptance for honour supra protest see PARA 1566. As to the meaning of 'bill' see PARA 1405. Provisions of the Bills of Exchange Act 1882 relating to acceptance supra protest are not applicable to promissory notes: s 89(3)(c).
2 Cf *Jackson v Hudson* (1810) 2 Camp 447. As to the meaning of 'general acceptance' see PARA 1462.
3 As to the meaning of 'bankrupt' see PARA 1514 note 4.

1568. Liabilities and rights on acceptance. The contract made by the acceptor for honour[1] by his acceptance is that he will on due presentment pay the bill[2] according to the tenor of his acceptance, if it is not paid by the drawee[3], provided that it has been duly presented for payment and protested for non-payment, and that he receives notice of these facts[4].

By so accepting he makes himself liable to the holder[5] and to all parties to the bill subsequent to the party for whose honour he has accepted[6], and he is bound alike by the estoppels which bind the original acceptor and those which bind the party for whose honour he has accepted[7].

If, in pursuance of his acceptance, he is called upon to pay, and does pay, the bill, he succeeds to the rights and duties of the holder as regards the party for whose honour he pays, and all parties liable to that party[8].

1 As to acceptance for honour supra protest see PARA 1566.
2 As to the meaning of 'bill' see PARA 1405. Provisions of the Bills of Exchange Act 1882 relating to acceptance supra protest are not applicable to promissory notes: s 89(3)(c).
3 As to the meaning of 'drawee' see PARA 1406.
4 Bills of Exchange Act 1882 s 66(1); *Hoare v Cazenove* (1812) 16 East 391; *Williams v Germaine* (1827) 7 B & C 468. As to presentment for payment see PARA 1516 et seq. As to the meaning of 'protest' see PARA 1539.
5 As to the meaning of 'holder' see PARA 1407.
6 Bills of Exchange Act 1882 s 66(2).
7 As to what these are see PARA 1457. See also *Phillips v Im Thurn* (1866) LR 1 CP 463 (where it was held that an acceptor for the honour of the drawer was estopped from denying that the bill was a valid bill, and from pleading that the payee was a fictitious person, of which fact he was in ignorance when he accepted the bill for honour).
8 See the Bills of Exchange Act 1882 s 68(5); and PARA 1573. Given the circumstances in which a bill can be protested for better security (as to which see PARA 1544), 'all parties liable to that party' will include the acceptor where a bill is so protested.

1569. Presentment for payment to acceptor for honour. Where a dishonoured bill has been accepted for honour supra protest[1], it must be protested for non-payment before it is presented for payment to the acceptor for honour[2]. Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity[3]; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him[4].

When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him[5].

1 As to acceptance for honour supra protest see PARA 1566.
2 Bills of Exchange Act 1882 s 67(1). This provision applies also to dishonoured bills naming a referee in case of need: see PARA 1409. As to the meaning of 'protest' see PARA 1539.
3 Bills of Exchange Act 1882 s 67(2). For the calculation of the date of maturity in relation to bills payable after sight and after time see PARA 1437.
4 Bills of Exchange Act 1882 s 67(2).
5 Bills of Exchange Act 1882 s 67(4).

1570. Excuses for delay, etc. Delay in presentment or non-presentment to the acceptor for honour[1] is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment[2].

1 As to acceptance for honour supra protest see PARA 1566.
2 Bills of Exchange Act 1882 s 67(3). As to excuses for non-presentment for payment see PARA 1517.

B. PAYMENT FOR HONOUR

1571. Payment for honour. Any person[1], whether liable as a party to the bill[2] or not, may intervene after it has been protested for non-payment[3] and pay it supra protest for the honour of any party liable on it, or for the honour of the person for whose account it was drawn[4].

In order to operate as a payment for honour supra protest, and not as a mere voluntary payment, the transaction must be attested by a notarial act of honour, which may be appended to the protest or form an extension of it[5]; but this notarial act of honour must be founded upon a declaration made by the payer for honour, or by his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays it[6].

Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill is the one preferred[7].

1 As to the meaning of 'person' see PARA 1401 note 4.
2 As to the meaning of 'bill' see PARA 1405.
3 As to necessity for protest see PARAS 1542–1543.
4 Bills of Exchange Act 1882 s 68(1). Although the provisions of the Bills of Exchange Act 1882 relating to acceptance supra protest are not applicable to promissory notes (s 89(3)(c)), a promissory note may perhaps be paid supra protest.
5 Bills of Exchange Act 1882 s 68(3). As to notarial acts generally see NOTARIES vol 33 (Reissue) PARA 732 et seq.
6 Bills of Exchange Act 1882 s 68(4). Cf *Re Wyld, ex p Wyld* (1860) 30 LJ Bcy 10.
7 Bills of Exchange Act 1882 s 68(2). This will as a rule give preference to a payer for the honour of the drawer, and so in order of priority. As to discharge of parties see PARA 1564 et seq.

1572. Duty of holder to accept payment. The holder[1] of a bill[2] must accept payment supra protest[3] when it is offered, otherwise he loses his right of recourse against any party who would have been discharged by such payment[4].

1 As to the meaning of 'holder' see PARA 1407.
2 As to the meaning of 'bill' see PARA 1405.
3 As to payment for honour supra protest see PARA 1571.
4 Bills of Exchange Act 1882 s 68(7). As to discharge of parties see PARA 1564 et seq.

1573. Effect of payment for honour. The effect of a payment for honour[1] is to discharge all parties to the bill[2] subsequent to the party for whose honour it is paid and to substitute for the holder[3] the payer for honour, who thereby succeeds both to the rights and to the duties of the holder in regard to the party for whose honour the bill is paid and all parties liable to that party[4]. On payment to the holder of the amount of the bill and the notarial expenses incidental to its dishonour, the payer for honour is entitled to receive both the bill itself and the protest[5]. If the holder does not deliver them up to him on demand, the holder is liable to him in damages[6].

The bill when paid supra protest and delivered up to the payer for honour ceases to be negotiable[7].

1 As to payment for honour supra protest see PARA 1571.
2 As to the meaning of 'bill' see PARA 1405. As to discharge of parties see PARA 1564 et seq.
3 As to the meaning of 'holder' see PARA 1407.
4 Bills of Exchange Act 1882 s 68(5); *Re Overend, Gurney & Co, ex p Swan* (1868) LR 6 Eq 344 (rights); *Goodall v Polhill* (1845) 14 LJCP 146 (duties).
5 Bills of Exchange Act 1882 s 68(6). As to noting and protest see PARA 1537 et seq.
6 Bills of Exchange Act 1882 s 68(6).

7 *Re Overend, Gurney & Co, ex p Swan* (1868) LR 6 Eq 344. As to the meaning of 'negotiable instrument' see PARA 1402.

(xvi) Liability of the Parties

A. DRAWER OF BILL

1574. Liability of drawer. The drawer[1] of a bill of exchange[2] undertakes that the bill on due presentment will be accepted and paid according to its tenor[3] and that if it is dishonoured he will compensate the holder[4] or any indorser[5] who is compelled to pay it, provided that the requisite proceedings on dishonour are duly taken[6].

He is precluded from denying to a holder in due course[7] the existence of the payee[8] and his then capacity to indorse[9].

The drawer of a bill may insert in the bill an express stipulation negativing or limiting his own liability to the holder or waiving as regards himself some or all of the holder's duties[10].

1 As to the meaning of 'drawer' see PARA 1406.
2 As to the meaning of 'bill of exchange' see PARA 1405.
3 Except in the case of a bill drawn for the drawer's accommodation: see PARA 1482. As to the liability of a drawer of a cheque see PARA 1575.
4 As to the meaning of 'holder' see PARA 1407.
5 As to the meaning of 'indorser' see PARA 1407 note 8.
6 Bills of Exchange Act 1882 s 55(1)(a). As to the requisite proceedings on dishonour see PARAS 1515, 1524; *Whitehead v Walker* (1842) 9 M & W 506. If there is only a qualified acceptance (as to which see PARA 1462) and the holder refuses to take it, the drawer becomes primarily liable. If the drawer receives notice of a qualified acceptance and does not, within a reasonable time, dissent from the holder's taking it, he is deemed to have given his assent: PARA 1464. As to notice of dishonour in case of a bill accepted for accommodation of the drawer see PARA 1529 text to notes 7–8.
7 As to the meaning of 'holder in due course' see PARA 1407.
8 As to the meaning of 'payee' see PARA 1406.
9 Bills of Exchange Act 1882 s 55(1)(b); *Collis v Emett* (1790) 1 Hy Bl 313.
10 See the Bills of Exchange Act 1882 s 16; and PARA 1440. As to the position where the payee is a confirming bank under a letter of credit see *Ng Chee Chong (t/a Maran Road Saw Mill) v Austin Taylor & Co Ltd* [1975] 1 Lloyd's Rep 156.

1575. Liability on cheques. The drawer[1] of a cheque[2] gives an undertaking similar to that given by the drawer of a bill[3], save that he undertakes that on presentment it will be duly paid (not accepted), and if it is not paid the holder[4] is referred for his remedy to the drawer[5].

Where a cheque is crossed specially[6] to more than one banker[7], except when it is crossed to an agent for collection being a banker, the banker on whom it is drawn must refuse payment of it[8]. If the banker nevertheless pays such a cheque, or if he pays a cheque that is crossed generally[9] otherwise than to a banker, or if he pays a cheque that is crossed specially otherwise than to the banker to whom it is crossed (or to his agent for collection being a banker), he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid[10].

However, where a cheque is presented for payment[11] which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by the Bills of Exchange Act 1882, the banker paying such a cheque in good faith[12] and without negligence is not responsible and does not incur any liability[13]. Nor may the payment be questioned by reason of the cheque having

been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorised by the Bills of Exchange Act 1882[14], and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed (or to his agent for collection being a banker), as the case may be[15].

The drawer of a crossed cheque[16] which has come into the hands of the payee[17] and, if crossed generally, has been paid by the banker on whom it is drawn to another banker, or, if crossed specially, has been paid to the banker to whom it is crossed or to that banker's agent for collection, that agent also being a banker, is entitled to the same rights and is placed in the same position as if payment of the cheque had been made to the true owner, whether that is in fact the case or not[18].

1 As to the meaning of 'drawer' see PARA 1406. As to the liability of a drawer of a bill of exchange see PARA 1574.
2 As to the meaning of 'cheque' see PARA 1405.
3 As to the meaning of 'bill' see PARA 1405.
4 As to the meaning of 'holder' see PARA 1407.
5 As to the rights of the drawer to have his cheques honoured by the drawee (his banker) see PARA 1454; and PARA 832. In Ireland it has been held that a payee of a cheque countermanded prior to presentation has a cause of action on the cheque against the drawer: *Gaynor v McDyer* [1968] IR 295.
6 As to the meaning of 'special crossing' see PARA 1411.
7 As to the meaning of 'banker' see PARA 1403 note 7.
8 Bills of Exchange Act 1882 s 79(1).
9 As to the meaning of 'general crossing' see PARA 1411.
10 Bills of Exchange Act 1882 s 79(2).
11 As to the presentment for payment of cheques see PARA 1519 et seq.
12 As to the meaning of 'good faith' see PARA 1401 note 7.
13 Bills of Exchange Act 1882 s 79(2) proviso.
14 As to the crossing of cheques and authorised alterations to such crossings see PARA 1411.
15 Bills of Exchange Act 1882 s 79(2) proviso.
16 As to the meaning of 'crossed cheque' see PARA 1552 note 7.
17 As to the meaning of 'payee' see PARA 1406.
18 Bills of Exchange Act 1882 s 80. The benefit of this section appears to be available to the drawer only where the banker on whom the cheque is drawn has paid it in good faith and without negligence. As to the meaning of 'true owner' see *Marquess of Bute v Barclays Bank Ltd* [1955] 1 QB 202 at 211, [1954] 3 All ER 365 at 368.

B. MAKER OF PROMISSORY NOTE

1576. Liability of maker. By making a promissory note[1] the maker[2] undertakes that he will pay it according to its tenor[3], and is precluded from denying to a holder in due course[4] the existence of the payee[5] and his then capacity to indorse[6].

1 As to the meaning of 'promissory note' see PARA 1405.
2 As to the meaning of 'maker' see PARA 1406.
3 Bills of Exchange Act 1882 s 88(1). So that where a person guarantees the payment of a note, a failure by the maker to pay it according to its tenor and effect when due will render the surety liable: *Walton v Mascall* (1844) 13 M & W 452.
4 As to the meaning of 'holder in due course' see PARA 1407.
5 As to the meaning of 'payee' see PARA 1406.
6 Bills of Exchange Act 1882 s 88(2); *Drayton v Dale* (1823) 2 B & C 293. It has been doubted whether the payee of a note could be a holder in due course, and in the case of *Herdman v Wheeler* [1902] 1 KB 361, where the maker, intending to borrow £15 from one lender, signed a blank stamped paper, which that lender afterwards filled in for a larger amount and made payable to a second lender, fraudulently keeping the balance for himself, the second lender failed to recover from the maker on the ground that he was not a holder in due course. In

RE Jones Ltd v Waring and Gillow Ltd [1926] AC 670, the House of Lords held that the original payee of a cheque is not a holder in due course and (distinguishing *Watson v Russell* (1864) 3 B & S 34; on appeal 5 B & S 968) that when A by fraud of B is induced to draw a cheque in favour of C who cashes the cheque, A can recover the money as money paid under a mistake and that there is nothing in the Bills of Exchange Act 1882, concerning the position of a payee of a cheque, to prevent such recovery.

In *Lloyds Bank Ltd v Cooke* [1907] 1 KB 794, the Court of Appeal held that where a note was fraudulently filled in for a larger sum than was authorised by a joint maker, that joint maker was estopped from denying the validity of the note by the common law rules of estoppel; see also *Brocklesby v Temperance Permanent Building Society* [1895] AC 173, HL. The general rule of estoppel is that a person who has signed an instrument in blank cannot be heard, as against a person who has changed his position on faith of it, to assert that the instrument as filled in is a forgery or that it was filled in in excess of the agent's authority: see *Wilson and Meeson v Pickering* [1946] KB 422 at 427, [1946] 1 All ER 394 at 397, CA. See also cases cited in PARAS 1448 note 7, 1450 note 3. As to the principles of estoppel generally see ESTOPPEL.

C. INDORSER

1577. Liability of indorser. The indorser[1] of a bill[2] by indorsing it undertakes that on due presentment it will be accepted, and paid according to its tenor[3], and that, should it be dishonoured, he will compensate the holder[4] or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour are duly taken[5]. But it is open to him, as it is to the drawer[6], to insert in the instrument[7] special stipulations restricting or extending his liability[8].

In regard to his immediate indorsee[9] the liability of an indorser of an instrument arises out of the contract between them, which is founded not merely on the indorsement[10] itself, but also upon the delivery[11] to the indorsee and upon the intention with which the delivery was made and accepted, as proved by words spoken or written by the parties, and the circumstances, such as the usage of the place, and the course of dealing between the parties, under which the delivery takes place[12].

In regard to the holder, the drawer and indorsers of any instrument are jointly and severally liable for its due payment and, in case of a bill, for its due acceptance also[13].

1 As to the meaning of 'indorser' see PARA 1407 note 8.
2 As to the meaning of 'bill' see PARA 1405.
3 As to presentment for acceptance and presentment for payment see PARA 1509 et seq.
4 As to the meaning of 'holder' see PARA 1407.
5 Bills of Exchange Act 1882 s 55(2)(a). As to the requisite proceedings on dishonour see PARAS 1515, 1524.
6 As to the meaning of 'drawer' see PARA 1406.
7 As to the meaning of 'instrument' see PARA 1402 note 1.
8 See PARA 1440.
9 As to the meaning of 'indorsee' see PARA 1407.
10 As to the meaning of 'indorsement' see PARA 1407.
11 As to the meaning of 'delivery' see PARA 1406.
12 *Castrique v Buttigieg* (1856) 10 Moo PCC 94.
13 See *Rouquette v Overmann* (1875) LR 10 QB 525.

1578. Estoppels of indorser. An indorser[1] is precluded from denying to a holder in due course[2] the genuineness and regularity in all respects of the drawer's[3] signature and all previous indorsements[4], and from denying to his immediate or a subsequent indorsee[5] that the instrument[6] was at the time of his indorsement a valid and subsisting instrument, and that he had then a good title to it[7].

1 As to the meaning of 'indorser' see PARA 1407 note 8.

2 As to the meaning of 'holder in due course' see PARA 1407.
3 As to the meaning of 'drawer' see PARA 1406.
4 Bills of Exchange Act 1882 s 55(2)(b); *MacGregor v Rhodes* (1856) 6 E & B 266. As to the meaning of 'indorsement' see PARA 1407.
5 As to the meaning of 'indorsee' see PARA 1407.
6 As to the meaning of 'instrument' see PARA 1402 note 1.
7 Bills of Exchange Act 1882 s 55(2)(c).

1579. Persons liable as indorsers. Where a person[1] signs an instrument[2] otherwise than as a maker[3], drawer[4] or acceptor[5], he incurs the liabilities of an indorser[6] to a holder in due course[7]. However, if there is ambiguity as to the capacity in which a party signed an instrument, the whole facts and circumstances attendant upon the making, issue[8] and transfer[9] of the instrument may be legitimately referred to for the purpose of ascertaining the true relation of the parties to each other; and reasonable inferences, derived from these facts and circumstances are admitted to the effect of qualifying, altering or even inverting the relative liabilities which the law merchant[10] would otherwise assign to them[11].

This ambiguity as to the true relation of the parties can arise in relation to bills which are 'backed' or which are accommodation bills[12]. In the case of such a bill, the signature of a relation or friend of the acceptor for whose accommodation the bill is drawn, placed on the back of the bill, constitutes the party an indorser of the bill, and it is immaterial whether the drawer who advances money to the parties accommodated on the strength of their acceptance[13] does so before or after the signature is placed on the back of the bill[14]. If two persons indorse a note as co-sureties for the maker, the first indorser will not be liable to indemnify the second indorser, as normally he would be, but as between them their rights will be regulated in accordance with the law which regulates the rights of co-sureties[15].

Again, if the drawer of a bill drawn to his order[16] indorses it to the surety, and the surety re-indorses it to him, then the surety, while liable to the holder[17] in the event of the bill being dishonoured[18], will have no right to be indemnified by the drawer, and if the drawer sues him on the bill, will not be able to avail himself of the defence, usually open to an indorser when sued by the drawer, of circuity of action[19]. Even if a backer-indorser indorses the bill before the drawer, the drawer will have the right, in accordance with the authority conferred upon him by the agreement with the backer, to add his indorsement[20] above the latter's, and the position will then be the same as if the drawer had indorsed the bill first in point of time[21].

It has been held also that, even if the drawer, when he indorses the bill in such circumstances, places his indorsement below instead of above the backer's (as strictly he ought to do), it will not have the effect of nullifying the intention of the parties, and consequently, if it is proved that the intention was that the backer should render himself liable to the drawer by indorsing the bill, he will still, as indorser, be liable to the drawer[22].

1 As to the meaning of 'person' see PARA 1401 note 4.
2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 As to the meaning of 'maker' see PARA 1406.
4 As to the meaning of 'drawer' see PARA 1406.
5 As to the meaning of 'acceptor' see PARA 1406.
6 As to the meaning of 'indorser' see PARA 1407 note 8. As to the liability of an indorser see PARA 1577.
7 Bills of Exchange Act 1882 ss 56, 89(1), (2). As to the meaning of 'holder in due course' see PARA 1407. However, where the signature gives rise to a contract governed by foreign law, the

liability of the person signing will not necessarily be that of an indorser: *G & H Montage GmbH v Irvani* [1990] 2 All ER 225, [1990] 1 WLR 667, CA.

8 As to the meaning of 'issue' see PARA 1406. 'Making' refers to the making of a promissory note: see PARA 1405.

9 As to transfer generally see PARA 1489 et seq.

10 As to the meaning of 'law merchant' see PARA 1400.

11 *Macdonald v Whitfield* (1883) 8 App Cas 733 at 745, PC, per Lord Watson; applied in *Yeoman Credit Ltd v Gregory* [1963] 1 All ER 245, [1963] 1 WLR 343. See also *Novaknit Hellas SA v Kumar Bros International Ltd* [1998] Lloyd's Rep Bank 287, CA.

12 As to accommodation bills see PARA 1482.

13 As to the meaning of 'acceptance' see PARA 1406.

14 *Steele v M'Kinlay* (1880) 5 App Cas 754, HL. In this case M'Kinlay obtained a loan in favour of his two sons from a party who drew a bill of exchange on them with the view of advancing the money on the strength of their acceptances. The sons duly accepted the bill and M'Kinlay himself signed his name on the back of the bill before returning it to the lender. The acceptors became bankrupt, and in an action by the representatives of the lender against those of M'Kinlay, both the lender and M'Kinlay being dead, it was held that the latter was liable as an indorser, not as an acceptor of the bill, and, per Lord Watson (at 782), that it made no difference whether his signature was placed there before the money was lent or not.

15 *Macdonald v Whitfield* (1883) 8 App Cas 733, PC; and see PARA 1165 et seq.

16 As to bills payable to order see PARA 1428.

17 As to the meaning of 'holder' see PARA 1407.

18 As to dishonour by non-acceptance see PARA 1515. As to dishonour by non-payment see PARA 1525.

19 *Wilkinson & Co v Unwin* (1881) 7 QBD 636, CA; *JW Holmes & Co v Durkee* (1883) Cab & El 23.

20 As to the meaning of 'indorsement' see PARA 1407.

21 *Glenie v Bruce Smith* [1908] 1 KB 263, CA; *Gerald McDonald & Co v Nash & Co* [1924] AC 625, HL.

22 *Re Gooch, ex p Judd* [1921] 2 KB 593, CA; *Bernardi v National Sales Corpn Ltd* [1931] 2 KB 188; *McCall Bros Ltd v Hargreaves* [1932] 2 KB 423. In *Lombard Banking Ltd v Central Garage and Engineering Co Ltd* [1963] 1 QB 220, [1962] 2 All ER 949, backers were liable although the drawer placed his indorsement underneath the backers'. Scarman J considered that the older authorities supporting the proposition that such a bill is not regular on the face of it had been overruled by *Gerald McDonald & Co v Nash & Co* [1924] AC 625, HL. In *Yeoman Credit Ltd v Gregory* [1963] 1 All ER 245, [1963] 1 WLR 343, Megaw J held a backer liable where the drawer's indorsement was a restrictive one, as well as being subsequent to and below the backer's. As to written evidence of promises of guarantee see PARA 1052 et seq.

1580. Rights of indorser. The contract of the indorser[1] is one of surety, and he is entitled as against the holder[2] to have the benefit of any securities which the maker[3] or acceptor[4] of the instrument[5] may have deposited with the holder to cover his liability; this is the case whether at the time of his indorsement[6] he knew of the existence or deposit of the securities or not[7].

1 As to the meaning of 'indorser' see PARA 1407 note 8.

2 As to the meaning of 'holder' see PARA 1407.

3 As to the meaning of 'maker' see PARA 1406.

4 As to the meaning of 'acceptor' see PARA 1406.

5 As to the meaning of 'instrument' see PARA 1402 note 1.

6 As to the meaning of 'indorsement' see PARA 1407.

7 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL. As to the surety's rights against the creditor see PARA 1129 et seq.

D. TRANSFEROR BY DELIVERY

1581. Warranties by transferor by delivery. A transferor by delivery is a holder[1] of a bill payable to bearer[2] which he negotiates by delivery[3] without indorsing it[4]. A transferor by delivery is not liable on the instrument[5], but when he negotiates it he warrants to his immediate transferee, if the latter is a holder

for value[6], three distinct things in regard to it, namely: (1) that the instrument is what it purports to be[7], for example, that if it purports to be a foreign bill of exchange[8] drawn at some place abroad, it is, in fact, a foreign and not an inland bill[9] and was in fact drawn as it appears to be drawn[10]; and (2) that he has a right to transfer it[11]; and (3) that at the time of transfer he is not aware of any fact which renders it valueless[12], for example, that he does not know that any of the signatures on it are forged or unauthorised[13], or that it has been altered in a material particular[14]. He is not liable on the bill[15].

If the instrument is found not to correspond with the warranty, the transferee can recover the money paid for it, but he must act with reasonable diligence[16].

1 As to the meaning of 'holder' see PARA 1407.
2 As to the meaning of 'bill' see PARA 1405. As to the meaning of 'bearer' see PARA 1407. As to instruments payable to bearer see PARA 1428.
3 As to the meaning of 'delivery' see PARA 1406.
4 Bills of Exchange Act 1882 s 58(1).
5 Bills of Exchange Act 1882 s 58(2). As to the meaning of 'instrument' see PARA 1402 note 1.
6 As to the meaning of 'holder for value' see PARA 1407; see also PARA 1486.
7 Bills of Exchange Act 1882 s 58(3). The reason is that no person is liable on an instrument in any capacity who has not signed it as such: s 23.
8 As to the meaning of 'foreign bill' see PARA 1432.
9 As to the meaning of 'inland bill' see PARA 1432.
10 *Gompertz v Bartlett* (1853) 2 E & B 849.
11 Bills of Exchange Act 1882 s 58(3). As to transfer generally see PARA 1489 et seq.
12 Bills of Exchange Act 1882 s 58(3).
13 *Gurney v Womersley* (1854) 4 E & B 133. As to mode of signing by an agent see PARA 1474. As to the presumption regarding signatures generally see PARA 1478.
14 *Leeds and County Bank Ltd v Walker* (1883) 11 QBD 84. As to material alterations see PARA 1560.
15 Bills of Exchange Act 1882 s 58(2).
16 *Pooley v Brown* (1862) 11 CBNS 566.

1582. Extent of liability. The liability on the warranties by a transferor by delivery[1] must be distinguished from a liability on the consideration. A transferor by delivery is in effect the vendor of an instrument[2] precisely as he might be the vendor of any other chattel[3]. Beyond the actual points in regard to it which he warrants, he is in no way responsible for the value of what he sells. If, therefore, its value diminishes or even vanishes altogether, for example, through the bankruptcy of any of the parties to it, he is not bound to compensate the transferee for his consequent loss[4]. However, where the instrument is transferred, not by way of sale, but in payment of a debt, the transferor is liable on the consideration unless the instrument was taken in absolute satisfaction of the debt[5].

If, however, the transferor, on negotiating an instrument which passes by delivery, indorses it, he makes himself liable as an indorser[6].

1 As to warranties by transferor by delivery see PARA 1581.
2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 Cf *Sard v Rhodes* (1836) 1 M & W 153.
4 *Fydell v Clark* (1796) 1 Esp 447 at 448 per Lord Kenyon CJ ('If ... he took the bills or notes he must be bound by it. The bankers parted with them supposing them to be good and he took them under the same impression. Having taken them without indorsement he has taken the risk on himself. They were the holders of the bills and by not indorsing them have refused to pledge their credit to their validity, and [the plaintiff] must be taken to have received them in their own credit only').
5 *Camidge v Allenby* (1827) 6 B & C 373; *Lichfield Union Guardians v Greene* (1857) 1 H & N 884.

6 See the Bills of Exchange Act 1882 s 55(2); PARAS 1577, 1580; and cf *Fairclough v Pavia* (1854) 9 Exch 690 at 695. As to the meaning of 'indorser' see PARA 1407 note 8.

E. ACCOMMODATION PARTY

1583. Duty to provide funds or indemnity. Where the instrument[1] is an accommodation bill[2], it is the duty of the party for whose accommodation it was drawn to provide funds to meet the bill at maturity[3], or in default of that to indemnify the acceptor[4] or any other party who has been compelled to pay the holder[5]. The indemnity to be given may be extended to include the costs of a claim brought unsuccessfully against the holder, if there was a prima facie ground of defence[6].

The duty to provide funds or to indemnify is a contract which may be expressed or implied. It is not required to be in writing[7].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 See PARA 1482.
3 See *Sleigh v Sleigh* (1850) 5 Exch 514. The acceptor is entitled to retain funds provided for this purpose, although after providing the funds and before maturity of the instrument the party accommodated becomes bankrupt: *Yates v Hoppe* (1850) 19 LJCP 180.
4 As to the meaning of 'acceptor' see PARA 1406.
5 As to the meaning of 'holder' see PARA 1407. This carries with it the right to benefit from securities belonging to the party accommodated in the hands of the holder: *Bechervaise v Lewis* (1872) LR 7 CP 372 at 377; cf *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL. As to the meaning of 'holder' see PARA 1407.
6 *Bagnall v Andrews* (1830) 7 Bing 217 at 222 per Tindal CJ; *Stratton v Mathews* (1848) 3 Exch 48. Aliter, if there is no prima facie defence (*Beech v Jones* (1848) 5 CB 696), though the indemnity will certainly cover costs where there is any evidence of a request on the part of the party accommodated to defend: *Garrard v Cottrell* (1847) 10 QB 679. See also *Hammond & Co v Bussey* (1887) 20 QBD 79, CA; and DAMAGES vol 12(1) (Reissue) PARA 831.
7 *Batson v King* (1859) 4 H & N 739 (contract of indemnity, Statute of Frauds 1677 s 4 not applicable). As to whether a promise is an indemnity or guarantee see *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294, [1961] 1 WLR 828, CA.

1584. Contribution between accommodation parties. If two or more persons agree to become parties to an instrument[1] for the accommodation of some other party[2], they are entitled and liable inter se to contribution as co-sureties without regard to the order of priority of their names upon the instrument[3], and an accommodation party is entitled to contribution from another accommodation party although at the time when the former becomes party to the bill he is unaware of the capacity in which the latter had signed[4].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 As to the meaning of 'accommodation party' see PARA 1482.
3 *Reynolds v Wheeler* (1861) 30 LJCP 350; cf *Macdonald v Whitfield* (1883) 8 App Cas 733, PC; and cf *Wolmershausen v Gullick* [1893] 2 Ch 514.
4 *Reynolds v Wheeler* (1861) 30 LJCP 350; *Macdonald v Whitfield* (1883) 8 App Cas 733, PC; *Godsell v Lloyd* (1911) 27 TLR 383.

1585. Enforcement of indemnity. The right to an indemnity may be enforced by bringing a claim, but in such a claim the claimant must show not merely that the money paid pro tanto discharges the liability of the defendant to the holder of the instrument, but also that it was paid at the request, express or implied, of the defendant[1]. If the situation is such that he might be compelled by law to pay the money a request to pay will be implied, but a mere voluntary payment made with full knowledge that payment could not be compelled is no ground for an indemnity[2].

In the case of the bankruptcy of the drawer[3] there cannot be a double proof against his estate, that is one proof by the holder of the bill, and the other proof by the acceptor[4] on the contract of indemnity[5].

1 See *Brittain v Lloyd* (1845) 14 M & W 762; *Re A Debtor (No 627 of 1936)* [1937] Ch 156, CA. As to the meaning of 'instrument' see PARA 1402 note 1. As to the meaning of 'holder' see PARA 1407. As to discharge of parties see PARA 1564 et seq.
2 *Sleigh v Sleigh* (1850) 5 Exch 514. However when the party accommodated discounts the bill with bill brokers in the City of London, the bill brokers have an implied authority in following the ordinary custom of their business to make themselves liable on a guarantee of the bill to their bankers, and are entitled to recover the amount paid on the guarantee from the party accommodated, or his estate if he becomes bankrupt: *Re Fox, Walker & Co, ex p Bishop* (1880) 15 ChD 400, CA.
3 As to the meaning of 'drawer' see PARA 1406. As to the meaning of 'bankrupt' see PARA 1514 note 4.
4 As to the meaning of 'acceptor' see PARA 1406.
5 *Re Oriental Commercial Bank, ex p European Bank* (1871) 7 Ch App 99 at 103 per Mellish LJ; *Re Hoey, ex p Hoey* (1918) 88 LJKB 273, DC. See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 495.

(xvii) Bills in a Set

1586. Nature and object. Bills of exchange[1] may be drawn in sets of two, three, or more parts.

Each part should be numbered and contain a reference to every other part of the set[2] and a condition that a part will be payable only so long as all the other parts are unpaid.

The whole of the parts constitute in such a case one bill[3].

1 As to the meaning of 'bill of exchange' see PARA 1405. Provisions of the Bills of Exchange Act 1882 relating to bills in a set are not applicable to promissory notes: s 89(3)(d).
2 Bills of Exchange Act 1882 s 71(1). Cf *Société Générale v Metropolitan Bank Ltd* (1873) 27 LT 849; *Davison v Robertson* (1815) 3 Dow 218, HL.
3 Bills of Exchange Act 1882 s 71(1).

1587. Rights and duties of holder. A holder[1] who negotiates a bill drawn in a set[2] is bound to deliver all the parts in his possession, but a negotiation[3] of one part by him does not warrant his possession of the other parts or make him liable to deliver them if not in his possession[4].

Where he indorses two or more parts to different persons[5], he is liable on every such part; and every indorser[6] subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills[7].

However, as between different holders in due course, the holder whose title first accrues is deemed to be the true owner of the bill[8]. The true owner may possibly be entitled to recover the other parts even from a holder of them in due course[9], but in any case the rights of a person who in due course accepts or pays the part first presented to him are preserved[10].

1 As to the meaning of 'holder' see PARA 1407.
2 As to the nature and object of such bills see PARA 1586.
3 As to the meaning of 'negotiation' see PARA 1407.
4 *Pinard v Klockmann* (1863) 32 LJQB 82. Where, however, the payee of bills drawn in a set contracted to deliver them up, it was held that he had not fulfilled his contract by delivering one part of each: *Kearney v West Granada Gold and Silver Mining Co* (1856) 26 LJEx 15.
5 As to the meaning of 'person' see PARA 1401 note 4.
6 As to the meaning of 'indorser' see PARA 1407 note 8.
7 Bills of Exchange Act 1882 s 71(2).
8 Bills of Exchange Act 1882 s 71(3).

9 See *Holdsworth v Hunter* (1830) 10 B & C 449; *Lang v Smyth* (1831) 7 Bing 284; *Perreira v Jopp* (1793) 10 B & C 450n.
10 Bills of Exchange Act 1882 s 71(3).

1588. Rights and duties of drawee. The drawee[1] may write[2] his acceptance[3] on any part of a bill drawn in a set[4], but he should do so on one part only, otherwise if two or more parts bearing his acceptance get into the hands of different holders in due course he is liable on every such part as if it were a separate bill[5].

Where the bill or a part of it is presented to the acceptor[6] for payment, he should require the part which he has accepted to be handed over to him on payment of the bill, for otherwise, if the part bearing his acceptance is outstanding at maturity in the hands of a holder in due course[7], he is liable on it[8]. Subject to this, however, the payment or other discharge of one part involves the discharge of the whole bill[9].

1 As to the meaning of 'drawee' see PARA 1406.
2 As to the meaning of 'writing' see PARA 1405 note 2.
3 As to the meaning of 'acceptance' see PARA 1406.
4 As to the nature and object of such bills see PARA 1586.
5 Bills of Exchange Act 1882 s 71(4). See *Ralli v Dennistoun* (1851) 6 Exch 483; *Holdsworth v Hunter* (1830) 10 B & C 449.
6 As to the meaning of 'acceptor' see PARA 1406.
7 As to the meaning of 'holder in due course' see PARA 1407.
8 Bills of Exchange Act 1882 s 71(5).
9 Bills of Exchange Act 1882 s 71(6). As to the meaning of 'discharge of the instrument' see PARA 1550.

(xviii) Conflict of Laws

1589. Lex loci contractus generally applicable. Inasmuch as bills of exchange, cheques, and (though to a lesser extent) promissory notes[1] are more than local in their character and use, it follows that in the course of their existence they may be subject to the laws of foreign countries, which laws may, and in many cases do, differ from the law of England. This fact is recognised to some extent in the distinction between foreign and inland instruments[2]. But the special provisions of the statute, for example, as to the protest of foreign bills[3], are more in the nature of practical expedients suited to the convenience of special cases than attempts to meet the difficulty of a conflict of laws.

It is therefore of the highest importance to determine by what principles the rights and liabilities of the various parties are to be governed where the laws of more than one country are concerned[4]. The principle adopted with regard to negotiable instruments[5] is in general that the lex loci contractus[6] should prevail[7].

1 As to the meanings of 'bill of exchange', 'cheque' and 'promissory note' see PARA 1405.
2 As to the meanings of 'foreign bill', 'foreign note', 'inland bill' and 'inland note' see PARA 1432.
3 As to the necessity for protesting foreign bills see PARA 1543.
4 As to the law governing contracts see CONFLICT OF LAWS vol 8(3) (Reissue) PARAS 349–365.
5 As to the meaning of 'negotiable instrument' see PARA 1402.
6 Ie the law of the place in which the contract is made.
7 A notable exception is the question of legality: see *Moulis v Owen* [1907] 1 KB 746, CA; and Dicey and Morris *Conflict of Laws* (13th Edn, 2000) p 1445, where the editors submit that any contract embodied in a negotiable instrument must be legal according to the law governing the bill or note and also according to its own proper law. See PARA 1591 et seq. Note that the Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980) does not apply to obligations arising under bills of exchange, cheques and promissory notes: see art 1 para 2(c); and CONFLICT OF LAWS vol 8(3) (Reissue) PARAS 349, 350.

1590. Law applicable to requisites in form. As a general rule validity of an instrument[1] as regards requisites in form[2] is determined by the law of the place of issue[3] and the place of issue is the place at which the instrument is first delivered complete in form, not the place where it is signed[4].

To this general rule, however, certain exceptions are admitted in the interests of persons[5] who become parties to a foreign instrument[6] in this country. Thus an instrument issued out of the United Kingdom is not invalid in this country by reason only that it is not stamped in accordance with the law of the place of issue[7].

Where an instrument issued out of the United Kingdom conforms as regards requisites in form to the law of this country it may for the purpose of enforcing payment[8] be treated as valid as between all persons who negotiate, hold, or become parties to it in this country[9].

1 As to the meaning of 'instrument' see PARA 1402 note 1.
2 The question whether a bill is conditional or not is a question relating to requisites of form: *Guaranty Trust Co of New York v Hannay & Co* [1918] 1 KB 43. (The correctness of the decision of Bailhache J on this point was left open in the Court of Appeal: see [1918] 2 KB 623.)
3 Bills of Exchange Act 1882 s 72(1).
4 *Chapman v Cottrell* (1865) 34 LJEx 186. See also PARA 1406.
5 As to the meaning of 'person' see PARA 1401 note 4.
6 As to the meanings of 'foreign bill' and 'foreign note' see PARA 1432.
7 Bills of Exchange Act 1882 s 72(1)(a). See *Wynne v Jackson* (1826) 2 Russ 351.
8 Obtaining a declaration that a holder who has been paid is entitled to retain his money is not 'enforcing payment': *Guaranty Trust Co of New York v Hannay & Co* [1918] 1 KB 43.
9 Bills of Exchange Act 1882 s 72(1)(b); *Re Marseilles Extension Railway and Land Co, Smallpage's and Brandon's Cases* (1885) 30 ChD 598.

1591. Law applicable to drawing and supervening contracts. Where a bill[1] drawn in one country is negotiated, accepted or payable in another, the law of the place where the particular contract is made determines: (1) the validity as regards requisites in form of the supervening contracts, such as acceptance or indorsement or acceptance supra protest[2]; and (2) the interpretation of the drawing, acceptance[3], indorsement and acceptance supra protest[4]; but where an inland instrument[5] is indorsed abroad the indorsement is to be interpreted as regards the payer by the law of this country[6].

As regards the payer, this rule perhaps contemplates the place of making the contract and the place of payment of the instrument being identical; if that be so, a qualification must be made where the places of contract and of payment are different. Where such is the case the interpretation of the contract would seem to be determined by the law of the place of payment[7].

So, too, in the event of dishonour, the extent of the liability of each party to the instrument is governed by the law of the place at which he undertakes to pay it[8].

1 As to the meaning of 'bill' see PARA 1405.
2 Bills of Exchange Act 1882 s 72(1). As to the meaning of 'acceptance' see PARA 1406. As to the meaning of 'acceptance supra protest' see PARA 1566. As to the meaning of 'indorsement' see PARA 1407.
3 See *Bank Polski v KJ Mulder & Co* [1942] 1 KB 497 at 500, [1942] 1 All ER 396 at 398, CA, per Mackinnon LJ.
4 Bills of Exchange Act 1882 s 72(1), (2). See *Embiricos v Anglo-Austrian Bank* [1905] 1 KB 677, CA (where a bill was taken in good faith and without negligence by an Austrian bank under a forged indorsement in Austria and forwarded to London by the bank as holder to the defendants for collection, and the validity of the bank's title to the bill was held to be determined by Austrian, not by English, law); *Koechlin et Cie v Kestenbaum Bros* [1927] 1 KB 889, CA (where the indorsees of a bill indorsed simpliciter without the words 'per pro' by the drawer in

France as agent of the payee were held to have obtained a good title to the bill by such indorsement valid by French law); *Allen v Kemble* (1848) 6 Moo PCC 314; *Bradlaugh v De Rin* (1868) LR 3 CP 538 (revsd on other grounds (1870) LR 5 CP 473); *Horne v Rouquette* (1878) 3 QBD 514, CA; *Haarbleicher and Schumann v Baerselman* (1914) 137 LT Jo 564. So where the time for presentment for payment is extended as regards the acceptor by a moratorium (see PARA 1518 note 14), the indorser remains liable in spite of the delay: *Rouquette v Overmann* (1875) LR 10 QB 525; *Re Francke and Rasch* [1918] 1 Ch 470. See also *G & H Montage GmbH v Irvani* [1990] 2 All ER 225 at 232, [1990] 1 WLR 667 at 675, CA, per Mustill LJ; PARA 1592 note 5; and *Banco Atlantico SA v British Bank of the Middle East* [1990] 2 Lloyd's Rep 504, CA.

5 As to the meaning of 'instrument' see PARA 1402 note 1. As to the meanings of 'inland bill' and 'inland note' see PARA 1432.

6 Bills of Exchange Act 1882 s 72(2) proviso; *Lebel v Tucker* (1867) LR 3 QB 77.

7 *Robinson v Bland* (1760) 1 Wm Bl 234, 256 at 258 per Lord Mansfield. See also *Moulis v Owen* [1907] 1 KB 746, CA (where in the case of a cheque given in the French colony of Algiers, but payable in London, it was held that the contract was to be interpreted by English law (the court being unanimous on this point), and that, the cheque being given for a gambling transaction illegal in this country, payment of the cheque could not be enforced by English law). See also the Bills of Exchange Act 1882 s 72(5); and PARA 1593.

8 *Cooper v Earl Waldegrave* (1840) 2 Beav 282 (where it was held that, a bill having been accepted in Paris, but payable in London, interest was to be charged at the English, not the French, rate); and see *Gibbs v Fremont* (1853) 9 Exch 25.

1592. Duties of holder. The duties of the holder[1] with respect to presentment for acceptance or payment[2] and the necessity for or sufficiency of a protest or notice of dishonour[3], or otherwise, are determined by the law of the place where the act is done or the instrument[4] dishonoured[5].

1 As to the meaning of 'holder' see PARA 1407.

2 As to presentment for acceptance see PARA 1509 et seq. As to presentment for payment see PARA 1516 et seq.

3 As to notice of dishonour see PARA 1524 et seq. As to the meaning of 'protest' see PARA 1539.

4 As to the meaning of 'instrument' see PARA 1402 note 1.

5 Bills of Exchange Act 1882 s 72(3); *Hirschfeld v Smith* (1866) LR 1 CP 340; *Horne v Rouquette* (1878) 3 QBD 514, CA; *Cornelius v Banque Franco-Serbe* [1942] 1 KB 29, [1941] 2 All ER 728. In *Bank Polski v KJ Mulder & Co* [1941] 2 KB 266, [1941] 2 All ER 647; affd on the question of general acceptance [1942] 1 KB 497, [1942] 1 All ER 396, CA, bills were drawn in Poland on a firm in London and accepted generally, and the fact that the bills were expressed to be payable (but not payable only) in Amsterdam and in guilders did not make Dutch law of presentment applicable, English law being the proper law of the contract. See also *G & H Montage GmbH v Irvani* [1990] 2 All ER 225, [1990] 1 WLR 667, CA, where the defendant's authorisation of the addition in Germany of the words 'bon pour aval pour les tirés' above his signature was held to give rise to a claim by way of aval, governed by German law ('aval' being an indorsement guaranteeing payment); the bills in question were payable in England, and the Court of Appeal accordingly determined the question whether notice of dishonour and protest were required by reference to English law, holding that neither of those requirements was applicable to a claim by way of aval.

1593. Date. Where an instrument[1] is drawn or made in one country and payable in another, its due date is determined according to the law of the place where it is payable[2].

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 Bills of Exchange Act 1882 s 72(5). The day that the instrument is payable being governed by the law of the place where payment is to be made, in a country where days of grace are allowed they must, therefore, be taken into consideration: *Rouquette v Overmann* (1875) LR 10 QB 525; *Re Francke and Rasch* [1918] 1 Ch 470.

1594. Sum payable. In the event of an instrument[1] drawn abroad being payable in this country, but the sum payable not being expressed in the currency of this country, it may be paid either in legal tender of the foreign currency or in

sterling at the rate of exchange at which units of the foreign legal tender can, on the day when the money is payable, be bought in London in a recognised and accessible market, irrespective of any official rate of exchange between that currency and sterling[2]. A similar rule applies in the case of instruments drawn in this country and payable abroad[3].

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 *Barclays Bank International Ltd v Levin Bros (Bradford) Ltd* [1977] QB 270, [1976] 3 All ER 900, decided by reference to the Bills of Exchange Act 1882 s 72(4) (now repealed).

3 See *Susé v Pompe* (1860) 8 CBNS 538.

1595. Validity of transfer. Where an instrument[1] is transferred in a foreign country, and different persons claim it, the validity of the transfer and the title to the instrument must be determined by the law of the place where the transfer was effected[2].

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 *Alcock v Smith* [1892] 1 Ch 238, CA; *Embiricos v Anglo-Austrian Bank* [1905] 1 KB 677, CA (see PARA 1591 note 4). As to transfer generally see PARA 1489 et seq.

1596. Scotland. In Scotland, where the drawee[1] of a bill[2] has in his hands funds available for the payment of it, the bill operates as an assignment of the sum for which it is drawn in favour of the holder[3] from the time when the bill is presented to the drawee[4]. Therefore where a bill is payable in Scotland this rule must be taken into account when interpreting the contract.

1 As to the meaning of 'drawee' see PARA 1406.
2 As to the meaning of 'bill' see PARA 1405.
3 As to the meaning of 'holder' see PARA 1407.

4 See the Bills of Exchange Act 1882 s 53(2) (which applies to Scotland only) and is subject to s 75A (also applicable to Scotland only). Generally Scottish matters are beyond the scope of this work. For the position under English law see PARA 1453.

1597. Referee in case of need. Where the name of a referee in case of need[1] has been inserted abroad, the holder[2] here has it in his option whether to apply to him or not[3]; but, in as much as in some countries application to the referee in case of need is obligatory, it is the more prudent course for a holder in this country to exercise his option in favour of such an application.

1 As to the meaning of 'referee in case of need' see PARA 1409.
2 As to the meaning of 'holder' see PARA 1407.
3 See the Bills of Exchange Act 1882 s 15; and PARA 1409.

1598. Discharge. In the matter of discharge, the rules to be followed are the general rules of private international law, forming part of the common law[1]. Applying these rules, the validity and effect of the discharge of any party will depend upon the proper law of the contract involving that party, while discharge of the instrument[2] itself under the law of the place of payment will presumably discharge all parties[3]. Statements in the older cases that the law of the place where the particular contract affecting the party in question was made must prevail[4], and that the discharge of a contract by the law of a place where the contract was not made or to be performed is not a discharge of it in any other country[5], should now be read in the light of modern conflict of laws principles[6]. The common law rules relating to foreign limitation periods were replaced by the Foreign Limitation Periods Act 1984, which provides that, where any matter is

governed by the law of a foreign country, then the rules of foreign law as to limitation (whether procedural or substantive) will generally apply[7], unless there is a conflict with English public policy[8].

1 Rules of common law continue to apply except where they are inconsistent with the Bills of Exchange Act 1882 Act: s 97(2); see PARA 1400 note 3. As to discharges generally see PARA 1550 et seq.
2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 See Dicey and Morris *Conflict of Laws* (13th Edn, 2000) pp 1445–1446.
4 *Potter v Brown* (1804) 5 East 124 (where it was held that a drawer having been discharged in bankruptcy in America, where the bill was drawn, could not be sued in England on the bill). See also *Allen v Kemble* (1848) 6 Moo PCC 314; *Ralli v Dennistoun* (1851) 6 Exch 483.
5 Story's Conflict of Laws (2nd Edn) s 342, quoted with approval in *Bartley v Hodges* (1861) 30 LJQB 352 at 354, by Blackburn J; *Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399 at 407, CA, per Lord Esher MR.
6 See further CONFLICT OF LAWS vol 8(3) (Reissue) PARA 349 et seq.
7 See the Foreign Limitation Periods Act 1984 s 1; and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 26.
8 See the Foreign Limitation Periods Act 1984 s 2(1); and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 26.

(2) LEGAL ENFORCEMENT

(i) Legal Proceedings

A. CLAIMS

1599. Claims. Proceedings in the High Court on a bill of exchange[1] are started when the court issues a claim form at the request of the claimant[2]. The claim form must contain a concise statement of the nature of the claim and must specify the remedy sought by the claimant[3]. If the defendant files an acknowledgment of service or a defence, the claimant may then make an application for summary judgment[4]. If the case is one in which notice of dishonour[5] must be proved, the allegation that it was given must be included in the particulars of claim[6], which must itself be verified by a statement of truth[7].

A substantive allegation of fraud[8] against a holder[9] raises a triable issue entitling the defendant to permission to defend[10]; but where there is clear evidence of value given in good faith and no grounds are shown on which such evidence can be challenged, then the defendant's allegation of fraud does not constitute material which would afford a defence and permission to defend should not be given[11]. As between immediate parties[12], the defendant may also raise by way of defence a total failure of consideration, an ascertained and liquidated partial failure of consideration[13], and, possibly, an ascertained and liquidated cross-claim arising under the contract which forms the consideration for the bill of exchange[14].

Subject to the foregoing exceptions, a holder for value[15] of a bill of exchange is entitled, save in truly exceptional circumstances[16], on its maturity to have it treated as cash, so that in an action upon it the court will refuse to regard either as a defence or as grounds for a stay of execution, any set-off, legal or equitable, or any counterclaim, whether arising on the particular transaction upon which the bill of exchange came into existence or arising in any other way[17]. The rule of practice is thus, in effect, pay on the bill of exchange first and pursue claims later[18].

It is unclear whether a defendant who is induced to draw an instrument[19] by the claimant's innocent misrepresentation is entitled to permission to defend[20].

If an action is stayed on payment of the debt and costs, the claimant has no right to retain the bill[21].

1 As to the meaning of 'bill of exchange' see PARA 1405.
2 CPR 7.2(1). As to the commencement of proceedings generally see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 301 et seq.
3 CPR 16.2(1)(a), (b). As to claim forms generally see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 651 et seq.
4 Ie under CPR 24. Summary judgment is normally available to the issuer of an instrument which is treated as equivalent to cash but this may be inappropriate where the instrument is not honoured and a defence that it was voidable through misrepresentation may provide a real prospect of success pursuant to CPR 24.2(a)(ii): *Solo Industries UK Ltd v Canara Bank* [2001] EWCA Civ 1059, [2001] 2 All ER (Comm) 217, [2001] 1 WLR 1800 (in relation to a performance bond), adopting the approach taken in *SAFA Ltd v Banque du Caire* [2000] 2 All ER (Comm) 567, CA (in relation to a letter of credit). If the defendant has not filed an acknowledgment of service or a defence, an application for summary judgment may only be made where the court gives permission or where a practice direction provides otherwise: CPR 24.4(1).
5 As to notice of dishonour see PARA 1524 et seq.
6 *Frühauf v Grosvenor & Co* (1892) 61 LJQB 717, DC; *Roberts v Plant* [1895] 1 QB 597, CA (statement of claim amended).
7 See CPR 22.1(1)(a); and PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 680.
8 As to the effect of fraud and the parties whose fraud is relevant see PARAS 1478, 1483.
9 As to the meaning of 'holder' see PARA 1407.
10 *Powszechny Bank Zwiazkowy W Polsce v Paros* [1932] 2 KB 353, CA; *Millard v Baddeley* (1884) Bitt Rep in Ch 125; *Fuller v Alexander Bros* (1882) 52 LJQB 103 (onus of proof shifted; cf PARA 1478).
11 *Bank für Gemeinwirtschaft v City of London Garages Ltd* [1971] 1 All ER 541 at 545, [1971] 1 WLR 149 at 155, CA.
12 Immediate parties are drawer and acceptor, payee and drawer, payee and the maker of a note, and indorsee and indorser.
13 *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 2 All ER 463 at 469, [1977] 1 WLR 713 at 720, HL; *Warwick v Nairn* (1855) 10 Exch 762; *Agra and Masterman's Bank Ltd v Leighton* (1866) LR 2 Exch 56; *James Lamont & Co Ltd v Hyland Ltd* [1950] 1 KB 585, [1950] 1 All ER 341, CA; *Brown, Shipley & Co Ltd v Alicia Hosiery Ltd* [1966] 1 Lloyd's Rep 668, CA; and see PARA 1481.
14 See *MK International Development Co Ltd v Housing Bank* (1990) Financial Times, 21 December; affd on this point (1991) Financial Times, 22 January, [1991] 1 Bank LR 74, CA.
15 As to the meaning of 'holder for value' see PARA 1407.
16 See eg *Saga of Bond Street Ltd v Avalon Promotions Ltd* [1972] 2 QB 325n, [1972] 2 All ER 545n, CA (leave to defend upon the whole amount of a bill of exchange being paid into court).
17 *Warwick v Nairn* (1855) 10 Exch 762; *James Lamont & Co Ltd v Hyland Ltd* [1950] 1 KB 585, [1950] 1 All ER 341, CA; *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 2 All ER 463, [1977] 1 WLR 713, HL; *Cebora SNC v SIP (Industrial Products) Ltd* [1976] 1 Lloyd's Rep 271, CA; *Montecchi v Shimco (UK) Ltd* [1979] 1 WLR 1180, [1980] 1 Lloyd's Rep 50, CA; *Thoni GmbH & Co KG v RTP Equipment Ltd* [1979] 2 Lloyd's Rep 282, CA; *Montebianco Industrie Tessili SpA v Carlyle Mills (London) Ltd* [1981] 1 Lloyd's Rep 509, CA.
18 See *Cebora SNC v SIP (Industrial Products) Ltd* [1976] 1 Lloyd's Rep 271 at 278, CA, per Sir Eric Sachs. See also *Brown, Shipley & Co Ltd v Alicia Hosiery Ltd* [1966] 1 Lloyd's Rep 668 at 669, CA, per Lord Denning MR.
19 As to the meaning of 'instrument' see PARA 1402 note 1.
20 See *Clovertogs Ltd v Jean Scenes Ltd* [1982] Com LR 88, CA; *Brass and Alloy Pressings (Deritend) Ltd v DA Allen* (8 December 1986, unreported), CA; *Famous Ltd v Ge Im Ex Italia SRL* (1987) Times, 3 August, CA.
21 *Cornes v Taylor* (1854) 10 Exch 441; *Davis v Tunnicliff* (1838) 7 LJCP 238.

1600. Right to sue. The holder[1] has the right to sue on the instrument[2] in his own name[3]. Where the instrument is payable to bearer[4], the holder who has it in his actual or constructive possession may sue on it in his own name, or in the name of a principal provided that the latter ratifies his act, which ratification

may take place even after the proceedings have begun[5]. Where the bill[6] is made payable or indorsed to a specified person the claim should be brought in that person's name[7].

The holder may or may not ever have had any personal interest in the bill[8] or, having had such interest, may have ceased to have any[9].

He may sue either for himself or as agent or trustee for another party. In the second case he so far stands in the position of that other party that a defence or set-off which would have been good against that other party is equally good against him[10]. Conversely, where he personally is the defendant in proceedings, he cannot use in defence an instrument which he holds as agent or trustee for another[11].

1 As to the meaning of 'holder' see PARA 1407; and see *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374. Where the consideration for a bill payable to drawer's order is goods supplied to the drawee, and the drawer negotiates the bill to a third party who is in possession of the same at the date of commencement of the action, the drawer cannot sue the acceptor for the price of the goods, for he is not the holder of the bill, and recovery of the bill, before the action is actually tried, is insufficient to remedy his original lack of title to sue: *Davis v Reilly* [1898] 1 QB 1, DC.
2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 Bills of Exchange Act 1882 s 38(1).
4 As to instruments payable to bearer see PARA 1428.
5 *Ancona v Marks* (1862) 31 LJEx 163.
6 As to the meaning of 'bill' see PARA 1405.
7 *Bawden v Howell* (1841) 3 Man & G 638.
8 *Law v Parnell* (1859) 7 CBNS 282.
9 *Poirier v Morris* (1853) 2 E & B 89.
10 *De la Chaumette v Bank of England* (1829) 9 B & C 208; see also *Barclays Bank Ltd v Aschaffenburger Zellstoffwerke AG* [1967] 1 Lloyd's Rep 387, CA.
11 *London, Bombay, and Mediterranean Bank v Narraway* (1872) LR 15 Eq 93; *Fair v M'Iver* (1812) 16 East 130, approved in *Forster v Wilson* (1843) 12 M & W 191 at 204 per Parke B. See also *Lackington v Combes* (1839) 6 Bing NC 71.

B. DAMAGES

1601. Parties entitled to damages. In the event of dishonour[1], damages may be recovered by the several parties to the instrument[2]. The holder[3] may recover from any party liable on the instrument. The drawer[4] of a bill which he has been compelled to pay may recover from the acceptor[5]. An indorser[6] of an instrument which he has been compelled to pay may recover from the person[7] primarily liable on the instrument[8], or on his default from any other prior party, for example, the drawer of a bill or any prior indorser[9]. But it seems that an accommodation party[10] cannot recover if he has paid voluntarily without legal obligation, when for example he is discharged by not receiving notice of dishonour[11].

1 As to dishonour by non-acceptance see PARA 1515. As to dishonour by non-payment see PARA 1525.
2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 As to the meaning of 'holder' see PARA 1407.
4 As to the meaning of 'drawer' see PARA 1406.
5 As to the meaning of 'acceptor' see PARA 1406.
6 As to the meaning of 'indorser' see PARA 1407 note 8.
7 As to the meaning of 'person' see PARA 1401 note 4.
8 Ie the maker of a note, the drawer of a cheque, or the acceptor of a bill (see PARA 1453 et seq), except where it is an accommodation bill in which the person primarily liable is the person for whose accommodation the bill is drawn (see PARAS 1583–1585).

9 Bills of Exchange Act 1882 s 57(1). As to the drawer and indorsers see PARAS 1574, 1577 respectively. But an indorser who has been compelled to pay a bill in an action brought by his indorsee cannot recover from the acceptor the costs which he has had to pay in such action: *Dawson v Morgan* (1829) 9 B & C 618.

10 As to the meaning of 'accommodation party' see PARA 1482.

11 Cf *Sleigh v Sleigh* (1850) 5 Exch 514. As to notice of dishonour see PARA 1524 et seq.

1602. Measure of damages. The damages to be recovered are deemed to be liquidated damages[1], and they may include[2]: (1) the amount of the instrument[3]; (2) interest[4] thereon, from the time of presentment for payment if the instrument is payable on demand, and from its maturity in any other case[5]; the interest claimed by way of damages may, however, be withheld wholly or in part if the justice of the case so requires[6], and where the instrument is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate[7]; and (3) the expenses of noting, or when protest is necessary, and the protest has been extended, the expenses of protest[8].

Damages may be awarded in the currency of the bill[9].

1 Bills of Exchange Act 1882 s 57. As to the procedure in a claim for a liquidated demand see CPR 12.1–12.3 (default judgment) (see PRACTICE AND PROCEDURE vol 37 (Reissue) PARAS 903–904); CPR 16.2–16.3 (contents of claim form) (see PRACTICE AND PROCEDURE vol 37 (Reissue) PARAS 652–653); CPR 24 (summary judgment) (see PRACTICE AND PROCEDURE vol 37 (Reissue) PARA 921 et seq).

2 Bills of Exchange Act 1882 s 57(1). In the case of *Prehn v Royal Bank of Liverpool* (1870) LR 5 Exch 92 other expenses incurred by the holder were allowed but that was an action on the contract and not on the bill; Kelly CB (at 97) said, 'It has been pointed out that in an action on a bill of exchange by an indorsee against an acceptor, neither general nor special damage can be recovered, the right of the indorsee being limited to the amount of the bill and interest. However in the case before us the action is not brought on the bill, but on a special contract, the incidents of which differ materially from those which belong to the contract constituted by becoming a party to a negotiable instrument and which are strictly limited by the law merchant.' As to the meaning of 'law merchant' see PARA 1400. Though that case was before the Bills of Exchange Act 1882, the reasoning was adopted by Mathew J in *Banque Populaire de Bienne v Cavé* (1895) 1 Com Cas 67 at 69. See also *Re English Bank of the River Plate, ex p Bank of Brazil* [1893] 2 Ch 438.

3 Bills of Exchange Act 1882 s 57(1)(a). As to the meaning of 'instrument' see PARA 1402 note 1. As to the distinction between the rights of an ordinary holder for value and those of a person who has merely lent money on the security of the instrument see PARA 1487. As to the rate of exchange of a bill expressed in foreign currency see PARA 1421; and as to damages in a foreign currency see DAMAGES vol 12(1) (Reissue) PARA 1132 et seq.

4 In the absence of an agreement to the contrary, a rate around or somewhat above base rate may properly be claimed; the Short Term Investment Account rate is a safe guide: *Practice Direction* [1983] 1 All ER 934, [1983] 1 WLR 377.

5 Bills of Exchange Act 1882 s 57(1)(b); *Re East of England Banking Co* (1868) 4 Ch App 14; *Lithgow v Lyon* (1805) Coop G 29; *Laing v Stone* (1828) 2 Man & Ry KB 561. As to the practice on claiming interest see *Practice Direction* [1983] 1 All ER 934, [1983] 1 WLR 377. Where in the case of a bill payable on demand no demand has been made, interest will run from service: *Pierce v Fothergill* (1835) 2 Bing NC 167. The bill must, it seems, be produced at the trial in order to recover interest before service: *Hutton v Ward* (1850) 15 QB 26. Interest will apparently run until payment or judgment (*London and Universal Bank v Earl of Clancarty* [1892] 1 QB 689; *Lawrence & Sons v Willcocks* [1892] 1 QB 696, CA), unless there has been a tender of the amount due, in which case it will cease as from the date of the tender: *Dent v Dunn* (1812) 3 Camp 296. The guarantor of the due payment of a bill is liable for interest (*Ackermann v Ehrensperger* (1846) 16 M & W 99 at 103 per Pollock CB), and he may in some cases recover interest from the acceptor: *Re Fox, Walker & Co, ex p Bishop* (1880) 15 ChD 400, CA; see PARA 1585 note 2. Where payment would be illegal owing to the outbreak of war before the date of payment arrives, interest is only payable from the termination of the war: *Biedermann v Allhausen & Co* (1921) 37 TLR 662; *NV Ledeboter and Van der Held's Textielhandel v Hibbert* [1947] KB 964. The damages recoverable are not affected by the power to award interest under the Supreme Court Act 1981 s 35A: see the Supreme Court Act 1981 s 35A(8); the County Courts Act 1984 s 69(7); and DAMAGES vol 12(1) (Reissue) PARA 848.

6 Bills of Exchange Act 1882 s 57(3). Cf *Webster v British Empire Mutual Life Assurance Co* (1880) 15 ChD 169, CA.
7 Bills of Exchange Act 1882 s 57(3); *Ward v Morrison* (1842) Car & M 368; *Keene v Keene* (1857) 3 CBNS 144. Cf *Gibbs v Fremont* (1853) 9 Exch 25; *Cameron v Smith* (1819) 2 B & Ald 305.
8 Bills of Exchange Act 1882 s 57(1)(c). As to where protest is necessary see PARAS 1542–1543. The expression 'bank charges' on a specially indorsed writ was held to be a sufficient description of the expenses of noting under this subsection of the statute: see *Dando v Boden* [1893] 1 QB 318, DC.

The expenses of protest for better security (see PARA 1544) are not recoverable under this subsection, even though the acceptor became insolvent before maturity of the instrument; nor is a commission paid by the drawer to the acceptor for honour in consideration of his acceptance: *Re English Bank of the River Plate, ex p Bank of Brazil* [1893] 2 Ch 438.
9 *Barclays Bank International Ltd v Levin Bros (Bradford) Ltd* [1977] QB 270, [1976] 3 All ER 900.

C. COSTS

1603. Costs. A holder[1] who has begun proceedings against several parties to the instrument[2] may, after payment of the instrument by one party, continue against the others for costs[3]. So also, in proceedings against the acceptor[4], the holder may proceed for costs after payment of the instrument has been tendered by another party to the instrument and he has taken it[5].

But an accommodation acceptor[6], who pays the amount of a bill[7] to the holder after proceedings have commenced, cannot recover from the party liable to him the costs of the action[8], unless there is some understanding or implied request from the party liable that he should defend[9].

Where the holder brings two claims on two bills of exchange against the same parties where he might have brought one for the two bills, he may be allowed the costs of one claim only[10].

In the discretion of the court a foreign claimant suing on a bill of exchange may be ordered to give security for costs[11].

1 As to the meaning of 'holder' see PARA 1407.
2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 *London and Suburban Bank v Walkinshaw* (1871) 25 LT 704.
4 As to the meaning of 'acceptor' see PARA 1406.
5 *Goodwin v Cremer* (1852) 18 QB 757.
6 As to accommodation bills see PARA 1482.
7 As to the meaning of 'bill' see PARA 1405.
8 *Roach v Thompson* (1830) Mood & M 487. See PARA 1583.
9 *Garrard v Cottrell* (1847) 10 QB 679. See PARA 1583.
10 *Jackson v Fleeman* (1872) 26 LT 584.
11 CPR 25.12–25.13. See also *Banque du Rhône SA v Fuerst Day Lawson Ltd (Promat SA, third party)* [1968] 2 Lloyd's Rep 153, CA; and *Aeronave SpA v Westland Charters Ltd* [1971] 3 All ER 531, [1971] 1 WLR 1445, CA.

(ii) Limitation of Action

1604. Proceedings barred by lapse of time. If proceedings to enforce payment against any party liable on an instrument[1] are not brought within six years from the time at which the right accrued, proceedings will, in general, be barred[2].

The date at which the time begins to run, in the case of a negotiable instrument[3], depends not upon its acquisition by a holder[4], but upon the contract entered into by the parties liable.

In the case of the acceptor[5] of a bill[6] it runs from the maturity[7] of the bill, unless: (1) the bill was accepted subject to the condition of presentment for

payment[8], in which case time begins to run from the date of presentment; or (2) the bill was accepted after maturity[9], in which case, it seems, time will run from the date of such acceptance; or (3) at maturity there was no person in existence capable of issuing a claim[10].

If, however, a bill is accepted in blank and is not filled up for more than six years, the acceptor is nonetheless liable at the suit of a bona fide holder for value[11], and in such a case time does not run against a bona fide holder for value until the bill, as filled up, becomes due[12]. But if such a bill remains uncompleted in the hands of the payee[13] for more than six years, the payee cannot then fill up the bill and sue the acceptor on it[14].

In the case of a note[15] payable at a specified period after date[16] or after demand or sight[17] time runs for the maker[18] from the maturity of the note. Where the instrument is payable on demand, then time is, in general, calculated from the date of the instrument[19], but, if the form of the instrument is such that presentment is necessary, time runs from the date of presentment[20]. The same principles apply where the instrument is in form a bill, but, by reason of the fact that the drawer[21] and drawee[22] are in law the same person[23], the holder is entitled to treat it as a note[24]. If a note payable on demand is deposited with a banker for delivery[25] to the payee on his producing another note cancelled, time runs only from the date when the note is delivered by the banker[26].

Time begins to run against the drawer or the indorser[27] of a bill or note from the date of receipt of notice of dishonour[28]. It is presumed that where notice of dishonour is excused time will begin to run from the date of the dishonour[29]. In the case of a bill payable at a fixed time after date time runs in favour of the drawer only from the date at which the bill or note becomes due, even although the action is for money lent for which the note is a security, because the money does not become payable until the time has expired[30].

If a bill is dishonoured by non-acceptance, a future dishonour by non-payment does not create a fresh right of action so as to make time run from the latter date[31].

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 Limitation Act 1980 s 5. As to the effect of an instrument containing an obligation collateral to a contract of loan, which contract (1) does not provide for repayment of the debt on or before a fixed or determinable date; and (2) does not effectively (whether or not it purports to do so) make the obligation to repay the debt conditional on a demand for repayment made by or on behalf of the creditor or on any other matter see s 6(2). As to the extension of time in certain cases see PARA 1606. If time expires on a day when the court offices are closed, the period is extended to the next working day: *Pritam Kaur v S Russell & Sons Ltd* [1973] QB 336, [1973] 1 All ER 617, CA. See further LIMITATION OF ACTIONS vol 28 (Reissue) PARA 801 et seq.

3 As to the meaning of 'negotiable instrument' see PARA 1402.

4 As to the meaning of 'holder' see PARA 1407.

5 As to the meaning of 'acceptor' see PARA 1406.

6 As to the meaning of 'bill' see PARA 1405.

7 As to maturity see PARAS 1436–1439.

8 As to presentment for payment see PARA 1516 et seq.

9 See PARA 1459.

10 See PARA 1606 note 2.

11 As to the meaning of 'holder for value' see PARA 1407.

12 *Montague v Perkins* (1853) 22 LJCP 187. The principle that an instrument must be filled up within a reasonable time does not apply as against a bona fide holder for value after completion (at 189 per Jervis CJ); see PARA 1450.

13 As to the meaning of 'payee' see PARA 1406.

14 *Re Bethell, Bethell v Bethell* (1887) 34 ChD 561 at 568; cf *Temple v Pullen* (1853) 8 Exch 389.

15 As to the meaning of 'note' see PARA 1405.

16 *Fryer v Roe* (1852) 12 CB 437. As to the meanings of 'bill payable after date' and 'note payable after date' see PARA 1434.
17 *Thorpe v Booth* (1826) Ry & M 388; *Thorpe v Coombe* (1826) 8 Dow & Ry KB 347; see also *Moore v Petchell* (1856) 22 Beav 172. As to the meaning of 'note payable after sight' see PARA 1435. In the case of a note payable at a fixed time after sight or demand, a demand is presumed to have been made if interest is paid on the bill and receipt thereof acknowledged, and time will run having regard to the date of such acknowledgment: *Re Rutherford, Brown v Rutherford* (1880) 14 ChD 687, CA.
18 As to the meaning of 'maker' see PARA 1406.
19 *Norton v Ellam* (1837) 2 M & W 461; *Christie v Fonsick* (1811) 1 Selwyn's Law of Nisi Prius (13th Edn) 301; *Rumball v Ball* (1711) 10 Mod Rep 39; *Re George, Francis v Bruce* (1890) 44 ChD 627.
20 *Re British Trade Corpn* [1932] 2 Ch 1, CA.
21 As to the meaning of 'drawer' see PARA 1406.
22 As to the meaning of 'drawee' see PARA 1406.
23 See PARA 1408.
24 *Re British Trade Corpn* [1932] 2 Ch 1, CA.
25 As to the meaning of 'delivery' see PARA 1406.
26 *Savage v Aldren* (1817) 2 Stark 232.
27 As to the meaning of 'indorser' see PARA 1407 note 8.
28 *Re Boyse, Crofton v Crofton, Canonge's Claim* (1886) 33 ChD 612 at 623 per North J. Cf *Webster v Kirk* (1852) 17 QB 944; *Castrique v Bernabo* (1844) 6 QB 498; *Re Bethell, Bethell v Bethell* (1887) 34 ChD 561 (in which, however, it was held that if a cheque is given undated on the understanding that the drawer will advise the payee as soon as there are funds to meet it, and that the payee will then present it, time will begin to run as soon as the payee receives an intimation that funds will not be forthcoming).
29 Cf *Kennedy v Thomas* [1894] 2 QB 759, CA.
30 *Wittersheim v Lady Carlisle* (1791) 1 Hy Bl 631; *Buckler v Moor* (1672) 1 Mod Rep 89.
31 *Whitehead v Walker* (1842) 9 M & W 506.

1605. Collateral transactions. When a cheque[1] is given, not in payment of a debt but as a loan, time begins to run against the lender from the time when the cheque is paid, for the claim is not on the instrument[2], but is a claim for the recovery of the loan[3]. In the same way with any other instrument where the claim is not on the instrument itself, but to enforce an obligation collateral to, although arising out of, the transaction for which the instrument was given, time will begin to run from the date when the particular obligation arises[4].

1 As to the meaning of 'cheque' see PARA 1405.
2 As to the meaning of 'instrument' see PARA 1402 note 1.
3 *Garden v Bruce* (1868) LR 3 CP 300.
4 Eg where the acceptor of a bill drawn for the drawer's accommodation is compelled to pay the bill (see PARA 1553), the time within which he must bring his action for indemnity against the drawer runs from the date of his payment of the bill: *Reynolds v Doyle* (1840) 1 Man & G 753. Where several persons are jointly liable on an instrument, an action by one of them who has paid it for contribution from the others must be begun within six years from his payment of the bill: *Davies v Humphreys* (1840) 6 M & W 153.

1606. Extension of time. The date at which time will begin to run may be postponed by circumstances peculiar to the holder[1], for example if the holder is under a disability to sue[2].

The right of action against any party liable on an instrument[3] may, as in the case of any other contract, be renewed or revived by an acknowledgment in writing, signed by that party or his agent, of his liability[4], or by part payment[5], but a right of action, once barred by the Limitation Act 1980, is not revived by any subsequent acknowledgment or payment[6].

An acknowledgment or payment must be made to the person, or an agent of the person, whose title or claim is being acknowledged or in respect of whose claim the payment is being made[7].

The running of time may also in certain circumstances be postponed on the ground of fraud or mistake[8].

1 As to the meaning of 'holder' see PARA 1407.
2 See the Limitation Act 1980 ss 28(1), 38(2); and LIMITATION OF ACTIONS vol 28 (Reissue) PARAS 1068–1069; *Scarpellini v Atcheson* (1845) 7 QB 864.
3 As to the meaning of 'instrument' see PARA 1402 note 1.
4 Limitation Act 1980 ss 29(5)–(7), 30(1), (2)(a); cf *Bourdin v Greenwood* (1871) LR 13 Eq 281; *Langrish v Watts* (1903) 72 LJKB 435, CA. An acknowledgment binds only the party by or on whose behalf it is made and his successors: see the Limitation Act 1980 s 31(6); and LIMITATION OF ACTIONS vol 28 (Reissue) PARA 1080 et seq.
5 Limitation Act 1980 s 29(5). If a part payment is made before the expiration of the original period of limitation, it binds all persons liable in respect of the debt (s 31(7)). A payment, unless it amounts to the admission that more is due, cannot operate as an admission of any still existing debt: *Tippets v Heane* (1834) 1 Cr M & R 252; and see LIMITATION OF ACTIONS vol 28 (Reissue) PARA 1093 et seq.
6 Limitation Act 1980 s 29(7).
7 Limitation Act 1980 s 30(2)(b). For the purposes of the Bills of Exchange Act 1882, a claim includes counterclaim and set-off: s 2. See *Stamford, Spalding and Boston Banking Co v Smith* [1892] 1 QB 765, CA.
8 See the Limitation Act 1980 ss 1(2), 32; and LIMITATION OF ACTIONS vol 28 (Reissue) PARA 1119 et seq.

(iii) Operation of Law

A. DEATH

1607. Death. By the ordinary operation of law the title to bills and notes[1] passes at the death of the holder[2] to his personal representatives, who can thereupon either sue on the instrument[3] or indorse it to a new holder as they think fit[4]. This principle applies also to cheques[5]. In doing so it is open to them expressly to disclaim personal responsibility[6]. Even where an instrument is specifically bequeathed to a legatee, the latter must obtain the indorsement of the testator's executor before attempting either to negotiate or to enforce it[7].

1 As to the meanings of 'bill' and 'note' see PARA 1405.
2 As to the meaning of 'holder' see PARA 1407.
3 As to the meaning of 'instrument' see PARA 1402 note 1.
4 *Rawlinson v Stone* (1746) 3 Wils 1. As to the meaning of 'indorsement' see PARA 1407.
5 *Re Robson, Robson v Hamilton* [1891] 2 Ch 559. As to the meaning of 'cheque' see PARA 1405.
6 See the Bills of Exchange Act 1882 s 31(5); and PARA 1495.
7 *Bishop v Curtis* (1852) 21 LJQB 391. As to negotiation see PARA 1489 et seq.

B. BANKRUPTCY

1608. Bankruptcy. The rules in bankruptcy relating to bills of exchange, promissory notes and cheques[1] were expressly saved by the Bills of Exchange Act 1882[2]. Therefore, in the event of the bankruptcy of the holder[3], the title to all bills, notes and cheques of which at the date of the bankruptcy he was the beneficial owner vests in his trustee without any form of transfer whatever[4], as also does any lien which he may have had upon any such instrument[5].

It seems that in the event of a bill being indorsed to a bankrupt before he obtains his discharge he may, unless his trustee intervenes, sue on it in his own name[6], and he may during bankruptcy indorse a bill accepted for his accommodation prior thereto[7].

1 As to the meanings of 'bill of exchange', 'promissory note' and 'cheque' see PARA 1405.

2 Bills of Exchange Act 1882 s 97(1). As to the meaning of 'bankrupt' see PARA 1514 note 4. As to bills of exchange and bankruptcy generally see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 512 et seq.
3 As to the meaning of 'holder' see PARA 1407.
4 See the Insolvency Act 1986 s 306; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 391 et seq. As to transfer generally see PARA 1489 et seq.
5 *Re Kensington, ex p Buchanan* (1812) 1 Rose 280. As to the meaning of 'instrument' see PARA 1402 note 1.
6 *Herbert v Sayer* (1844) 5 QB 965; approved in *Jameson & Co v Brick and Stone Co Ltd* (1878) 4 QBD 208; *Cohen v Mitchell* (1890) 25 QBD 262, CA. See also *Re Bennett, ex p Official Receiver* [1907] 1 KB 149.
7 *Willis v Freeman* (1810) 12 East 656. As to accommodation bills see PARA 1482.

C. EXECUTION

1609. Execution. Although at common law negotiable instruments[1] of all sorts and money itself were formerly immune from seizure in execution, they are alike by statute made liable to seizure by the sheriff under a writ of fieri facias[2] and a claim may be brought on them when the time of payment thereof arrives in the name of the sheriff on his receiving an indemnity therefor[3].

They are also liable to seizure by a bailiff or officer executing any warrant of execution issuing out of the county court[4], in which case the district judge[5] is to hold them as a security for the amount directed to be levied by such execution or so much of it as has not been otherwise levied or raised for the benefit of the claimant, and the claimant may sue on them, when the time of payment thereof arrives, in the name of the defendant or in the name of any person in whose name the defendant might have sued[6].

1 As to the meaning of 'negotiable instrument' see PARA 1402.
2 As to writs of fieri facias see ENFORCEMENT vol 17(1) (Reissue) PARA 102; and SHERIFFS vol 42 (Reissue) PARA 1117.
3 See the Judgments Act 1838 s 12; and ENFORCEMENT vol 17(1) (Reissue) PARA 152. The instruments named are cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money: Judgments Act 1838 s 12.
4 See the County Courts Act 1984 s 89(1)(b); and ENFORCEMENT vol 17(1) (Reissue) PARA 152. The instruments named are bills of exchange, promissory notes, bonds, specialties, or other securities for money: s 89(1)(b). As to the issue of warrants of execution see ENFORCEMENT vol 17(1) (Reissue) PARAS 120–121.
5 As to district judges see COURTS vol 10 (Reissue) PARAS 661–662.
6 County Courts Act 1984 s 91 (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3)).

(3) OTHER NEGOTIABLE INSTRUMENTS

(i) Rules for Determining Negotiability

1610. Law governing other negotiable instruments. Though bills of exchange, cheques and promissory notes[1] are the only instruments specifically dealt with by the codifying statute, there are many other instruments to which the attribute of negotiability has gradually come to be ascribed, and which must now be regarded as having been definitely admitted to the same category[2]. The branch of the law from which, apart from statute, these other instruments draw their authority is the law merchant[3]. This term denotes the accumulated product of the customs of trade to which sanction has from time to time been given by decisions of the courts[4], but not a permanently fixed and stereotyped body of law[5]. Customs and usages of trade indeed vary from time to time just as they

vary in one place and another, and a custom that is known and recognised by the law merchant as existing in one place may be absolutely unknown elsewhere[6]. Moreover, the exigencies of trade and finance are continually expanding, and have led to new customs and usages being more speedily devised, adopted and recognised than formerly[7].

1 As to the meanings of 'bill of exchange', 'cheque' and 'promissory note' see PARA 1405.
2 As to the meaning of 'negotiable instrument' see PARA 1402. As to bills of lading and other instruments relating to the transfer of goods, eg dock warrants (which in some respects resemble negotiable instruments) see SHIPPING AND NAVIGATION vol 43(2) (Reissue) PARA 1532 et seq.
3 As to the meaning of 'law merchant' see PARA 1400; and CUSTOM AND USAGE vol 12(1) (Reissue) PARAS 662–664.
4 See *Goodwin v Robarts* (1875) LR 10 Exch 337 at 352 per Cockburn CJ.
5 *Edelstein v Schuler & Co* [1902] 2 KB 144 at 154 per Bigham J.
6 Eg a bill operates in Scotland as an assignment of funds in the hands of a drawee available for its payment, but not in England; and this usage was conferred by statute: see the Bills of Exchange Act 1882 s 53(2); and PARA 1596. Cf *Lang v Smyth* (1831) 7 Bing 284. As to the immemorial existence of custom see generally CUSTOM AND USAGE vol 12(1) (Reissue) PARA 607 et seq.
7 Even in 1902 this matter was considered: see *Edelstein v Schuler & Co* [1902] 2 KB 144 at 154 per Bigham J. As to customs and usages of trade see further CUSTOM AND USAGE.

1611. Requisites for negotiability. There remain, however, always the same prime requirements with which an instrument must comply before it can be accorded negotiability. One of these requirements is the form of the instrument itself; the other is the custom of trade in regard to it.

It must be in a form which renders it capable of being sued on by the holder of it in his own name; and it must be by the custom of trade transferable, like cash, by delivery[1]. Failure to comply with either of these requirements prevents the instrument being a negotiable instrument at all[2]. Negotiable instruments come into existence for the purpose only of recording an agreement to pay money and nothing more[3].

1 Including indorsement and delivery in the case of an instrument payable to order.
2 Cf *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 at 381 per Blackburn J; *Miller v Race* (1758) 1 Burr 452. See PARA 1618 note 5.
3 See *Akbar Khan v Attar Singh* [1936] 2 All ER 545 at 550, PC, per Lord Atkin. See also the observation per Dillon LJ in *Claydon v Bradley* [1987] 1 All ER 522 at 526, [1987] 1 WLR 521 at 526, CA, that if the statutory definition of a promissory note in the Bills of Exchange Act 1882 s 83 (see PARA 1405) is applied literally, it would seemingly cover a range of documents which no one would ordinarily dream of regarding as promissory notes or in any other way negotiable, such as four year covenants in favour of charities.

(ii) What Instruments are Negotiable

A. TREASURY BILLS

1612. Extent of negotiability. Treasury bills[1] of the British government are negotiable instruments, and are thus expressed: 'This Treasury Bill entitles ———— or order to the payment of, etc.' So long as the blank remains unfilled the bill is an instrument transferable by delivery; so soon as the blank is filled in it becomes an instrument payable to order. In either case it is negotiable.

1 As to Treasury bills see the Treasury Bills Act 1877; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 730.

B. BANK NOTES AND POSTAL ORDERS

1613. Bank notes and certificates of deposit as negotiable instruments. In England, bank notes are issued solely by the Bank of England and are in effect promissory notes payable on demand[1].

Since 1968, instruments described as negotiable certificates of deposit have been issued by banks certifying the receipt of a stated sum deposited on terms that it is payable (with interest) to bearer on a fixed date against surrender of the certificate. The instruments appear not to be promissory notes; so far they have not been considered by the courts.

1 See PARA 1469; and PARAS 796–798. As to bank notes and legal tender see PARA 1278.

1614. Postal orders not negotiable. Post Office postal orders are not negotiable; if presented by a banker unsigned but bearing the banker's stamp, the effect is only to make the stamp of the banker a substitute for the signature to the receipt of the original payee[1].

1 *Fine Art Society v Union Bank of London* (1886) 17 QBD 705 at 713, CA. As to the meaning of 'payee' see PARA 1406.

C. BRITISH AND FOREIGN BONDS

1615. Foreign bonds. The bonds of a foreign government[1], as also those of a foreign corporation[2], may be negotiable[3]. For them to be recognised as such here they must either purport on their face to be transferable by indorsement or delivery or be shown to be otherwise negotiable according to the law of the country of issue[4], and must be negotiable by custom in this country[5]. It is not sufficient to prove merely that they are negotiable in the country of issue[6].

It has further been suggested that a foreign instrument is not negotiable here unless negotiable where it was made[7]; but it may be open to doubt how far this qualification would now be allowed to prevail.

1 *Gorgier v Mieville* (1824) 3 B & C 45; *A-G v Bouwens* (1838) 4 M & W 171; *Heseltine v Siggers* (1848) 1 Exch 856; *Goodwin v Robarts* (1875) LR 10 Exch 337 (affd (1876) 1 App Cas 476, HL); *London and County Banking Co v London and River Plate Bank* (1888) 21 QBD 535, CA; *London Joint Stock Bank v Simmons* [1892] AC 201 at 224, HL, per Lord Macnaghten.

2 *Venables v Baring Bros & Co* [1892] 3 Ch 527 (holding it to be immaterial that the bonds were secured by a mortgage of property to trustees); *Bentinck v London Joint Stock Bank* [1893] 2 Ch 120; *Edelstein v Schuler & Co* [1902] 2 KB 144; *Earl of Sheffield v London Joint Stock Bank* (1888) 13 App Cas 333, HL, which is in apparent conflict with the above cases, and was decided upon special facts, the bonds in question having been pledged with bankers, who, in the opinion of the court, should have made fuller inquiries than they did before accepting them. See *London Joint Stock Bank v Simmons* [1892] AC 201 at 225, HL, per Lord Macnaghten.

3 No distinction is to be made for this purpose between the bonds of a foreign government and those of a foreign corporation, except that a foreign government can in no case be sued in this country either in its own name or in that of its agent (*Twycross v Dreyfus* (1877) 5 ChD 605, CA).

4 *Colonial Bank v Cady and Williams* (1890) 15 App Cas 267 at 285, HL; *London and County Banking Co v London and River Plate Bank* (1887) 20 QBD 232; on appeal (1888) 21 QBD 535, CA, where the point was not raised.

5 *Easton v London Joint Stock Bank* (1886) 34 ChD 95 at 113; CA, per Bowen LJ; *Bentinck v London Joint Stock Bank* [1893] 2 Ch 120.

6 See *Picker v London and County Banking Co* (1887) 18 QBD 515, CA (where it was held that proof of the negotiability of Prussian bonds in Berlin was insufficient to establish their negotiability here; otherwise, 'if it were proved that cowries are part of the currency of Africa, they must be treated as money in this country, though there were no custom here to treat them as money': at 520 per Fry LJ).

7 See notes to *Miller v Race* (1758) 1 Burr 452, in 1 Smith LC (13th Edn) 536 (a discussion of the case of *Lang v Smyth* (1831) 7 Bing 284). 'These are not English instruments, recognised by the law of England, but Neapolitan securities brought to the notice of the court for the first time, and as judges we are not allowed to form an opinion on them unless supplied with evidence as to the law of the country whence they come': *Lang v Smyth* at 293 per Tindal CJ. However, it has been stated that 'evidence that an instrument is accustomably transferable from hand to hand in this country is prima facie evidence that it is also so abroad': 1 Smith LC (13th Edn) 536–537 (quoting from *Lang v Smyth*, and citing a suggestion of Lord Esher in *Picker v London and County Banking Co* (1887) 18 QBD 515 at 518, CA).

1616. Bonds issued by English companies. An attempt was made to distinguish between the bonds of a foreign country or company and those issued by an English company in England[1], but the case in which this distinction was drawn has been overruled[2]; and it is now settled that English and foreign bonds are upon the same footing. So well established, indeed, is the fact that English debenture bonds payable to bearer are negotiable that the court has stated that it would be prepared to presume the usage without proof thereof[3].

An alleged custom that an unpaid seller of bearer bonds should have a lien over them or that they should be impressed with a trust in favour of an unpaid seller is inconsistent with the nature of negotiable securities and invalid[4].

1 *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 at 384.
2 See *Goodwin v Robarts* (1875) LR 10 Exch 337; affd (1876) 1 App Cas 476, HL (where the instrument, though a foreign one, was issued in England). The whole question of the validity of the judgment in *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 was discussed by Kennedy J in *Bechuanaland Exploration Co v London Trading Bank Ltd* [1898] 2 QB 658 at 669 et seq.
3 *Edelstein v Schuler & Co* [1902] 2 KB 144 at 155 per Bigham J.
4 *Lloyds Bank Ltd v Swiss Bankverein* (1913) 108 LT 143, CA.

D. SCRIP AND SHARE WARRANTS

1617. Scrip. Scrip to bearer issued for debenture bonds is also negotiable, there being no real distinction between the scrip and the bonds themselves[1].

1 *Goodwin v Robarts* (1875) LR 10 Exch 337; affd (1876) 1 App Cas 476, HL.

1618. Share warrants. On the same principle[1] scrip certificates to bearer for shares in a joint stock company are negotiable[2], and so also are share warrants to bearer[3]. Share warrants not to bearer are not negotiable instruments[4].

If certificates for company shares issued with a blank form of transfer, which have been signed but not filled in by the original holder of the shares, are delivered by or with the authority of the owner with intent to transfer them, such delivery will suffice to pass title; but if there has been no intent on the part of the owner to transfer them, a good title can only be obtained as against him if he has so acted as to preclude himself from setting up a claim to them[5].

1 Ie the principle given at PARA 1617.
2 *Rumball v Metropolitan Bank* (1877) 2 QBD 194, DC.
3 *Webb, Hale & Co v Alexandria Water Co Ltd* (1905) 93 LT 339, DC; cf *Stern v R* [1896] 1 QB 211.
4 *London and County Banking Co v London and River Plate Bank* (1887) 20 QBD 232, not dealt with by the Court of Appeal (1888) 21 QBD 535; *Colonial Bank v Cady and Williams* (1890) 15 App Cas 267, HL. As to the meaning of 'negotiable instrument' see PARA 1402.
5 *Colonial Bank v Cady and Williams* (1890) 15 App Cas 267 at 285, HL, per Lord Herschell; and cf *Fuller v Glyn, Mills, Currie & Co* [1914] 2 KB 168; *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 at 381 per Blackburn J (citing with approval the notes to *Miller v Race* (1758) 1 Burr 452, in 1 Smith LC (2nd Edn) 259, (13th Edn) 534).

1619. Dividend warrants. The negotiability of dividend warrants was rendered doubtful by a decision[1] prior to the Bills of Exchange Act 1882; but in other cases[2] it has been assumed that they were negotiable, and the Act itself appears to contemplate their being so[3]. If drawn in accordance with the statutory definition of a cheque[4], they are clearly negotiable.

1 *Partridge v Bank of England* (1846) 9 QB 396.
2 Eg *Lang v Smyth* (1831) 7 Bing 284; *Goodwin v Robarts* (1875) LR 10 Exch 337 at 354.
3 See the Bills of Exchange Act 1882 s 97(3)(d), which specially preserves the usage relating to dividend warrants and their indorsement, and s 95, which applies to them the provisions of that Act which relate to crossed cheques. See also PARA 900.
4 See the Bills of Exchange Act 1882 s 73; and PARA 1405.

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